



Press and Information

Court of Justice of the European Union

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Judgment in Case C-368/10
Commission v Netherlands

EU law does not preclude, in principle, a public contract for which a contracting authority requires or desires that certain products to be supplied should be derived from organic agriculture or fair trade

However, the contracting authority must inter alia use detailed specifications rather than refer to eco-labels or specific labels

The private Netherlands label EKO is granted to products made up of at least 95% of ingredients from organic agricultural production. It is administered by a foundation established under Netherlands private law which has the objective of promoting organic agriculture. The MAX HAVELAAR label is also a private label administered by a foundation established under Netherlands private law, in conformity with the standards laid down by an international umbrella organisation, the Fairtrade Labelling Organisation. That label is used in a number of countries, including the Netherlands. It aims to promote the marketing of fair trade products, certifying that the products in respect of which it is granted are purchased at a fair price and under fair conditions from organisations made up of small-scale producers in developing countries.

In August 2008, the province of North Holland (Netherlands) published a contract notice for the supply and management of coffee dispensing machines. That notice emphasised the importance accorded by the province to increasing the use of organic and fair trade products in automatic coffee machines. In addition, it was laid down that *'the province of North Holland uses the MAX HAVELAAR and EKO labels for coffee and tea consumption'* and that, if possible, the ingredients other than coffee or tea, such as milk, sugar or cocoa, should comply with those two labels. A little later, it was added in an information notice that other labels would also be accepted *'in so far as the criteria are equivalent or identical'*.

On the basis of that information, the European Commission brought an action for failure to fulfil obligations against the Netherlands, alleging infringement of the Directive on the award of public contracts¹. The Commission complains *inter alia* that the province laid down in the technical specifications (which determine the subject-matter of the contract) that the EKO and/or MAX HAVELAAR labels or at least labels based on comparable or identical criteria concerning the tea or coffee to be supplied should be used.

In that regard, the Court notes that technical specifications may be formulated in terms of performance or functional requirements, which may include environmental characteristics. The EKO label, in so far as it is based on environmental characteristics and fulfils the conditions listed in the directive, constitutes an 'eco-label' within the meaning of the directive. However, by requiring that certain products to be supplied were to bear a specific eco-label, rather than using the detailed specifications defined by that eco-label, the province of North Holland established a technical specification which was incompatible with the directive. With regard to the MAX HAVELAAR label, the Court holds that, according to its subject-matter, it does not constitute a technical specification but a condition for performance of the contract. It therefore rejects the Commission's complaint in

¹ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and corrigendum OJ 2004 L 351, p. 44).

that regard, without examining whether that condition was formulated in compliance with the directive.

Second, the Commission claims that the province established an award criterion (which determines the most economically advantageous tender from the point of view of the contracting authority) based on the fact that the ingredients to be supplied other than the tea and coffee are to bear the EKO and/or MAX HAVELAAR labels. In that regard, the Court states that the directive accepts that contracting authorities are authorised to choose the award criteria based on considerations of an environmental or social nature. Considerations of a social nature may concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons. It also follows from the drafting of the award criterion at issue that it referred only to the ingredients to be supplied, without any bearing on the general purchasing policy of the tenderers. Therefore, that criterion related to products the supply of which constituted part of the subject-matter of that contract. There is therefore nothing, in principle, to preclude such an award criterion from referring to the fact that the product concerned was of fair trade origin.

With regard to the manner in which those award criteria may be formulated, the Court considers that the directive's rules concerning the use of an eco-label in the formulation of a technical specification are a relevant indication. It notes that the European Union legislature authorised the contracting authorities to have recourse to the criteria underlying an eco-label in order to establish certain characteristics of a product. It does not however authorise making an eco-label a technical specification. That can be used only in order to create a presumption that the products bearing that label comply with the characteristics thus defined, expressly subject to any other appropriate means of proof being allowed. By granting a certain number of points in the choice of the most economically advantageous tender to certain products bearing specific labels instead of listing the criteria underlying those labels and allowing proof that a product satisfies those criteria by all appropriate means, the province established an award criterion that was incompatible with the directive.

Finally, the Commission claims that the requirement for the contracting authority to 'comply with criteria of sustainable purchases' and 'socially responsible business' is contrary to the directive. The Court holds that, by imposing those criteria in the specifications, the province of North Holland established a minimum level of technical capacity which was not authorised.

The Court also holds that the principle of transparency implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents. That enables, first, all reasonably informed tenderers exercising ordinary care to understand their exact significance and interpret them in the same way and, second, the contracting authority to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract. Thus, it holds that the requirements concerning compliance with the 'criteria of sustainable purchases and socially responsible business' and the obligation to 'contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production' are not sufficiently clear, precise or unequivocal.

Accordingly, the Court holds that the Netherlands failed to fulfil its obligations under the Directive on the award of public contracts.

NOTE: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay.

Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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