



**Master of European Affairs, 2003-2004**

# **Ecological criteria when awarding a public procurement contract**

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# **Ecological criteria when awarding a public procurement contract**

## **1. Introduction**

### **1.1. The challenge**

In the past, EU and national policy makers have treated environmental issues as just another “sector” that could be managed in isolation of other policy domains. The non-integration of environmental considerations within the sectoral planning and decision-making processes imposed considerable economic and environmental costs.

The EU has now 25 Member States and the environmental concerns are more important than ever. Protecting the environment is essential for the quality of life of current and future generations.

The challenge is to combine this with continuing economic growth in a way that is sustainable in the long run. Public authorities can make use of public procurement in order to sustain environmental purchasing by using ecological criteria during the procurement process. The criteria set up in the procurement process can be used as a tool by the Member States in order to reach a more efficient and sustainable development.

After the Commission’s Green Paper on Public Procurement, published in 1996, a hot debate has started regarding how environmental criteria may be taken into account at each stage of the contract award procedure. This thesis is regarding environmental criteria that a public authority can take into account when awarding procurement contracts.

### **1.2. The importance of the public procurement market within the EU and the work of the Commission**

The market for public procurement within the Internal Market is a high priority for the EU because of two reasons. Firstly, the public procurement plays a significant role in the economy: a study published on the 3 February 2004 by the Commission<sup>1</sup> shows that public procurement accounts for over 16% of the Union's GDP<sup>2</sup>.

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<sup>1</sup> See IP/04/149

<sup>2</sup> The public procurement accounted for about 14% of the Union’s GDP in 2001, according to the Commission’s Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, Brussels, 4.7.2001, COM(2001) 274,

Secondly, only 2% of public contracts in the Community were awarded to firms from a Member State other than that in which the invitation to tender was issued. A genuinely open single market will be achieved only when all firms can compete for contracts on an equal footing respecting the principle of non-discrimination.

This lack of open and effective competition was one of the most obvious and anachronistic obstacles to the completion of the single market. Moreover, in certain sectors, such as water, energy and telecommunication, the competition within the single market is necessary in order to be competitive on world markets.

Taken together, the EU-law on public procurement is based on:

- rules ensuring transparency in order to open up public contracts to competition, with preference being given to open or restricted tendering procedures, and clear criteria for the selection of tenders
- effective and rapid review of decisions taken by contracting entities which infringe Community public procurement law.

The Commission has prepared legislation on award and review procedures and it has taken other steps to improve transparency.

The Commission is encouraging standardisation at European and international level in fields which are particularly important for the opening-up of public procurement. The Commissions' scope is to improve the quality of information on public procurement and to make it easier to be translated, circulated, read and understood. The Commission has also developed standardised forms to simplify the drafting and understanding of the notices which have to be published under the Directives.

The Commission has, in close cooperation with the Member States, launched the SIMAP public-procurement information system, which is aimed at making optimum use of new information technology in the field of public procurement. This should make it possible not only to improve the quality and reliability of existing information, but also to promote the

development of new electronic procurement procedures in order to offer the public authorities better value for money and thereby reduce the cost to the European taxpayers.

The Commission's objective, as it is set up in its Communication of May 2001 on "A sustainable Europe for a better World: A European Union Strategy for Sustainable Development"<sup>3</sup>, is to make Member States aware of the possibilities they have in order to achieve a "green purchasing".

### **1.3. The purpose of the thesis**

The public purchasers, respectively contracting authorities, are very significant and powerful actors on the EU market.

To accomplish sustainable development requires in practice that economic growth respects the environment and that the environmental policy is cost effective.

It is crucial that Member States are conscious of the possibilities they have to their disposal to better make use of their resources and as well as of public procurement in order to favour environmentally friendly products and services.

By integrating environmental criteria when purchasing, public authorities contribute to the implementation of Community objectives regarding environmental policy. Since environment policy is a EU concern, this aspect is even more important with the enlargement, when ten new Member States join the EU this year. The public procurement can be used as a tool even in the new Member States in order to adopt a more proactive approach towards an efficient environmental policy.

As I mentioned before, a hot debate has started regarding how environmental criteria may be taken into account at each stage of the contract award procedure after the Commission's Green Paper on Public Procurement

The purpose of this thesis is, to analyse how and under which requisites, according to EU legislation, environmental criteria can be taken into account by the contracting authorities when awarding a public procurement contract, when assessing the economically most advantageous tender. I will present and analyse the framework of Community law on public procurement: relevant provisions from the EC Treaty, the EU Directives on public

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<sup>3</sup> Communication from the Commission of the European Communities, Brussels, 15.5.2001, COM(2001)264 final, (Commission's proposal to the Gothenburg European Council)

procurement and the new legislative package, the latest evolution of the relevant case law and the Commissions Interpretative Communication.<sup>4</sup> The Commission's Recommendations are not legally binding acts but they constitute important guidelines for the actors on the public procurement market.

#### **1.4. Demarcations**

Within the public procurement procedures, during different stages of the contract award, there are numerous possibilities when public purchasers can integrate environmental considerations: when making the decision regarding the subject matter of the contract, when defining the technical specifications, when defining selection criteria and the awarding criteria. The major possibilities for "green purchasing" are to be found at the starting point of the public procurement process, when it is decided the subject matter of the contract.

In this work I will concentrate my analysis on the award criteria. I will present the different stages of the procurement procedure and will examine and try to clarify the possibilities to integrate environmental criteria that a contracting authority has at the stage of the awards, when assessing the economically most advantageous tender.

#### **1.5. Methodology**

In order to clarify what the environmental criteria are and how they can be used by the procurement authorities, I will primary use a traditional legal approach. Therefore, in my research, having the actual legislation as a starting point, I will investigate all the sources of law - primary and secondary law, and then try to clarify how the environmental criteria can be taken into account when awarding a public contract. I will also formulate the rule of law from the relevant case law from the European Court of Justice<sup>5</sup>. The case law I have chosen constitutes the latest development in the field, and is regarding respectively the procurement of buses and the procurement of "green electricity". The cases are relevant in order to see how the ECJ has given the formal conditions that have to be fulfilled by the criteria in order to comply with the EU law. The analysis will be integrated in the presentation of the relevant legislation and case law. In the final chapters of the thesis a discussion and my conclusions will be drawn.

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<sup>4</sup> COM(2001) 274 , Commissions Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, Brussels, 4.7.2001

<sup>5</sup> Further on, the ECJ

This thesis does not aim to provide an economic analysis of the award criteria when assessing the most economically advantageous tender within the procurement procedure. Thus, in the conclusions of my thesis, I will briefly present some of the implications that the ecological criteria have on the economic operators. As I mentioned above, in this thesis I will not provide an extensive economic analysis on the implications of the awards criteria, but by presenting some of the implications I will try to provide a better understanding of the core question of the thesis.



## **2. The legal framework of EU law for public procurement**

### **2.1. Background**

European industry have, unlike the Japanese or the US market, for a long period been handicapped by the smallness of its markets. This have prevented companies from becoming truly competitive on a global basis and from facing the challenges posed from Europe's major trading partners.

The public procurement within the EU is still threatened by a desire from the national authorities to keep their purchase and agreements within the country and thereby protect the domestic industry from outside competition. The systematic preference given by national governments to particular domestic companies has not paid off. As a result of this, European industry has lost out on the benefits which a continental scale market, similar to that of the Japanese and the US, confers.<sup>6</sup> It is therefore important to create a legal framework of EU law, which confers an open market where the conditions for the procurement are the same.

### **2.2. Primary law: the EC Treaty**

The Amsterdam Treaty has reinforced the principle of integration of environmental requirements into other policies, recognising that it is key in order to achieve sustainable development.<sup>7</sup>

Article 6 had been inserted in the EC Treaty<sup>8</sup> by the Treaty of Amsterdam, and confers the Community the legal background to integrate environmental considerations (referred to in article 3 of the Treaty) into primary and secondary EU law, in particular with a view to promoting sustainable development. At the same time, the article 13 has been inserted in the EC Treaty to confer the powers to the Community to take the appropriate measures in order to combat discrimination.

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<sup>6</sup> Lee, Philip, Current EC Legal Developments, Public Procurement, Butterworths, London 1992

<sup>7</sup> COM(2001) 274, Commission Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, Brussels, 4.7.2001, page 3

<sup>8</sup> Article 6 of the consolidated version of the Treaty establishing the European Community states that "environmental protection requirements must be integrated into the definition and the implementation of the Community policies and activities referred to in article 3, in particular with a view to promoting sustainable development", 24.12.2002, OJEC, C 325/33

The general provisions for public procurement are set up in the EC Treaty. The most important provisions can be found in the articles 28, 39, 43, 49, and 86 (before 30, 48, 52, 59, and 90)<sup>9</sup>. The provisions of the Treaty constitutes primary law, the adoption of the Directives did not lead to the fact that the Treaty provisions had became less important. The Directives are secondary law, and they only cover certain areas of public procurement.

