

Grounds for change: ECJ judgment in Dutch coffee case points to need for reform of procurement rules

Case [C-368/10](#) *Commission v Netherlands*

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[Abby Semple](#), LL.B.

1. Introduction

On 10 May the European Court of Justice (ECJ) delivered its judgment in a case brought by the Commission against the Netherlands relating to the procurement of coffee machines and ingredients. The ECJ found that the province of North Holland had violated the Public Sector Procurement Directive (2004/18/EC) in its use of technical specifications, selection and award criteria linked to the environmental and social characteristics of the contract. The case comes at an important time, as changes have been proposed to Directives 2004/17/EC and 2004/18/EC which would affect the way in which public authorities can procure organic or fair trade products. In particular, the use of environmental and social labels in procurement is currently under debate.

2. Facts of the case

The province on North Holland wished to award a contract for the supply and management of automatic coffee machines in public buildings. In its tender documents, the province included a number of provisions which the Commission challenged:

- A general requirement for the supplier to practice sustainable purchasing and socially responsible business (as a basis for selection);
- A statement that “the Province uses the Max Havelaar and EKO labels in relation to the consumption of coffee and tea” which appeared in the technical specifications. EKO is a label available to products with at least 95% organic ingredients and Max Havelaar is a label relating to fair trade production – i.e. payment of a minimum price and premium, pre-financing and long-term trading relationships with producers;
- An award criterion in which extra marks would be awarded for the use of ingredients (sugar, milk powder, cocoa) with the Max Havelaar and EKO labels.

The province made clear in an information note issued during the tender procedure that it would accept equivalent labels, provided these were based on the same or similar criteria. The Commission argued that these provisions violated the requirements for selection criteria, technical specifications and award criteria set out in Directive 2004/18/EC. Under Article 23 of the Directive, contracting authorities may refer to labels to define the environmental characteristics required of products, but may not insist on a particular label and must accept other equivalent evidence. Article 48 of the Directive sets out an exhaustive list of the selection criteria contracting authorities may apply, and Article 53 sets requirements for award criteria relating to transparency and equal treatment.

3. Findings of the Court

The Court ruled that the province had infringed the relevant provisions of the Directive on all but one of the grounds alleged by the Commission.

3.1 Technical specifications and contract conditions

Interestingly, the one area in which the ECJ rejected the Commission’s argument was the first reference to the Max Havelaar label. The ECJ chose to treat this as a contract performance condition,

despite the indication in the contract notice that no such performance conditions applied. It based this on the fact that the label refers to requirements to be fulfilled in the delivery of the contract such as payment of a minimum price to producers. This follows the reasoning of Advocate General Kokott, but it is an unusual approach to interpreting tender documents. The reference to the Max Havelaar label was formulated in the same manner and appeared in the same section as the reference to the EKO label, which the Court treated as a technical specification.

There are two important differences between technical specifications and contract performance clauses under Directive 2004/18/EC. The first is that technical specifications are much more rigidly defined than contract clauses – a number of rules must be applied to ensure that they afford equal access to all tenderers. The second is that whereas technical specifications act as pass/fail requirements in a tender competition, contract clauses can only be enforced during the performance of the contract. This difference was pointed out by the Court in the *Nord Pas de Calais* case ([C-225/98](#)), and forms an important restriction on the role of contract performance conditions in tender procedures. Otherwise, it would be possible to avoid all the requirements for technical specifications by simply identifying them as contract clauses.

The decision of the Advocate General and ECJ to treat the fair trade requirements as contract conditions in this case limits the scope for other contracting authorities to actually assess tenderers based on these requirements and eliminate those who do not comply. It is not clear whether any tenderers in the Dutch case were in fact eliminated on this basis, but if evidence of this had been presented to the Court it seems unlikely that it could have treated the requirements as contract conditions only.

