CJEU case law review

The link to the subject matter – a question of importance for sustainable public procurement

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Cases brought to the Court of Justice of the European Union have posed questions about whether specific characteristics (often social or environmental sustainability concerns) have been correctly used by a contracting authority in a procurement procedure as award criteria. One of the arguments considered by the Court is whether the criterion is linked to the subject matter.

The Court has given a broad interpretation to the scope of the link to the subject matter, as is shown in the case summaries below.

The Concordia Bus case

The Court held in its 2002 decision in the Concordia Bus case that, under the procurement directives in force at the time, a contracting authority organising a tender procedure for the operation of city bus services could include, among the award criteria for awarding the contract on the basis of the ‘economically most advantageous tender’, criteria that take into account the nitrogen oxide emissions and noise level of the bus fleet offered by parties seeking the tender. It was in this case that the ‘link to the subject matter’ test was first endorsed by the Court.

The question before the Court was whether it was compatible with the EU rules to award points at the evaluation stage for ecological concerns – as indicated the Court confirmed that it was. The Court went on to state: ‘However, that does not mean that any criterion of that nature [i.e., addressing horizontal objectives] may be taken into consideration by the contracting authority.’

The Court explained that, although the contracting authority has discretion to choose the criteria on which it proposes to base the award of the contract, award criteria must not be designed in such a way as to give a contracting authority unrestricted freedom of choice,

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1 Case No. C-513/99, Concordia Bus Finland v Helsingin Kaupunki, [2002] All ER (EC) 87. (Concordia Bus)
2 Directive 93/38/EEC provided in Article 34(1) that: the criteria on which the contracting entities shall base the award of contracts shall be: the most economically advantageous tender, involving various criteria depending on the contract in question, such as: delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance, commitments with regard to spare parts, security of supplies and price; or the lowest price only. Concordia Bus at para. 6, (quoting Article 34 of Directive 93/38/EC of 14 June 1993 Coordinating the procurement procedures of entities operating in the water energy, transport, and telecommunications sectors (OJ 1993 L199/84)). See also para. 88, which noted that Article 36 of Directive 92/50 of 18 June 1992 relating to the coordination of procedures for the award of public contracts is substantially the same.
3 Concordia Bus, para. 58.
must comply with fundamental principles of EU law, in particular the principle of non-discrimination, and must be expressly mentioned in the contract documents.

The Court said that criteria must also be linked to the subject matter of the contract. This is because a tender necessarily relates to the subject matter of the contract and, the Court reasoned, it follows that the award criteria which may be applied must themselves also be linked to the subject matter of the contract.\(^4\)

Applying this rule to the facts at issue in the case, the Court held that ‘criteria relating to the level of nitrogen oxide emissions and the noise level of the buses [...] must be regarded as linked to the subject matter of a contract for the provision of urban bus transport services.’\(^5\)

This case clarifies that being ‘linked to the subject-matter of the contract’ is not limited to the functional objectives of the contract (in \textit{Concordia Bus}, the provision of bus services), but can also encompass environmental externalities arising from the use of procured goods or services (in \textit{Concordia Bus}, the pollution effects of the procured bus services).

**The green electricity case (\textit{Weinstrom})\(^6\)**

The question remained whether ecological criteria related to the production phase and which do not so obviously result in different physical composition or performance of the end product could be distinguished and therefore were not linked to the subject matter. However, as discussed below, the Court rejected this argument in the \textit{Weinstrom} case.

At issue in \textit{Weinstrom} was an award criterion consisting of the allocation of points for the amount of electricity from renewable energy sources that the tenderers will be able to supply to a non-defined group of consumers, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption expected in the context of the invitation to tender.\(^7\)

In respect of the link to the subject matter the Court broke down the criterion into two parts.