### **2.3. Secondary law: the EU Directives on public procurement**

Opening up public procurement to competition is a matter of creating incentives for public purchasers, as well as for entities with special or exclusive rights, to adopt competitive tendering procedures. To that end, the Community has decided to coordinate the procurement procedures followed in different countries and has endeavoured to encourage more firms to bid for public contracts, inter alia by developing a number of tools for boosting supplier participation.

The coordination effort has led to the adoption of four Directives on public works, supplies, services and water, energy, transport and telecommunication and two Directives regarding the remedies on public procurement.

The Directives which are covering: public works contracts, supply contracts, public services contracts are called the “Classic Directives” and the Directives on procurement in the water, energy, transport and telecommunications sectors, are called the “Utilities Directive”.

The Public Works Directive 93/37/EEC covers the area of public works, the public supplies Directive 93/36/EEC is a final version on all supplies Directives in force.

The Public Service Directive 92/50/EEC relates to the co-ordination of procedures for the award of public services.

The Utilities Directive 93/38/EEC covers contracts for supplies, works or services concluded by undertakings operating in the water, energy, transport and telecommunications sectors. The Directive takes account of the specific nature of such enterprises and of the different ways the sectors are structured in the Community. The Directives on works, supplies, and public works exclude water, energy, transport and telecommunications. The main reason is that the entities operating in these sectors in some cases are governed by public law and by private law in other cases.

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<sup>9</sup> see Annex 1

The Review Procedures: the two Remedies Directives. The Review Procedures Directive aims to ensure that there is a proper remedy for any infringement committed during contract award procedures.

The Directive 89/665/EEC comprises the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and was extended to cover services in 1992.

The Remedies Directive 92/13/EEC, the so called the Utilities Directive Council is coordinating the laws, Regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. It is, to a great extent, formed in the same way as the remedies Directive 89/665/EEC.

The EU's Council of Ministers and the European Parliament has adopted a legislative package simplifying and modernising the public procurement Directives and adapting them to modern administrative needs. The Parliament formally approved a conciliation text between the representatives of the Council and those of the Parliament, at its plenary session in Brussels on 29 January 2004.

The new legislative package, which must be implemented by the Member States, has put together the Public Supplies Directive, the Public Works Directives and the Public Service Directive in one Directive.<sup>10</sup> The Utilities Directive<sup>11</sup> had also been revised.

The package of amendments to the Directives was proposed by the Commission in May 2000. It aims to reduce bureaucracy and to clarify, based on the ECJ's case-law, how environmental and social criteria can be applied in awarding contracts. The Directives also aim to ensure that contracting authorities and bidders can save time and money by using new technology to manage the tendering process. The amended Directives are now published in the EU's Official Journal and need to be written into national law within 21 months of publication.<sup>12</sup>

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<sup>10</sup> Directive 2004 /18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJEU, L 134/114

<sup>11</sup> Directive 2004/17/EC of coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJEU, L 134/1

<sup>12</sup> The new Directives had been published in the Official Journal of the European Union, on 30.4.2004

### **2.3.1. The new Directives- what is new?**

The new Directives aim to simplify and clarify the existing Directives and to adapt them to modern administrative needs. Here, I will refer to Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, further on called the Classic Directive.

There are some substantial changes in the new Directives.

In the new Directives the contracting authorities are given the possibility to use electronic purchasing techniques in order to increase competition and make more efficient public purchasing, particularly in terms of the savings in time and money.

The new Directives introduced a new procurement procedure, called “competitive dialogue” which applies especially to complex contracts. The legal provisions are set up in article 1 pt11c:

"Competitive dialogue" is a procedure where:

- any economic operator may request to participate
- whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure
- with the aim of developing one or more suitable alternatives capable of meeting its requirements
- on the basis of which the candidates chosen are invited to tender

The procedure gives more scope for dialogue between contracting authorities and tenderers, in order to determine contract conditions. It confers the contracting authorities the right to discuss all aspects of the contract with each tenderer. However, this procedure must not be used to restrict competition, particularly by altering any fundamental aspects of the offers, or by imposing substantial new requirements on the successful tenderer, or by involving any other tenderer than the one selected as the most economically advantageous.

The environmental criteria when awarding the public procurement contract has an important role and had been better clarified in the new Directives. They are now especially enumerated within the criteria which the contracting authority can set up in order to assess the most economically advantageous tender. I will analyse these criteria in a special chapter of the thesis, as they constitute the main subject of the thesis.

The new Directives also introduce the concept of a "central purchasing body". It is a contracting authority which acquires supplies and/or services intended for contracting authorities or awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities.

Member States may stipulate that contracting authorities may purchase works, supplies and/or services from or through a "central purchasing body".

However, the Member States will comply with the principles of equal treatment, non-discrimination and transparency set up by EU law.

A new, improved formulation of "framework agreement" is made in article 1pt 5 in the Classic Directive. A "framework agreement" is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged. Article 32 provides the rules for concluding of "framework agreements", at pt 2 it is stated that, the parties to the framework agreement shall be chosen by applying the award criteria set in accordance with article 53.

#### **2.4. The WTO Agreement**

In 1994 the European Council, by Decision 94/800/EC, concluded on behalf of the European Community, the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994)<sup>13</sup> and approved the WTO Agreement on Government Procurement.

The aim of the Agreement on Public Procurement is to establish a multilateral framework of balanced rights and obligations relating to public contracts with a view to achieving the liberalisation and expansion of world trade. The WTO Agreement does not have direct effect.<sup>14</sup>

It has to be mentioned here that, the contracting authorities and tenderers in the Member States as well as operators of third countries which are signatories of the Agreement have to comply with the provisions of the Agreement.

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<sup>13</sup> OJ L 336, 23.12.1994, p. 1.

<sup>14</sup> Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, introduction, pt (7)

### 3. Procurement theory

#### 3.1. Procurement procedures

The purpose of the Classic Directive is, among other things, to support intra-Community trade by making the procedures within the Member States aware of the potential market possibilities. There are now five types of public procurement procedures.<sup>15</sup>

1. **"Open procedures"** means those procedures whereby *any* interested economic operator may submit a tender, article 1, pt 11 a
2. **"Restricted procedures"** means those procedures in which any economic operator may request to participate and whereby *only those economic operators invited* by the contracting authority may submit a tender, article 1, pt 11b
3. **"Competitive dialogue"** is a procedure in which *any* economic operator may request to participate and whereby *the contracting authority conducts a dialogue* with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender, article 1, pt 11c
4. **"Negotiated procedures"** means those procedures whereby the contracting authorities consult the economic operators of their choice and *negotiate the terms of contract* with one or more of these, article 1, pt 11d
5. **"Design contests"** means those procedures which enable the contracting authority to acquire, mainly in the fields of town and country planning, architecture and engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes, article 1, pt 11e

#### 3.2. Directive 2004/18/ EC on the classic sector - definitions and new concepts

A new Directive of the EU Parliament and of the Council was issued on the 9 December 2003 and published on 30 April 2004 in Brussels. Three main objectives can be pursued: modernising, simplifying and increasing the flexibility of the existing legal framework in the field of public procurement.

The Directive is intended to ensure compliance with the principles of equality of treatment, non-discrimination and transparency in the award of public contracts in all Member States.

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<sup>15</sup> In the former Directives there were only three types of procedures: open, restricted and negotiated procedures

A public contract is a written agreement entered into by a contracting entity after public procurement, normally comprising advertising, qualification of suppliers and evaluation of tenders. The contract can be signed by the parties entering into it by hand or by electronic signature.

Article 1 pt 2 is giving the definition of "public contracts". They are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

At pt.2b-d the concept of public works, public supply and public service contracts are defined. At pt 6 at the same article, the new concept of "dynamic purchasing system" is introduced.

According to this article, a "dynamic purchasing system" is a completely electronic process for making commonly used purchases meet the requirements of the contracting authority. The "dynamic purchasing system" is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification.

### **3.3. Who is a "contracting authority" according to EU law?**

In order to answer the question, it is necessary to look at the provisions of the Directives and the ECJ's case law. An ultimate interpretation is only given by the rulings of the ECJ.

