

17 September 2002

European Court says environmental criteria can be taken into account in awarding public procurement contracts: implications for EU and WTO law

The European Court of Justice (the "ECJ") has today issued a landmark judgment (Concordia Bus Finland) that has important implications for the integration of environmental criteria in public procurement. The judgment clarifies the extent to which "secondary" criteria (i.e., criteria that are not purely economic, such as environmental or social) can be taken into account at the stage at which a public procurement contract is awarded.

In a request for a preliminary ruling, the Finnish Supreme Administrative Court asked the ECJ whether the EU public procurement Directives allow consideration of non-economic factors, such as the level of air and noise pollution, when deciding to whom to award a public procurement contract.

The EU Directives refer to two options for the award of contracts: (i) lowest price; or (ii) most economically advantageous tender, determined by reference to a non-exhaustive list of criteria such as price, delivery date, quality, aesthetic and functional characteristics, technical merit, technical assistance and after-sales service. Although one could argue for a flexible reading of the EU Directives, since they refer to non-economic elements such as aesthetics, the legitimacy of considering environmental or other secondary criteria in awarding public procurement contracts was uncertain.

Here, for the first time, the ECJ was explicitly asked to clarify the extent to which environmental criteria (and by extension, other secondary criteria) can be considered by a public authority at the award stage of a tender process. The ECJ held that, when determining what constitutes the most economically advantageous tender, a public authority is allowed to take environmental criteria into consideration. According to the ECJ, the EU public procurement Directives do not imply that each of the award criteria used by a public authority must necessarily be of a purely economic nature. However, the possibility of integrating environmental (and by extension, other secondary) criteria is qualified by a number of conditions:

- (i) environmental criteria must be linked to the subject-matter of the contract;
- (ii) the criteria must not give to the public authority an unrestricted freedom of choice;
- (iii) the criteria must be expressly mentioned in the contract documents or the tender notice (the principle of transparency); and
- (iv) the criteria must comply with the fundamental principles of Community law, namely non-discrimination.

The judgment is of tremendous importance, as it supports a more flexible approach to public procurement than previous Commission interpretations had suggested. Until now, the Commission had insisted that each award criterion not only have a link to the subject matter of the contract, but also bring an economic advantage directly benefiting the public authority. Sometimes the economic advantages of secondary considerations can be quantified (e.g., savings derived from requiring a low rate of energy consumption), but there was uncertainty among public authorities as to whether a broader array of environmental and social factors

could be taken into account. The *Concordia Bus Finland* judgment clarifies that, as long as the conditions previously mentioned are respected, secondary criteria such as those referred to in the instant case are legitimate. It is to be noted that the EU is currently revising its public procurement rules, a revision which could shed further light on this issue.

It is an open question whether the judgment will affect the EU position on public procurement within the framework of the WTO. The WTO Government Procurement Agreement (the "GPA") refers to attribution of a contract on the basis of different terms than the EU Directives, calling for award to be based on the "lowest" or "most advantageous tender" and allowing exceptions in the interest of protecting human, animal or plant life or health -- however, notably, the GPA does not contain the GATT's "environmental" exception, for measures relating to the conservation of exhaustible natural resources.

When interpreting the GPA, the EU has similarly defended (*inter alia*, with relation to consultations with the US on the *Massachusetts State Law prohibiting contracts with firms doing business with or in Myanmar*) at WTO level that award of the contract should be guided by considerations of an economic nature. The EU may need to review its position in the light of the *Concordia Bus Finland* judgment. Third country suppliers interested in bidding for EU government procurement contracts could also argue in the WTO that consideration of secondary criteria is an indirect means of giving preference to European suppliers, who are more capable of integrating EU-specific environmental concerns. Seen from this perspective, the judgment strikes a chord that could already be heard, much more clearly, in the Commission's recent Green Paper for an "Integrated Product Policy", where one key element was that the EU would give preference to products that fulfill the EU ecolabel criteria.

* * *

This Bulletin has been prepared by Marco Bronckers (Marco.Bronckers@wilmer.com), Natalie McNelis (Natalie.McNelis@wilmer.com) and Pablo Charro (Pablo.Charro@wilmer.com). If you have any questions about the *Concordia Bus Finland* case, please do not hesitate to contact them or any of the partners and counsel of the EU/WTO group at Wilmer, Cutler & Pickering:

In Brussels:

Claus-Dieter Ehlermann
John Ratliff
Charles S. Stark
Paul von Hehn
Marco Bronckers
Yves Van Gerven
Thomas Mueller
Christian Duvernoy
Sven Völcker
Frédéric Louis
Eric Mahr

+32 (2) 285.49.00

Claus-Dieter.Ehlermann@wilmer.com
John.Ratliff@wilmer.com
Charles.Stark@wilmer.com
Paul.vonHehn@wilmer.com
Marco.Bronckers@wilmer.com
Yves.VanGerven@wilmer.com
Thomas.Mueller@wilmer.com
Christian.Duvernoy@wilmer.com
Sven.Voelcker@wilmer.com
Frederic.Louis@wilmer.com
Eric.Mahr@wilmer.com

In Berlin:

Ulrich Quack

+49 (30) 20.22.64.00

Ulrich.Quack@wilmer.com

This bulletin is for general informational purposes only and does not represent our legal advice as to any particular set of facts, nor does this bulletin represent any undertaking to keep recipients advised as to all relevant legal developments.