3.2 Award criteria

The ECJ confirmed that award criteria may be “based on considerations of a social nature, which may concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons” (para 85). It also shed some welcome light on the ‘link to the subject matter of the contract’ test which has often been cited as an impediment to broader use of environmental and social criteria. This test was first articulated in the *Concordia* case ([C-513/99](#)), and subsequently written into the requirements for award criteria set out in Article 53 of Directive 2004/18/EC. In the *EVN and Wienstrom* case ([C-448/01](#)) the Court found that an award criterion based on the amount of renewable electricity which a potential supplier could generate *above* the amount required by the contracting authority was not linked to the subject matter of the contract. Outside of this ruling, the scope of limitations introduced by the subject-matter test – and particular the question of whether criteria linked to production processes must perceptibly alter the ‘end product’ – has remained unclear.

The ECJ has now helped resolve this uncertainty by stating that “there is no requirement that an award criterion relates to an intrinsic characteristic of a product, that is to say something which forms part of the material substance thereof” (para 91). This means that an award criterion may relate to fair trade production, provided all the relevant requirements are met. However, the Court went on to find that the province’s failure to list the criteria underlying the labels and to accept other appropriate evidence was a violation of the requirements for award criteria (para 97). This effectively applies the same standard to award criteria as technical specifications, and creates uncertainty regarding the ability of contracting authorities to assign higher marks to third-party certified products at award stage.

This approach appears to go against the explicit wording of the Directive, which creates different rules for technical specifications and award criteria, leaving contracting authorities considerably more discretion in formulating and evaluating the latter. It may also create problems in respect of the equal treatment principle. At technical specification stage, any form of evidence (including non third-party certified) may suffice in order to establish whether a product meets the environmental and social criteria set out. The question being answered is of the ‘yes/no’ variety and so the evidence either establishes compliance or does not. However at award criteria stage the contracting authority may

have to make a more qualitative assessment – how *well* does the product demonstrate performance against the criteria set out? Awarding the same marks to products with a third-party certification and those without, (for example, where only a supplier’s self-declaration is submitted) may contravene the principle of equal treatment, by treating objectively different situations in the same way.

4. Proposed reforms

Several of the issues raised in the case are directly relevant to the proposed reform of the Directives. The proposal contains new social and environmental provisions, discussed in a [previous article](#). Article 41 of the proposal addresses the use of labels in technical specifications and, for the first time, refers to social as well as environmental labels. Unfortunately the drafting of this article is likely to leave contracting authorities in serious doubt as to what they can and cannot do with labels, and whether the existing position has changed.

On the one hand, Article 41.1 states that contracting authorities may "require that th[e] works, services or supplies bear a specific label" provided the label meets certain conditions (being linked to the subject matter of the contract; drawn up on the basis of scientific information or other objectively verifiable and non-discriminatory information; established under an open and transparent procedure.) However this apparent ability to insist on a particular label is completely removed by a subsequent paragraph in Article 41.1, which states that, in addition to equivalent labels, a technical dossier of the manufacturer or any other appropriate means of proof must be accepted for products which do not bear the label. This means that contracting authorities will still not be able to insist on third-party certification in respect of environmental or social characteristics of products.

Recital 41 of the proposal seeks to limit the scope of award criteria linked to social elements of production. Where MEAT is applied, contracting authorities may award marks based on the working conditions of people directly involved in the production of goods or provision of works or services. However, “Those characteristics may only concern the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities.” This would appear to rule out fair trade criteria such as those relating to the payment of minimum prices, pre-financing and long-term trading relationships. Given that the ECJ has now explicitly endorsed the possibility to include such considerations in award criteria, the content of this recital may need to be reconsidered.

5. Conclusion

The confirmation from the ECJ that award criteria may concern fair trade production characteristics is valuable and should be reflected in the new procurement directives. However this needs to be accompanied by effective means of verifying the claims put forward by suppliers – both at technical specification and award criteria stage. In a sea of competing claims about the social and environmental characteristics of products, contracting authorities must find objective and rigorous means of verification. Reference to labels is clearly one of the most common and useful ways of doing this, and can reduce work for both buyers and suppliers.

While the specific approach applied by the Dutch authority in this case may have been lacking in transparency, the ECJ has arguably gone too far by introducing new requirements regarding the use of labels in award criteria. At award stage, contracting authorities must exercise their discretion and take into account the merits of the evidence submitted. A requirement to accept non third-party-certified evidence in respect of social or environmental criteria interferes with the exercise of this discretion, and may impede the equal treatment of tenderers.