According to the Classic Directive, article 1 pt 9, by "contracting authorities" it is meant the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

The requisites for a "body governed by public law" are:

- it has to be established for a purpose of general interest which does not have an industrial or commercial character
- it has legal personality
- it has to be financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law

It is important to emphasise here that, the contracting authority has to be build up for a purpose of general interest and does not have an industrial or commercial character. If the body does or does not produce economic gain is not relevant.

Non-exhaustive lists, regarding each Member States' "contracting authorities" which fulfil the requisites and consequently fall under this article are set out in Annex III in the Classic Directive.

In the Case C-31/87 *Gebroeders Beentjes BV v State of the Netherlands*<sup>16</sup> the ECJ has given a functional interpretation of the notion of the "state", as it is referred to in the Council Directive 71/305/EEG.<sup>17</sup>

In the case *Beentjes* the national Court, the *Arrondissementsrechtbank*, (District Court), referred to the ECJ for a preliminary ruling under article 234 of the EC Treaty two questions on the interpretation of Council Directive 71/305/EEC. The first one was regarding what is falling within the notion of "the State" or a "regional or local authority" for the purposes of Council Directive 71/305/EEC?

The fundamental question put to the Court regarded whether or not it is possible for organs outside the traditional structures of the administration (which have no legal personality of their own, but carry out functions which normally fall within the competence of the State or local authorities) to evade the effect of Community rules. The ECJ's judgement and the opinion of the Advocate General Darmon are giving significant and comprehensive guidance in this mater.

At pt 11 of the judgement, the Court states that the term "State" must be interpreted in functional terms. The aim of the directive, which is to ensure the effective attainment of freedom of establishment and freedom to provide services in respect of public works contracts, would be jeopardized if the provisions of the directive were to be held to be inapplicable only because a public works contract is awarded by a body which, even if it was set up to carry out tasks entrusted to it by legislation, is not formally a part of the State administration.

Consequently, a body whose composition and functions are laid down by legislation and which depends on the authorities for the appointment of its members, the observance of the

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<sup>16</sup> Case C- 31/87 *Gebroeders Beentjes BV v State of the Netherlands*, European Court reports 1988 Page 04635

<sup>17</sup> Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, Official Journal, English Special Edition 1971



obligations arising out of its measures and the financing of the public works contracts which it is its task to award, must be regarded as falling within the notion of “the State” for the purpose of article 1 of Directive 71/305/EEC, even if it is not part of the State administration in formal terms.

In his opinion on the Case C-31/87, the Advocate General Darmon<sup>18</sup>, emphasized that the Court is faced with a phenomenon which is common in the administrative life of developed societies: the "fragmentation of the administration ". With increasing frequency, the laws of States entrust functions, which are by definition public, to organs which are not attached to the traditional administrative organization, but nevertheless have no legal personality of their own. This fragmentation reflects a desire to associate closely with the functions concerned persons from outside the administration - this being reflected in the composition of the organs - or to reinforce the independence of such organs in the eyes of the public, by means of the fact that the traditional administrative authorities may not give them instructions.

It may also correspond to a mixture of the two concerns. Thus, for example, we have witnessed for a number of years the appearance in certain States of "independent administrative authorities" endowed with important powers, in particular that of laying down rules. But even leaving aside these recent creations, the everyday organization of the administration has, for a long time, given rise to organs such as examining boards whose activity is in substance administrative but is carried out separately and independently from the traditional structures of the administration, which, because it has no hierarchical authority, is in functional terms held at arm's length<sup>19</sup>.

Further on, Advocate General determines the criteria for deciding whether certain organs are in fact inseparable from the State or local authorities:

- an organ which has no legal personality of its own
- whose members are appointed by the State or a local authority
- has a function which falls within the ordinary competence of such authorities or the State and
- is endowed by them with the means enabling it to carry out such functions

Keeping strictly to the letter of expressions such as the "State" or "regional or local authorities” is not in the wording of the provisions of the Directive 71/305/EEC.

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<sup>18</sup> Opinion of Mr Advocate General Darmon delivered on 4 May 1988, on case C-31/87 Gebroeders Beentjes BV v State of the Netherlands, European Court Reports 1988 Page 04635

<sup>19</sup> Opinion of Mr Advocate General Darmon, European Court Reports 1988 Page 04635, pt 10

### 3.4. The threshold values

Whether or not a public procurement contract is governed by the national or EU law depends on the overall amount involved. If the amount of the contract exceeds the threshold, the rules which apply are those of the EU Directives on public procurement. Contracts below that threshold fall within the scope of national law, but they must always comply with the general principles of the EC Treaty, and in particular with the principles of transparency and non-discrimination.

In the following table<sup>20</sup> the threshold values applicable from the 15 February 2004 are illustrated, depending on the nature of the contract.

		EURO
Works		5 000 000
Goods and services		
Utilities	without	400 000
telecommunications		
telecommunications		600 000
National authorities		130 000 SDR*
Other authorities		200 000
Publication		750 000

\* SDR = special drawing rights and are used in the GPA.

Companies from countries that signed this agreement can directly participate on equal terms as companies from Member States of the European Economic Area. Signatories are amongst others USA, Canada, Israel and Japan.

### 3.5. What are the award criteria?

The award criteria are decisive factors that the contracting authority sees as significant and which aim to establish which tender best fulfils the needs of the contracting authority. The function of the award criteria is to assess the intrinsic quality of the tenders.

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<sup>20</sup> source: [www.nou.se](http://www.nou.se)

For example, a contracting authority can set up award criteria which refers to the provenience of the supplied energy, the consumption of natural resources, the environmental soundness of a product etc.

## **4. The environmental criteria when awarding public procurement contracts**

### **4.1. General background**

In the preamble of the Classic Directive, at pt (2) it is stated that the award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the EC Treaty.

This means to apply the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services.

The Member States should also comply with the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency.

The principle of mutual recognition was set up by the ECJ in the famous case C-120/68 Cassis de Dijon<sup>21</sup> and has implications even for the public procurement. It has to be pointed out that the principle of mutual recognition is applicable only if the field has not been covered by harmonisation of Community law.

The Commission, in its interpretative Communication<sup>22</sup> concerning the consequences of the judgement in the Cassis de Dijon case, emphasizes that any product imported from another Member State must in principle be admitted to the territory of the importing Member State if it has been lawfully produced, manufactured and marketed in the exporting country.

This principle is important for public procurement since it implies that Member States, when drawing up commercial or technical rules liable to affect the free movement of goods, may

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<sup>21</sup> Case C-120/78 Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, (1979), European Court reports 1979 Page 00649

<sup>22</sup> Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ('Cassis de Dijon') Official Journal C 256 , 03/10/1980 p. 0002 - 0003

not take an exclusively national viewpoint and take account only of requirements confined to domestic products. The proper functioning of the Internal Market demands that each Member State also give consideration to the legitimate requirements of the other Member States. All public procurement within the EU has to comply with the principle of mutual recognition, only what falls under the so called “mandatory requirements” can constitute exceptions. Four matters were listed by the ECJ, as mandatory requirements, in the case Cassis de Dijon and they were related to:

- the effectiveness of the fiscal supervision
- the protection of public health
- the fairness of commercial transactions
- the defence of the consumer.

The list is not exhaustive, it can be and it has been added to by the ECJ<sup>23</sup>. Through the judgement in the Cassis de Dijon case, the ECJ has established that trade barriers resulting from disparities between national laws, on an area that has not been covered by harmonisation of Community law, can be accepted and applied on imported goods only if:

- the obstacles are absolutely necessary in order to satisfy a mandatory requirement which is in concordance with the scope of the EC Treaty
- the obstacles stay in a reasonable proportion to the requirement
- the obstacles don't have a more far-reaching trade restrictive effect that is necessary in order to satisfy the mandatory requirement.

In another case, Case C-45/87 Dundalk Water Supply<sup>24</sup>, the Court has confirmed the application of the principle of mutual recognition, and ruled that, a Member State fails to fulfil its obligations under article 28 of the EC Treaty if it allows a public body to include in the contract specification a clause stipulating that the materials used must be certified as complying with a national technical standard. Further on, the Court emphasized that such a clause is liable to impede imports in so far as it may cause economic operators utilizing materials equivalent to those certified as complying with the relevant national standards to renounce from tendering.

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<sup>23</sup> Paul Craig, Grainne de Burca, EU Law, text, cases and materials, third edition, Oxford University press 2003, p.638

<sup>24</sup> Case C-45/87 Commission of the European Communities v Ireland, European Court reports 1988 Page 04929

Nevertheless, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the EC Treaty.