First, the Court applied its reasoning in \textit{Concordia Bus} and held that ‘where a contracting authority decides to award a contract to the tenderer who submits the most economically advantageous tender it may take into consideration ecological criteria.’\(^8\) More specifically, the Court held that, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, a criterion requiring that the electricity supplied be produced from renewable energy sources is permissible, provided that it complies with the other conditions set out in \textit{Concordia Bus}, including the provision that the criterion be ‘linked to the subject matter of the contract.’\(^9\)

\(^4\) \textit{Concordia Bus}, para. 59.
\(^5\) \textit{Concordia Bus}, para. 65.
\(^7\) \textit{Weinstrom}, paras. 26, 60.
\(^8\) \textit{Weinstrom}, para. 33.
\(^9\) \textit{Weinstrom}, paras. 34, 72.
Second, the Court held that an award criterion that relates solely to the amount of electricity produced from renewable energy sources in excess of the expected annual consumption, as laid down in the invitation to tender, cannot be regarded as linked to the subject matter of the contract and was therefore impermissible.\textsuperscript{10}

Notably, the award criterion at issue in \textit{Weinstrom} had to do with the sustainable production of the supplies procured. Moreover, the characteristic endorsed as an award criteria in \textit{Weinstrom} was irrelevant to the procured supplies’ physical or functional characteristics - electricity produced from fossil fuels has the same physical and functional characteristics as electricity produced from renewable sources, but the environmental impact of the respective production processes is, obviously, quite different. Therefore, for the purposes of award criteria, \textit{Weinstrom} plainly refutes any distinction between production processes and methods that affect the functional characteristics of the procured product and those that do not.

\textbf{North Holland}\textsuperscript{11}

Although \textit{Weinstrom} had confirmed that award criteria can be used to compare the relative advantages of different production processes on the basis of their environmental impacts, it was some time before the Court was presented with a chance to rule on whether the same reasoning applies to social aspects, such that these could also be considered linked to the subject matter. The ruling in the \textit{North Holland} case resolved that question.

This case relates to a tender for the supply and management of automatic coffee machines by the Province of North Holland. The contracting authority sought to procure products that respected the environment and were socially responsible and specifically asked for the ingredients to bear specific labels indicating that they were organically produced and fair trade.\textsuperscript{12} Although the judgment did not rule favourably on the way the Province had used the labels,\textsuperscript{13} it gave further insight into the legitimacy of contracting authorities pursuing the underlying criteria.

The Court noted that the Directive provided that award criteria could be not only economic but also qualitative before concluding, ‘that contracting authorities are also authorised to choose the award criteria 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.’\textsuperscript{14}

Further, the argument that by seeking fair trade products, the contracting authority was in fact assessing the tenderer’s purchasing policy, which is not linked to the subject matter, was dismissed. The award criterion was found to cover only the ingredients to be supplied under the contract, and therefore had no bearing on the general purchasing policy.\textsuperscript{15}

\textsuperscript{10} \textit{Weinstrom}, para. 68.
\textsuperscript{11} Case C-368/10, \textit{Commission v The Kingdom of the Netherlands}. (\textit{North Holland}).
\textsuperscript{12} The labels were EKO (organic production) and Max Havelaar (fair trade).
\textsuperscript{13} The Court ruled that the contracting authority had referred to the labels in a way such that the technical specifications and award criteria could only be understood as requiring the supplied goods to bear specific labels, and that this was problematic. See \textit{North Holland}, para. 52.
\textsuperscript{14} \textit{North Holland}, para. 85.
\textsuperscript{15} \textit{North Holland}, para. 90.
The fair trade origin of the coffee or sugar, analogously to the renewable origin of the electricity in *Weinstrom*, was not obvious in the purchased product but was nonetheless of value to the contracting authority. This aspect was summarised by the Advocate General in this case ‘the taste of sugar does not vary depending on whether it was traded fairly or unfairly. A product placed on the market in unfair conditions does however leave a bitter taste in the mouth of a socially responsible customer’. 16

Therefore, through its judgment in *North Holland* the Court struck at the heart of concerns about whether social considerations could be considered linked to the subject matter: there does not need to be an impact on the function or appearance of the end-product or service. Or as the Court put it ‘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’. 17

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For further discussion of other points connected with sustainable public procurement and the revision of the Public Procurement Directive, please see ClientEarth’s publications at [www.clientearth.org/public-procurement/publications/](http://www.clientearth.org/public-procurement/publications/)

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16 *Opinion of Advocate General Kokott, North Holland*, para. 110.
17 *North Holland*, para. 91.