It must be emphasized that even environmental law and other legislation, EU law or national law is binding for contracting entities. All procurement directives contain a provision for contracting entities to define the technical specifications “without prejudice to the legally binding national technical rules”. This means that national legislation must always be compatible with Community law, may contain prohibitions against, for instance, the use of specific substances that the national authorities consider hazardous to the environment, or requirements for a certain minimum environmental standard to be observed.<sup>25</sup>

#### **4.1.1. The environmental impact has to be considered by the contracting authority when formulating the award criteria**

The contracting authority has to assess in an appropriate manner, when it decides to purchase, the environmental impact of the goods, works or services purchased. The contracting authority, when formulating the award criteria shall have a complete knowledge about the impact on human health and on the environment itself in each individual case.

The environmental impact assessment will identify and describe the direct and indirect effects on human beings, fauna and flora, soil, water, air, climate and the landscape, the inter-action between them, and the impact on material assets and the cultural heritage.

For example, when buying buses, the contracting authority has to assess the effects of pollution generated by non-environmental buses on human beings, on the air etc. When a contracting entity decides to buy works the award criteria should regard the impact of the plants during the construction process on the human beings, fauna and flora, on the air and

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<sup>25</sup> An integrated product policy in the EU – some EC legal conditions, Annika Nilsson, Henrik Norinder, Katarina Olsson Lund University, Law Faculty, Report 5338 December 2003, from the Swedish Environmental Protection Agency

water. When buying electricity it should regard the source of the energy supply, to award the contract to the supplier who is able to provide energy from renewable energy sources.

The decision and the responsibility rely on the contracting authority that has to make the assessment in the light of each individual case depending on the subject matter of the contract and where it is located.

The aim of achieving the environmental objectives on a Community level must be given priority. Human health should be protected and natural resources should be used rationally.

## **4.2. Stages of public procurement procedure**

In order to understand when the awarding criteria are used, I will present the different stages of the public procurement process and put the emphasis on the selection and awarding stage. It is important to distinguish, in practice, between the selection criteria and the award criteria. The two criteria are situated respectively one after each other and are governed by different rules.

In the Swedish literature on public procurement, for example, there is some confusion regarding these aspects, partly related to deficiencies in the translations of the ECJs' case law.<sup>26</sup> The distinction is also important in order to understand the judgements of the Court, in particular the Court's Judgement in the case *Wienstrom*<sup>27</sup> (analysed in the next subchapter).

I have chosen an open procurement procedure without prior publication of a contract notice.

### **Stage 1. The invitation to tender.**

The contracting authority makes the invitation to tender in order to inform all potential suppliers about forthcoming procurements.

All public tenders exceeding specific contract values must be published in the Supplement to the Official Journal of the European Union and published throughout the EU. The contract value thresholds above which an invitation to tender must be published throughout the EU are laid down in the EU Directives. The tenderer may, at this stage, ask the contracting authority to send the contract documents, and request for further information.

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<sup>26</sup> see Ecological and social criteria when awarding a public procurement contract- Delia Barbaiani, Lund University, 2003

<sup>27</sup> see case C-448/01 *Wienstrom* pt 63, the Judgement of the Court

The contract documents contains the documentation on which the procurement is based. Therefore, each contracting authority must carefully plan and formulate the contract documents.

The contract documents must, at least, comprise:

- a specification of the goods/services required
- commercial terms
- administrative conditions e.g. for submission of tenders
- evaluation and awards criteria
- qualification requirements in respect of suppliers

When a procurement exceeds the threshold values, references to European standards are required.

It is very important to mention that the stipulated requirements from the contract documents may not be changed during a procurement procedure. If a contracting entity, during procurement, finds it necessary to alter its requirements, normally the procurement must be recommenced. When selecting a supplier, no consideration may be taken to anything offered that has not been required in the contract documents. The principle of non-discrimination and of transparency would be jeopardized if the requests could be changed after the contract documents had been published.

### **Stage 2. The work with the tenders.**

The suppliers who want to submit tenders adjust their tenders to the requests set up in the contract documents. Contracting authorities shall take account in particular the complexity of the contract and the time required for drawing up tenders, but have to respect the minimum time limits set up in the article 38 in the Classic Directive.

The time limits for receipt of requests to participate and for receipt of tenders within the open procurement procedure in the classic sector is minimum 52 days from the date on which the contract notice was sent to the Official Journal of the European Union.

### **Stage 3. The opening of tenders**

The tenders are opened after the time limits have expired, normally at the same time.

#### **Stage 4. Selection of the candidates**

Here, the tenderers who apply and tenders submitted are evaluated within a pre-qualification procedure.

##### **Step one:**

The tenders are controlled in order to see if they accomplish the requests set up in the contract documents. The contracting authority has to formulate the contract documents carefully. They have to contain information regarding what it shall purchase and how, conditions for admission of tenders and awarding criteria. The stipulated requirements from the contract documents may not be altered during the procurement procedure.

##### **Step two: selection of the candidates**

The evaluation is intended to ensure that a tenderer has the internal stability, financial and economic standing as well as the technical ability and capacity necessary in order to execute the contract. In its contract notice or contract documents, the entity must specify the certificates, statements etc. to be submitted by the supplier to prove that he meets the stipulated requirements. The requirements must be in reasonable proportion to the procurement.

Article 45 pt 1 of the classic Directive sets up new rules concerning internal stability and sets up the grounds that justify a candidate's exclusion from participating in a public contract.

Any candidate or tenderer, who has been the subject of a conviction by final judgment of which the contracting authority is aware, shall be excluded from participation in a public contract. By choosing the word "shall" the legislator has emphasized the compulsory character of the provision.

These grounds are as follows:

1. participation in a criminal organisation<sup>28</sup>
2. corruption<sup>29</sup>
3. fraud<sup>30</sup>
4. money laundering<sup>31</sup>

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<sup>28</sup> as defined in Article 2(1) of Council Joint Action 98/733/JHA

<sup>29</sup> as defined in Article 3 of the Council Act of 26 May 1997<sup>29</sup> and Article 3(1) of Council Joint Action 98/742/JHA respectively

<sup>30</sup> as defined in the article 1 of the Convention relating to the protection of the financial interests of the European Communities

<sup>31</sup> as defined in Article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering



The article has direct effect and the next subparagraph states that Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this article.

The Member States may also provide for derogation from the requirement referred to in the first subparagraph for overriding requirements in the general interest.

At point 2, another set of exclusion grounds are set up. They relate to e.g. the state of bankruptcy, conviction for offences regarding professional conduct, grave professional misconduct, non-payment of social security contributions or taxes or serious misrepresentation in supplying the information required. Here, the word used by the legislator is “may”, consequently the contracting authority can exclude a tenderer who does not comply with the provisions of the article 45 pt 2 but does not have to do so.

**Step 3.** At this point the contracting authority makes a control where the tenderers may be requested to prove their enrolment, as prescribed in the Member State where they are established, in order to provide evidence that they are registered according to the rules of their country. The rules are provided in article 46, the Classic Directive.

### **Stage 5. Award of the contract**

Once the candidates have been selected, the contracting authorities enter the stage of the evaluation of the tenders, resulting in the award of the contract. It is at this stage the issue of award criteria arises. These criteria should be mentioned either in the contract notice or in the contract documents, where possible in descending order of importance.

According to the article 53<sup>32</sup> of the new procurement Directive for the classic sector, the contracting authorities have two options for the award of contracts: either the “most economically advantageous tender” or the lowest price. The aim of the first option is to help the contracting authorities to get the best value for money.

It has to be mentioned here that, when a contracting authority choose to apply a “competitive dialogue” as a procurement procedure, a public contract shall be awarded on the sole basis of the award criterion for the most economically advantageous tender. Otherwise, the criteria on which the contracting authorities shall base the award of contracts shall be either: the most

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<sup>32</sup> see Annex 2

economically advantageous tender or the lowest price only, as it is stated in the article 53 of the classic Directive.

The new Directive underwent a restructuring. The order of the two award criteria has been changed, with the most economically advantageous tender cited first.<sup>33</sup> The aim was to combat the prevailing opinion that public contracts give priority to a purely budgetary approach.

The criterion of the lowest price is not difficult to apply, since only the price requested by tenderers is to be taken into consideration and the contract must be awarded to the tenderer asking the lowest price.

Regarding the most economically advantageous tender, the Directive gives examples of the criteria that may be applied. At article 53 pt 1a, it is stated that “when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion”.

From the wording of the article - the expression “for example” is used - it is obvious that the list is not exhaustive. By these provisions the environmental criteria are specifically introduced into the legal text, as a result of the Commission’s proposals and based on the case law.

Where weighting is not possible, the contracting authority shall indicate in the contract notice or contract documents the criteria in descending order of importance.

In the preamble of the Classic Directive, at pt (1) it is stated, “This Directive is based on the Court of Justice case law, in particular case law on award criteria, which clarifies the

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<sup>33</sup> In the directive 93/36/EEC on public supplies it is stated, at article 26.1: “The criteria on which the contracting authority shall base the award of contracts shall be: (a) either the lowest price only; (b) or, when award is made to the most economically advantageous tender, various criteria according to the contract in question: e. g. price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales, service and technical assistance.

2. In the case referred to in point (b) of paragraph 1, the contracting authority shall state in the contract documents or in the contract notice all the criteria they intend to apply to the award, where possible in descending order of importance.”

possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area”.

There are four requisites to fulfil:

- the criteria are linked to the subject matter of the contract
- do not confer an unrestricted freedom of choice on the contracting authority
- are expressly mentioned
- comply with the fundamental principles of the EU law

The principles referred, specified at pt (2), are “the principles of the EC Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency”.

An analysis of the recent and relevant case law on the award criteria, case C-513/99 *Cocordia Bus Finland* and Case C-448/01 *Wienstrom*, will be presented in a special chapter of this thesis.

### **Stage 6. Signing the contract**

Here the contracting authority concludes the procurement contract with the selected economic operator.

### **Stage 7. Report**

A report is written by the contracting authorities when a contract, framework agreement or establishment of a dynamic purchasing system are concluded. The scope of the report is, among other things, to provide information about reasons for the rejection to the tenders who had been rejected.

### **4.3. Case law**

There are two relatively new and related cases where the European Court of Justice sets up the requisites for the award criteria: the *Concordia Bus*<sup>34</sup> case, and the *Wienstrom*<sup>35</sup> case. I will analyse both cases and formulate the requisites and the rule of law which constitutes the

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<sup>34</sup> C-513/99 *Cocordia Bus Finland Oy Ab vs. Helsingin kaupunki, HKL-Bussliikenne*, ECR 2002 page I-07213

<sup>35</sup> Case C-448/01, *EVN and Wienstrom*, ECR 2003 page 00000

legal basis for how environmental criteria in awarding public procurement contracts must be formulated.

#### **4.3.1. Case C-513/99 Concordia Bus<sup>36</sup>**

##### **Introduction and the background of the case**

In the case Concordia Bus, the national Court in Finland<sup>37</sup> (Supreme Administrative Court) referred three questions to the ECJ for a preliminary ruling under the article 234 EC Treaty. The Court's decision from the 17 december 2002 is regarding public procurement within the transport sector, and specially under which conditions a contracting authority is allowed to integrate environmental criteria when establishing the most economically advantageous tender according to EU law.

It is for the first time the ECJ is answering this question and the case is significant as it is regarding the requisites that must be fulfilled when a contracting authority formulates environmental criteria for the contract awards.

The Court has ruled, in two previous cases, case Beentjes<sup>38</sup> and case Evans Medical and Macfarlan Smith<sup>39</sup> that the contracting authorities, when selecting the most economically advantageous tender, are free to choose the criteria they want to use in awarding the contract. In the Concordia Bus case, the Supreme Administrative Court in Finland has stopped the proceedings before the national court and referred three questions for a preliminary ruling under article 234 EC Treaty on the interpretation of the articles 2(1)(a), (2)(c) and (4) and 34(1) of Council Directive 93/38/EEC on coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunication sectors.

The background of the main proceedings before the national courts in Finland is the following:

The city of Helsinki decided to start a procurement procedure in order to purchase buses. The tender procedure was published nationally and internationally by a notice published in the Official Journal of the European Communities of 4 September 1997. It was specified in the

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<sup>36</sup> C-513/99 Concordia Bus Finland Oy Ab vs. Helsingin kaupunki, HKL-Bussliikenne, ECR 2002 page I-07213

<sup>37</sup> the "Korkein hallinto-oikeus"

<sup>38</sup> Case C-31/87 Gebroeders Beentjes BV v State of the Netherlands, ECR 1988 Page 04635

<sup>39</sup> Case C-324/93 Evans Medical and Macfarlan Smith [1995] ECR I-563

tender notice, that the purchasing unit of the city of Helsinki will award the contract to the undertaking whose tender was most economically advantageous overall to the city. Three categories of criteria would be taken into consideration: the overall price of operation, the quality of the bus fleet and the operator's quality and environment management. The question was, if it is allowed to award additional points for the use of buses with emissions and external noise below certain levels. The purchasing office of the city of Helsinki received eight tenders, among others from Concordia Bus Finland Oy Ab, further on called Concordia, and HST. The commercial service committee of the city of Helsinki decided to award the contract to HST, which they considered offered the most economically advantageous tender.

### **The interpretation questions**

Three questions were referred for preliminary rulings to the ECJ by the Supreme Administrative Court in Finland.

The first question: would the answer on the second and third question be different if the Utilities Directive 93/38/EEG<sup>40</sup> will apply on the current procurement?

The second and the core question is regarding the interpretation of article 36.1a of the Public Service Directive 92/50/EEC and the article 34.1a of the Utilities Directive 93/38/EEC. Is a contracting entity allowed to, when awarding a public contract on the basis of the economically most advantageous tender, take into account environmental criteria offered by a tendering undertaking in addition to the tender price and the quality and environment programme of the transport operator and various other characteristics of the bus fleet?

The third interpretation question: is it allowed according to the procurement directives, and in particular the principle of equal treatment to take into account such criteria, where it appears from the beginning that the transport undertaking which belongs to the municipality organising the tender procedure is one of the few undertakings able to offer buses which satisfy those criteria?

### **The problem of law and the arguments of the parties**

The problem of law in the Concordia Bus case is: are environmental award criteria allowed by the EU law?

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<sup>40</sup> Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

If the answer is yes, which are the requisites that must be fulfilled according to the EU law that allows a contracting authority to take into consideration ecological criteria when it decides to award a contract to the tenderer who submits the economically most advantageous tender?

The parties in the national procedure are: Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab, as applicant and Helsingin kaupunki<sup>41</sup> and HKL-Bussiliikenne as the defendant.

Written observations were submitted to the ECJ by the parties and by the Finnish Government, the Greek Government, the Netherlands Government, the Austrian Government, the Swedish Government and by the Commission.

Concordia argued that, in a public tender procedure, the criteria for the decision must, in accordance with the wording of the relevant provisions of Community law, always be of an economic nature. Further on, Concordia argues that, if the objective of the contracting authority is to satisfy ecological or other considerations, they should use another procedure than a public tender procedure.<sup>42</sup>

The other parties, the Commission and the Member States who submitted written observations to the Court, have the opinion that it is permissible to include ecological criteria in the criteria for the award of a public contract. They refer, firstly, to article 36.1a of the Directive 92/50/EEG on public service, and article 34.1a of the Utilities Directive 93/38/EEG, which list only as examples factors which the contracting entity may take into account when awarding such a contract. Subsequently, they refer to article 6 EC Treaty, which requires environmental protection to be integrated into the other policies of the Community and finally, they refer to the Beentjes and Evans Medical and Macfarlan Smith judgments<sup>43</sup>, which allow a contracting entity to choose the criteria it regards as relevant when it assesses the tenders submitted.<sup>44</sup>

In particular, the city of Helsinki and the Finnish Government state that it is in the interest of the city and its inhabitants for toxic emissions to be limited as much as possible. For the city of Helsinki itself, which is responsible for protection of the environment within its territory, direct economies follow from this. Factors that contribute even on a modest scale to

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<sup>41</sup> the city of Helsinki

<sup>42</sup> see pt 44, the Grounds of the Judgement

<sup>43</sup> Case C-324/93 Evans Medical and Macfarlan Smith [1995] ECR I-563

<sup>44</sup> see pt 45, the Grounds of the Judgement

improving the overall state of health of the population enable it to reduce its charges rapidly and to a considerable extent.

The Commission contends<sup>45</sup> that the criteria for the award of public contracts, which may be taken into consideration when assessing the economically most advantageous tender, must fulfil four requisites:

- they must be objective,
- apply to all the tenders,
- be strictly linked to the subject-matter of the contract in question and
- be of direct economic advantage to the contracting authority.

### **The Judgement of the Court**

Firstly, the Court aims to determine if it is allowed under the EU law to take environmental criteria into consideration where the award is made to the economically most advantageous tender. The Court grounds its judgement on article 6 EC Treaty and on the wording of the provisions of article 36.1a of the Directive 92/50/EEC on public services<sup>46</sup>. The use of the expression “for example” shows that the criteria which may be used for the award of a public contract to the economically most advantageous tender are not listed exhaustively.

The Court emphasizes further on that, article 36.1 a of the above mentioned Directive cannot be interpreted as meaning that each of the award criteria used by the contracting authority must necessarily be of a purely economic nature. At this point, the Court has not agreed with Concordias and the Commissions argument that the criteria for the decision must always be of an economic nature.

Moreover, the Court reminds that the purpose of coordinating at Community level of the procedures for the award of public contracts is to eliminate barriers to the free movement of services and to the free movement goods.

The answer to the second question is that the article 36.1a of Directive 92/50/EEG does not exclude the possibility for the contracting authority of using criteria relating to the

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<sup>45</sup> see pt 52, the Grounds of the Judgement

<sup>46</sup> Article 36(1)(a) of Directive 92/50 provides: “the criteria on which the contracting authority may base the award of contracts may, where the award is made to the economically most advantageous tender, be various criteria relating to the contract, such as, for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, or price”

preservation of the environment when assessing the economically most advantageous tender. However, the ECJ holds the position that not any criterion of environmental nature may be taken into consideration by the contracting authority.

Further on, the Court examines the conditions that must be fulfilled by the award criteria.

The Court refers to the article 36.1 in the of Directive 92/50/EEG and to the ECJ's judgements in the previous cases: *Beentjes*, paragraph 19, *Evans Medical and Macfarlan Smith*, paragraph 42, and *SIAC Construction*, paragraph 36. The Court emphasizes that the award criteria must aim at identifying the economically most advantageous tender and that since a tender necessarily relates to the subject-matter of the contract, it follows that the award criteria, which may be applied in accordance with that provision, must themselves also be linked to the subject-matter of the contract.

The Court recalls that, the contracting authority must be able to assess the tenders and take a decision on the basis of qualitative and quantitative criteria relating to the contract in question, *Case C-274/83 Commission v Italy*.<sup>47</sup> The case was concerning the awarding of public works contracts, and the Court held that in order to determine the most economically advantageous tender the contracting authority must be able to exercise its discretion in taking a decision on the basis of qualitative and quantitative criteria that vary according to the contract in question and cannot therefore rely solely on the quantitative criterion of the average price.<sup>48</sup>

The ECJ refers again to the case *Beentjes* and to the case *SIAC Construction* where it was held by the Court that an award criterion having the effect of conferring on the contracting authority an unrestricted freedom of choice is incompatible with the article 36.1 a of the Directive 92/50/EEC on public services. According to the same article, pt 2, all such criteria must be expressly mentioned in the contract documents or the tender notice, where possible in descending order of importance, so that operators are in a position to be aware of their existence and scope.

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<sup>47</sup> C-274/83, *Commission of the European Communities v Italian Republic*, ECR 1985 page 01077

<sup>48</sup> see *Case C-274/83, Commission of the European Communities v Italian Republic*, ECR 1985 page 01077, pt 25



The Court emphasizes finally, that such criteria must comply with all the fundamental principles of the EU law, in particular the principle of non-discrimination, on the right of establishment and the freedom to provide services as it follows from the provisions of the EC Treaty. Over again, the Court refers to its judgements in the case *Beentjes*, paragraph 29 and to the case *C-225/98 Commission v. France*<sup>49</sup> paragraph 50.<sup>50</sup>

In the present case, the Court holds the opinion that, such environmental criteria as those at issue in the main proceedings must be regarded as linked to the subject-matter of the contract. Further on, the Court states that criteria whereby additional points are awarded to tenders which meet certain specific and objectively quantifiable environmental requirements are not such as to confer an unrestricted freedom of choice on the contracting authority.

With regard to the circumstances above the ECJ answered the second interpretation question referred by the Administrative Court in Finland.

The Court gives the following interpretation to the article 36.1a of the Directive 92/50/EEG on public services: where the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take environmental criteria into consideration provided that:

- they are linked to the subject-matter of the contract
- do not confer an unrestricted freedom of choice on the authority
- are expressly mentioned in the contract documents or the tender notice and
- comply with all the fundamental principles of EU-law, in particular the principle of non-discrimination

The Court's judgement in this case, and the requisites set up here, provides the basis of the changes regarding the environmental criteria in awarding public procurement contracts in the new legislative package.

Further on, the Court answers the third interpretation question - whether it is allowed according to the procurement directives, and in particular the principle of equal treatment, to take into account such criteria, where it appears from the beginning that the transport undertaking which belongs to the municipality organising the tender procedure is one of the few undertakings able to offer buses which satisfy those criteria.

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<sup>49</sup> C-225/98, *Commission of the European Communities v French Republic*, ECR 2000 Page I-07445

<sup>50</sup> Case C-225/98, paragraph 50: "None the less, that provision does not preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment provided that that condition is consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services".

Concordia submitted that the possibilities of using buses powered by natural gas were very limited. At the date of the invitation to tender, only HST had the possibility to offer busses driven by natural gas in Finland, and therefore it should not be allowed to get additional points, at least in a case where not all the operators in the sector in question have, even theoretically, the possibility of offering services eligible for those points.

The ECJ finds first that, the award criteria at issue in the main proceedings were objective and applied without distinction to all tenders. Next, the criteria were directly linked to the fleet offered and were an integral part of a system of awarding points.

Consequently, the answer to the third question is that the principle of equal treatment does not preclude the taking into consideration environmental criteria such those at issue solely because the contracting entity's own transport undertaking is one of the few undertakings able to offer a bus fleet satisfying those criteria.

Finally, the Court answers the first interpretation question: would the answer on the second and third question be different if the Utilities Directive 93/38/EEG<sup>51</sup> will apply on the current procurement?

The Court notes that the provisions regarding the award criteria in the four public supply directives constitute the core of EU law on public contracts and are intended to attain similar objectives in their respective fields. The respective provisions on award criteria in the public service directive and in the utilities directive have substantially the same wording.

As a result, the Courts' answer to the first question was no.

#### **4.3.2. Case C-448/01 Wienstrom<sup>52</sup>**

##### **Introduction and the background of the case**

Two years after the judgement in the Concordia case, the issue of the award criteria was raised again before the Court of Justice. The judgement of the Court came one year after the judgement in the Concordia case. The Wienstrom case was referred to the ECJ for a preliminary ruling under article 234 EC Treaty, by the Bundesvergabeamt (Federal Procurement Office in Austria). They sent four interpretation questions to the Court of

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<sup>51</sup> Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

<sup>52</sup>Case C-448/01, EVN and Wienstrom, ECR 2003 page 00000

Justice, raised in proceedings between a consortium consisting of EVN AG Wienstrom GmbH, as the applicants, and the Austrian Republic, as the defendant.

The case is related to the Concordia Bus case because it also regards the award criteria and gives further interpretation to the article 26 in the Directive 93/36/EEC on public procurement of goods. The Court refers to its judgement in the Concordia Bus case and goes further in interpreting the requisites set up there. The Court also maintains the same reasoning from the Concordia case relating to the fact that the award criteria does not necessary have to give a *direct* economic benefit to the contracting authority.

The background of the case is the following: the contracting authority in Austria has opened a procurement procedure. The object of the procurement was the supply with “green electricity”<sup>53</sup> for the Federal administrative offices in the land of Kärnten (Austria). The invitation to tender contained the following provision under the heading “Award criteria”: “the economically most advantageous tender according to the following criteria: impact of the services on the environment in accordance with the contract documents”<sup>54</sup>. The supplier had the obligation, as long it was technically possible, to supply electricity produced from renewable energy sources, and not with electricity generated by nuclear fission.

The supplier was not required to submit proof of his electricity sources and the contracting authority was aware that, for technical reasons, no supplier could guarantee that the electricity supplied was actually “green electricity”. The annual consumption of the Federal offices was estimated to be around 22.5 GWh (gigawatt hour) and the contracting authority decided, and published in the contract documents, to contract with tenderers who could supply at least 22.5 GWh green electricity per annum.

Tenders which did not contain any proof that in the past two years and/or in the next two years has produced or purchased, and/or will produce or purchase, and has supplied and/or will supply to final consumers, at least 22.5 GWh green electricity per annum will be rejected. The criteria “electricity from renewable energy sources” shall weight with 45% and only the amount of energy that can be supplied from renewable energy sources in excess of 22.5 GWh per annum will be taken into account.<sup>55</sup>

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<sup>53</sup> electricity produced from renewable energy sources like water, sun, wind etc.

<sup>54</sup> see pt 15, in the Courts’ Judgement

<sup>55</sup> see pt 18 in the Courts’ Judgement

### **The interpretation questions**

The Bundesvergabebamt stopped proceedings before the national Court and referred four interpretation questions to the ECJ for a preliminary ruling. Only the first question is relevant for the environmental criteria. The Court divided the question in two parts:

Firstly, is it allowed by article 26 of Directive 93/36/EEC the applying of an award criterion requiring that the electricity supplied is produced from renewable energy sources?

Secondly, if the answer to the first part is yes, is an award criterion in relation to the supply of green electricity allowed by article 26 of Directive 93/36/EEC when:

- it is given a 45% weighting
- is not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified
- the supplier was not bound to a defined supply period
- account being taken only of the supply volume exceeding the consumption to be expected in the context of the invitation to tender?

### **The problem of law**

The first problem of law is whether an award criterion is allowed by the EU law when it has an ecological nature?

The Court's answer was yes.

The second problem of law here is if an award criterion is in concordance with the EU law when it is given that the contracting authorities neither can nor want to technically verify the information provided by the tenderers?

The third problem of law is if an award criterion is allowed by the EU law if it takes into consideration only of the supply volume exceeding the consumption to be expected in the context of the invitation to tender?

The Court's answer to the second and third questions was no.

### **The Judgement of the Court**

Regarding the first question, the Court referred to its judgement in the case Concordia Bus, and held that that each of the award criteria used by the contracting authority to identify the most economically advantageous tender must not necessarily be of a purely economic nature.

The Court refers even to the case C-379/98 *PreussenElektra*<sup>56</sup>, where the use of green electricity is encouraged.

Further on, the Court refers to the four requisites set up in the *Concordia Bus* case.

The award criterion has to be linked to the subject-matter of the contract, does not confer an unrestricted freedom of choice on the authority, is expressly mentioned in the contract documents or the contract notice, and complies with all the fundamental principles of the EU law, in particular the principle of non-discrimination. Consequently, there is no doubt that if the conditions above are met, the criteria regarding green electricity is allowed by the EU law.

The second and the third questions are the core of the *Wienstrom* case, since the ECJ gives further clarification to the conditions set up in the *Concordia* case.

The second question is regarding the objectivity of the award criterion. It has been held by the Court in the case C-243/89 *Commission v. Denmark* that the “observance of the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers”.

The ECJ recalls that if an award criterion does not comply with the principle of equal treatment of tenderers, the obligation of transparent and objective evaluation it is not lawful according to the EU law. The Court refers to the Case C-470/99 *Universale-Bau and Others*<sup>57</sup> to the case Case C-315/01 *GAT*<sup>58</sup> to emphasize the importance of the principle of equal treatment of tenderers, which underlies the directives on procedures for the award of public contracts.

Further on, the Court makes the judgement of the third problem, that the contracting authority takes into consideration only of the supply volume exceeding the consumption to be expected in the context of the invitation to tender.

The applicants in the main proceedings- *EVN AG Wienstrom GmbH*, the Netherlands government and the Commission submit that it has to be a link, a connection between the environmental award criteria and the subject matter of the contract. They make the

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<sup>56</sup> Case C-379/98 *PreussenElektra AG v Schleswag* 2001 ECR I-2099, paragraph 73

<sup>57</sup> Case C-470/99 *Universale-Bau and Others*, 2002, ECR I-11617, pt 91

<sup>58</sup> Case C-315/01 *GAT*, European Court reports 2003 Page I-06351 pt 73

observation that only the supply of green electricity, that is to say the ecological friendly source of the electricity is relevant in this case.

A very good argument, in my opinion, was submitted by Wienstrom in the main proceedings. The applicants submit that the award criterion in question is actually a disguised selection criterion since in fact concerns the tenderers' capacity to supply as much green electricity as possible and, in that way, it ultimately relates to the tenderers themselves<sup>59</sup>. Indeed, if a small supplier is able to produce the requested amount of green electricity it should not have any relevance how much he can supply exceeding the subject matter of the contract.

The defendant and the Austrian Government consider that, by setting up such a criterion, the contracting authority seeks the reliability of supply of electricity since it cannot be stored. The Commission shares the opinion that it would have been enough for the contracting authority to require that the tenderer shall prove that it is able to supply a reserve of 10% over the annual consumption of the contracting authority.

The Court finds that, in our case, the award criterion applied does not relate to the service which is the subject of the contract, but to the amount of electricity that the tenderers have supplied, or will supply, to other customers. The ecological criteria used by a contracting authority as award criteria for determining the most economically advantageous tender must, inter alia, be linked to the subject-matter of the contract. Moreover, the award criteria as the contracting authority formulated it, are liable to result in unjustified discrimination against tenderers and are not compatible with the Community legislation.

In his opinion, the Advocate General Mischo<sup>60</sup> considers that the award criterion seems “that it may give rise to discrimination between suppliers, in particular between small suppliers and large suppliers”.

#### **4.4. Discussion**

The rule of law in the Concordia case can be formulated as following: an environmental award criterion, in order to be compatible with the Community law, has to be linked to the subject-matter of the contract, does not confer an unrestricted freedom of choice on the

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<sup>59</sup> see pt 63 in the Courts' Judgement

<sup>60</sup> see the Advocate Generals' opinion on the case Wiensstrom, pt 70, delivered on 27 February 2003, European Court reports 2003 Page 00000

authority, is expressly mentioned in the contract documents or the contract notice, and complies with all the fundamental principles of the EU law, in particular the principle of non-discrimination.

The two cases, *Concordia Bus* and *Wienstrom*, are linked since in both cases the issue of environmental award criteria is raised. In both cases, the ECJ has consistently held that the nature of the criteria does not necessarily have to be susceptible of directly financial evaluation.

The Court's judgement is different from Commissions' opinion on this point.

While the Commission submitted that the criterion must have a direct economic benefit for the contracting authority, the Court and the Advocate General Mischo does not share this opinion.

The Commission, both in the Green Paper<sup>61</sup> and in the Interpretative Communication<sup>62</sup> on public procurement, contends that the criteria for the award of public contracts which may be taken into consideration when assessing the economically most advantageous tender must be objective, apply to all the tenders, be strictly linked to the subject-matter of the contract in question and be of direct economic advantage to the contracting authority.

In my opinion, the Commission has a business related perspective, while the Court of Justice and the Advocate General have a more legal perspective. The scope of the procurement directives is, among others, to sustain environmental friendly procurement, which complies with the general principles of EU law, in particular with the principle of freedom of movement of goods, the principle of freedom of establishment, the principle of freedom to provide services and the principle of non-discrimination and transparency. When a contracting authority decides to award the contract to the economically most advantageous tender and to apply environmental criteria, they must be conferred the freedom of choice to award the contract as they wish, even if the criteria does not lead to direct advantages of financial nature. The scope of the Community law and of the procurement directives is to eliminate barriers to the free movement of services and goods.

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<sup>61</sup>Green Paper: public procurement in the European Union: exploring the way forward, adopted by the Commission on 27th November 1996; COM (96) 583 final

<sup>62</sup> COM(2001) 274 , Commissions Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, Brussels, 4.7.2001

I share the opinion of the Court that the criteria should not be limited by setting up such a condition as the Commissions.

In its interpretation notice<sup>63</sup> the Commission considers that the scope of legal provisions in the procurement Directive is to help the contracting authorities to get the best value for money. This should not be measured solely in financial terms.

#### **4.5. Commission Interpretative Communication<sup>64</sup>**

The Commission stated, in its Communication of May 2001 on “A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development”, presented to the meeting of the European Council in Gothenburg in June 2001, that Member States should consider how to make better use of public procurement to favour environmentally friendly products and services.

The Interpretative Communication<sup>65</sup> aims to analyse and to set out the possibilities of the existing Community legal framework with regard to the integration of environmental considerations into public procurement.

The Interpretative Communication was written in 2001. The public procurement directives did not contain any explicit reference to environmental protection or considerations or any other aspects beyond the core internal market policy. This is, regarding the time of adoption of these directives, not surprising, as the Commission emphasizes.

The Commission considers, in the executive summary of the interpretative document, that the introduction of further possibilities that go beyond the ones offered by the existing legal framework requires intervention from the Community legislator.

In April 2004, a new legislative package regarding the public procurement has been published in the Official Journal of the European Union. It has, among other changes, explicitly

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<sup>63</sup> COM(2001) 274 , Commissions Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, Brussels, 4.7.2001

<sup>64</sup> COM(2001) 274 final , Commissions Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, Brussels, 4.7.2001

<sup>65</sup> COM(2001) 274



introduced the environmental criteria which may serve for identifying the most economically advantageous tender into the legal provisions regarding the public contracts.

The Commission emphasizes that, after the adoption of the procurement Directives, the EU and the Member States, had taken several initiatives towards more sustainable environmental policy having the article 6 in the EC Treaty as a legal background.

Indeed, the Treaty of Amsterdam has reinforced the principle of integration of environmental requirements into other policies, recognising that it is key in order to achieve sustainable development. Article 6 states that “environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in article 3, in particular with a view to promoting sustainable development”.

The main possibilities for “green purchasing” are to be found at the start of a public purchase process, when making the decision on the subject matter of a contract.

These decisions are not covered by the rules of the public procurement directives, but are covered by the rules of the EC Treaty and principles on the freedom of goods and services, in particular the principles of non-discrimination and proportionality.

The public procurement directives offer different possibilities to integrate environmental considerations into public purchases, notably when defining the technical specifications, the selection criteria and the award criteria of a contract.

Public procurements under the threshold values, which are not covered by the public procurement directives, have also to comply with rules and principles of the EC Treaty. At this point, it depends on national law of the Member States whether contracting authorities have further possibilities for “green purchasing”.

According to the Commission, as a general rule, the public procurement directives impose two conditions regarding criteria which will be applied for determining the most economically advantageous tender:

- the compliance with the principle of non-discrimination and
- the criteria applied shall generate an economic advantage for the contracting authority.

The Commission emphasizes the aim of the public procurement directives is to avoid both the risk of preferential awarding of public contracts to national tenderers and the possibility that a body financed or controlled by the State, regional or local authorities to choose to be guided by considerations that are not economic. The criteria applied should give the contracting authority discretion to compare objectively the different tenders and to accept the

most advantageous on the basis of objective criteria. Therefore the function of the award criteria is to assess the intrinsic quality of the tenders. This implies that the award criteria have to be linked to the subject-matter of the contract. Further on, the Commission has the opinion that for example the consumption of natural resources can be taken into account if the characteristics can be translated into product-related and economically measurable criteria by requiring a rate of energy consumption.

The Commission rises the question whether the concept of “economically most advantageous tender” implies that each individual award criterion has to have an economic advantage which directly benefits the contracting authority, or that each individual award criterion has to be measurable in economic terms, without the requirement of directly bringing an economic advantage for the contracting authority. They opt for the first interpretation, maintaining the same line as in the Green Paper and the Communication<sup>66</sup> on public procurement.

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<sup>66</sup> Commission Communication “Public Procurement in the European Communities”, adopted by the Commission on 11 March 1998, COM (1998) 143 final.

## **5. Conclusions**

### **The implications of the ecological criteria on the economic operators**

Generally speaking, the contract shall be awarded to the most economically advantageous tender from the contracting authority's point of view. This fact implies that all the award criteria applied shall or should be measured in economical terms.

Let us suppose that a procurement regarding the supply of goods, works or services whereas the tenders shall be evaluated considering three criteria: economical criteria, technical merit and the impact on the environment.

From the economical point of view, the evaluation is clear as it concerns the purely economical criteria notwithstanding of the fact that it is a matter of investment costs or running costs. If the invitation to tender includes a combination of the both aspects, the annual costs can be calculated and set up in the contract documents.

The technical merit can often be measured in economical terms, e.g. when choosing different materials with certain durability, when choosing industrial equipment with certain performance qualities, when choosing the types of constructions with certain life length. A demand for life cycle analysis can occur here in order to reach an objective evaluation of tenders.

However, it can be difficult to set a price even on technical quality differences such as different intrinsic values regarding the work environment (the impact on individuals health and security), the design of works or user accessibility.

When it comes to environmental criteria, the economical measures are even more diffuse. How can the buses' nitrogen oxide emissions and external noise levels be measured and differentiated in economical terms? How can one appreciate the use of electricity produced from renewable energy sources? The question that arises is who is the beneficiary or the receiver of the environmental impact? The contracting authority only - respective the people who live in a certain municipality, the local environment or the global environment?

A tender who confers a superior in-house environment for the contracting authorities employees can be regarded as an advantage for the contracting authority only.

In a broader perspective, an environment criterion can have consequences on the local environment. This aspect was illustrated in the case Concordia Bus, mentioned above, where the nitrogen oxide emissions and external noise levels of the purchase buses only influence the people living in the city of Helsingfors. Another example can be energy generating plants with different external noise emissions that only influences local inhabitants.

In the case Wienstrom, the source of energy which constituted the subject matter of the contract has global implications: energy generated by hydroelectric power stations (renewable energy sources) does not reduce the global natural resources.

On an even broader perspective the environmental criteria can have consequences even on the global environment, such as reduced carbon dioxide emissions or the exploit of non-renewable natural resources etc.

Within the evaluation of tenders which is based on environmental criteria the contracting authority shall assess what these criteria are worth, that is to say put a “price” on the environment. When the impact of the environmental is regarding the contracting authority itself, an evaluation of the impact of a product, works or service should be easiest.

In the case that the environmental impact has a local, regional or a global character, a larger perspective is required since the purchaser has to take into account the consequences on the environment in a larger and wider perspective. Such assessments usually are set up by local, regional or national environmental objectives.

However, regardless if it is a subject of local or global environmental impact, the contracting authority must set up some kind of “price” on the environment that confer the tenderers the possibility to assess the ecological award criteria among the other award criteria and in the same time the contracting authority can evaluate and compare the tenders in an objective way. Consequently, the purchasing entity must specify in the contracting documents the modalities of evaluation for the award criteria. In the same time, within one criterion, specify how to compare tenders when taking into consideration the impact on the environment. The most important issue is here, to compare the tenders on an objective basis and in such way that all parties involved can take into consideration the ecological criteria in a relevant and predictable manner.

The economic assessment of the environmental criteria is therefore depending entirely on the “subjective” evaluation of the contracting authority. It should be important, in this context, to provide harmonized guidelines specially regarding environmental criteria with a national, regional or global impact.

Another aspect is how can the market actors make benefit if they comply with the environmental criteria?

Generally speaking and in a narrow and short-term viewpoint environmental investments always cost money though the results cannot be observed directly and in a simple way. The starting point has to be environmental security provisions that standardize what is allowed or not. The harmonisation of environmental requirements within the Internal Market can contribute to the achievement of Community goals of a sustainable development and environment protection. However, the aim of harmonisation on a Community level should not have a completely covering character, but rather to create conditions to individual adaptation as economic operator in relation to the environmental impact.

If environmental criteria are applied by public organs on a larger scale and are given more weight when awarding public contracts, then the economic operators will adjust their own activity by developing a more environmentally friendly production in order to compete. The concept of competition incorporates the wish to fight and to come first. In the long run this would lead to more environmentally friendly products, services, works etc.

In the case Concordia Bus it has been shown that environmental concerns can be prioritised under certain conditions. A contracting authority when awarding the contract to the most economically advantageous tender can take such environmental criteria into account if they: are linked to the subject matter of the contract, if they do not give the authorities unrestricted freedom of choice, are expressly mentioned in the contract documents or the tender notice and comply with all the fundamental principles of EU law, in particular the principle of non-discrimination.

The market actors are a mixed group of companies - from multinational companies to small suppliers. Big companies see an incentive by developing an environmentally friendly policy, this can confer goodwill or a stronger trademark. Small companies do not have the same possibility to prioritise environmental considerations in the same way.

The ECJs judgement in the case *Wienstrom*, analysed above, is an illuminating example on how the EU can and should promote the ecological objectives. A purchaser of “green electricity” who is specialized on the supply of energy from renewable energy sources should not be discriminated in the competition with big suppliers.

The method used in this thesis is primary a traditional legal method. Therefore, the solutions provided in the conclusions have legal character. The implications that the ecological criteria have on the economic operators have been only briefly presented and analysed but nonetheless offer a better understanding of their position within the Internal Market.

The 25 Member States have likely different ambition levels of environment protection and different potential to allocate economical resources on the environment protection. The challenge is, with help of harmonisation, to offer a moderate level of protection that is acceptable and possible to enforce to all Member States.

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## **Annex 1**

### **The Consolidated Version of the Treaty establishing the European Community 24.12.2002, OJEC, C 325/33**

#### **Article 28**

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

#### **Article 39**

1. Freedom of movement for workers shall be secured within the Community.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
  - (a) to accept offers of employment actually made;
  - (b) to move freely within the territory of Member States for this purpose;
  - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
  - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.
4. The provisions of this article shall not apply to employment in the public service.

#### **Article 43**

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.

#### **Article 49**

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community.

#### **Article 86**

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

## **Annex 2**

### **Directive 2004 /18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJEU, L 134/114**

#### **Article 53 Contract award criteria**

1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:

(a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or

(b) the lowest price only.

2. Without prejudice to the provisions of the third subparagraph, in the case referred to in paragraph 1(a) the contracting authority shall specify in the contract notice or in the contract documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings can be expressed by providing for a range with an appropriate maximum spread.

Where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance .

