



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15.10.2001
COM(2001) 566 final

INTERPRETATIVE COMMUNICATION OF THE COMMISSION

**on the Community law applicable to public procurement and the possibilities for
integrating social considerations into public procurement**

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EXECUTIVE SUMMARY

- The aim of this Communication, which follows on from the Commission's Communication on "Public procurement in the European Union" of 11 March 1998¹, is to clarify the range of possibilities under the existing Community legal framework for integrating social considerations into public procurement. This Communication also figures among the actions announced in the Social Policy Agenda adopted by the European Council of Nice in December 2000². The Agenda is part of the integrated European approach set out in Lisbon whose goal is economic and social renewal. It seeks in particular to provide a dynamic and positive interaction between economic, social and employment policies, which mutually reinforce one another.
- The introduction of other possibilities and, in particular, of practices that go beyond the current system of the public procurement directives would require intervention by the Community legislator.
- All relevant national rules in force in the social field, including those implementing relevant Community rules in the field, are binding on contracting authorities, insofar as they are compatible with Community law. Such rules include, in particular, provisions on workers' rights and on working conditions.
- Non-compliance by tenderers with certain social obligations may in some cases lead to their exclusion. It is for Member States to determine in which cases this should arise.
- It is especially during the execution of the contract, that is, once the contract has been awarded, that public procurement can be used by contracting authorities as a means of encouraging the pursuit of social objectives. Contracting authorities can require the successful tenderer to comply with contractual clauses relating to the manner in which the contract is to be performed, which are compatible with Community law. Such clauses may include measures in favour of certain categories of persons and positive actions in the field of employment.
- The public procurement directives also offer various possibilities for taking account of social considerations that relate to the products or services required, in particular when drawing up the technical specifications and selection criteria.
- Public purchasers are free to pursue social objectives in respect of public procurement contracts not covered by the public procurement directives, within the limits laid down by the general rules and principles of the EC Treaty. It is for Member States to determine whether contracting authorities may, or must, pursue such objectives in their public procurement.

¹ COM(98) 143.

² Social Policy Agenda, COM (2000) 379 of 28.6.2000.

INTRODUCTION

The purpose of this Communication, which follows on from the Commission's Communication on "Public procurement in the European Union" of 11 March 1998, is to clarify the range of possibilities under the existing Community legal framework for integrating social considerations into public procurement. The Communication should thus make it possible to integrate various social considerations into public procurement in the best way possible and in this way contribute to sustainable development - a concept which combines economic growth, social progress and respect for the environment.

Public procurement policy is one of the components of Internal Market policy. In this respect, the public procurement directives³ aim to guarantee "the attainment of free movement of goods" and "the attainment of freedom of establishment and freedom to provide services in respect of public works contracts"⁴. Attainment of these objectives necessitates co-ordination of public procurement procedures in order to ensure effective competition and non-discrimination in respect of such procedures and optimal allocation of public money through the choice of the best tender. Contracting authorities⁵ must be allowed to obtain best value for money while complying with certain rules, especially as regards selection of candidates in accordance with objective requirements and award of contracts solely on the basis of price or of the most economically advantageous tender based on a set of objective criteria.

Internal market policy can be pursued while at the same time integrating pursuit of other objectives, including social policy objectives.

Social policy has played a central role in building Europe's economic strength, through the development of a unique social model⁶. Economic progress and social cohesion, and a high level of protection and improvement of the quality of the environment, are complementary pillars of sustainable development and are at the heart of the process of European integration. Raising living standards, promoting a high level of employment and social protection, improving living and working conditions and promoting quality of life are goals of the European Union⁷. The Social Policy Agenda adopted at the Nice European Council in December 2000 forms part of the integrated European approach that aims to achieve the economic and social renewal outlined by the Lisbon European Council in March 2000. Specifically, it seeks to ensure the positive and dynamic interaction of economic,

³ Council Directive 92/50/EEC of 18.6.1992 relating to the coordination of procedures for the award of public service contracts, Council Directive 93/36/EEC of 14.6.1993 coordinating procedures for the award of public supply contracts and Council Directive 93/37/EEC of 14.6.1993 concerning the coordination of procedures for the award of public works contracts, as amended by European Parliament and Council Directive 97/52/EC; Council Directive 93/38/EEC of 14.6.1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by European Parliament and Council Directive 98/04/EC.

⁴ This objective means that "it is necessary to improve and extend the safeguards in the directives that are designed to introduce transparency into the procedures and practices for the award of such contracts, in order to be able to monitor compliance with the prohibition of restrictions more closely and at the same time to reduce disparities in the competitive conditions faced by nationals of different Member States" (recital 6 of Council Directive 89/440/EEC of 18.7.1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts, OJ L 210/1 of 21.7.1989).

⁵ For the purposes of this Communication, the term "contracting authorities" shall include "contracting entities" within the meaning of Directive 93/38/EEC, unless specified otherwise.

⁶ Preface to the Communication on the Social Policy Agenda, cited above.

⁷ Communication from the Commission: "Promoting core labour standards and improving social governance in the context of globalisation", COM(2001) 416 of 18.7.2001.

employment and social policies, and to forge a political agreement that mobilises all key players to work jointly towards the new strategic goal⁸.

In addition, the Treaty of Amsterdam sets as one of the priorities of the European Union the elimination of inequalities and the promotion of equal opportunities between men and women in all policies and activities of the European Union. Article 13 of the Treaty also lays down the need to combat all forms of discrimination⁹. The Charter of Fundamental Rights of the European Union, proclaimed at the Nice European Council, restates the European Union's aim to fully integrate fundamental rights in all its policies and actions¹⁰.

The public procurement directives currently in force contain no specific provision on the pursuit of social policy goals within the framework of public procurement procedures¹¹. The Commission, as stated in its 1998 Communication referred to above, nevertheless considers that current Community public procurement law offers a range of possibilities which, if properly pursued, should make it possible to attain desired objectives.

The expression "social considerations" used in this Communication covers a very wide range of issues and fields. It can mean measures to ensure compliance with fundamental rights, with the principle of equality of treatment and non-discrimination (for example, between men and women), with national legislation on social affairs, and with Community directives applicable in the social field¹². The expression "social considerations" also covers the concepts of preferential clauses (for example, for the reintegration of disadvantaged persons or of unemployed persons, and positive actions or positive discrimination in particular with a view to combating unemployment and social exclusion).

This Communication aims to identify the possibilities under existing Community law applicable to public procurement for taking social considerations into account in the best way in public procurement. The Communication examines the different phases of a procurement procedure and sets out, for each phase, whether and to what extent social considerations can be taken into account.

It should be noted that, in any event, interpretation of Community law is ultimately the role of the European Court of Justice.

⁸ See preface to the Communication on the Social Policy Agenda, cited above.

⁹ Article 13 covers all forms of discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

¹⁰ See Communication on core labour standards, cited above, Part 3.

¹¹ The only provisions referring explicitly to provisions of a social nature are to be found in Article 23 of Directive 93/37/EEC, Article 28 of Directive 92/50/EEC and Article 29 of Directive 93/38/EEC. As regards Article 9 of Directive 93/37/EEC, which lays down a special award procedure for the design and construction of public housing, it should be noted that the sole aim of this provision dating from the 1970s was to permit Member States to provide for the possibility for award of a contract for the construction of public housing to a single contractor who would be responsible for both design and construction. The other relevant provisions of the directive are fully applicable to such procedures.

¹² At Community level, there are a number of legislative texts that may apply to public procurement. They include, in particular, texts on safety and health at work (for example, Council Directive 89/391/EEC of 12.6.1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183/1 of 29.6.1989, and Directive 92/57/EEC of 24.6.1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites), working conditions and the application of employment law (for example, Directive 96/71/EC of the European Parliament and of the Council of 16.12.1996 concerning the posting of workers in the framework of the provision of services, OJ L 18/1 of 21.1.1997, and Directive 2001/23/EC on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82/16 of 22.3.2001, codifying Directive 77/187/EEC).

If it were considered that the current public procurement regime does not offer sufficient possibilities for taking social considerations into account, modification of the public procurement directives would be necessary. It should be noted that in the proposals for modification of the public procurement directives adopted by the Commission on 10 May, 2000, specific mention is made of the possibility to use contractual conditions regarding execution of a contract that have as their goal the promotion of employment of disadvantaged or excluded persons, or the combating of unemployment¹³.

I CONTRACTS COVERED BY THE PUBLIC PROCUREMENT DIRECTIVES

1.1. Definition of the subject-matter of the contract

The first occasion for taking social considerations into account in respect of a public procurement contract is the phase just before the public procurement directives will be applicable: the actual choice of the subject-matter of the contract or, to put it more simply “what do I, public authority, wish to construct or purchase”? At this stage, contracting authorities have a great deal of scope for taking social considerations into account and choosing a product or service that corresponds to their social objectives. How far this will actually be done depends to a great extent on the awareness and knowledge of the contracting authority.

As the Commission states in its Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, the possibilities for taking account of environmental considerations vary from one type of contract to another¹⁴. This is also true as regards the possibilities for taking account of social considerations. Public contracts for works and services, in respect of which it is possible to lay down the manner in which the contract is to be performed, provide the best opportunity for a contracting authority to take account of social concerns. In the case of supply contracts, apart from the basic choice of the subject-matter of the contract (“what shall I purchase?”), the possibilities to take social considerations into account are more limited. A contracting authority can, for example, choose to buy goods or services which meet the specific needs of a given category of person, such as the socially disadvantaged or excluded¹⁵. In this context, it should be noted that service contracts which have a social objective relate in most cases to services within the meaning of Annex IB of Directive 92/50/EEC or Annex XVIB of Directive 93/38/EEC and are thus not subject to the detailed procedural rules of the directives, and in particular the rules on selection and award¹⁶ (see Chapter II, last paragraph, below).

¹³ See recital 22 of the proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts, COM(2000) 275 final (OJ C 29 E of 30.1.01, pp. 11-111), relating to Article 23(3) of the proposal, and recital 32 of the proposal for a Directive coordinating the procurement procedures of entities operating in the water, energy and transport sectors, COM(2000) 0276 final (OJ C 29 E of 30.1.01, pp. 112-188), relating to Article 33, third subparagraph, of the proposal.

¹⁴ See the Chapter on the definition of the subject-matter of a contract in the Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, COM(2001) 274 final of 4.7.2001.

¹⁵ Certain service contracts targeted at a particular social category have, by their very nature, a social objective (for example, a contract for training for long-term unemployed persons). Another example is contracts for the purchase of computer hardware/services adapted to the needs of disabled persons.

¹⁶ For example, social and sanitary services, educational and vocational training services, or recreational and cultural services. The services listed in Annex IB to Directive 92/50/EEC and Annex XVI B to Directive 93/38/EEC are subject only to the provisions of the public procurement directives on technical specifications and the publication of an award notice. However, they remain

If different solutions exist which would meet the needs of a contracting authority, the contracting authority is free to define contractually what it considers as corresponding best to its social concerns in the subject-matter of the contract, and it may also use variants in this respect (see Part 1.2, below).

This freedom is, however, not entirely unlimited. A contracting authority, as a public body, has to observe the general rules and principles of Community law, and in particular the principles regarding free movement of goods and the freedom to provide services laid down in Articles 28 to 30 (ex 30 to 36), and 43 to 55 (ex 52 to 66) of the EC Treaty¹⁷.

This implies that the subject-matter of a public contract may not be defined in such a way that it has as its aim, or that it results in, a reservation of access to the contract for domestic companies to the detriment of tenderers from other Member States.

Existing Community legislation, and national legislation that is compatible with Community law, on social or other matters may well also limit or influence the freedom of choice of the contracting authority.

In general, any contracting authority is free, when defining the goods or services it intends to buy, to choose to buy goods, services or works which correspond to its concerns as regards social policy including through the use of variants, provided that such choice does not result in restricted access to the contract in question to the detriment of tenderers from other Member States.

In any event, the fact that a contract is intended for a "social" use, (for example, construction of a school, a hospital or a retirement home), is of no particular relevance to the application of the public procurement directives, since such contracts must be awarded according to the rules of such directives, if they fall within their scope.

The choice of subject-matter of the contract made by a contracting authority is initially reflected in the technical specifications.

1.2. Technical specifications

As the Commission stated in its above-mentioned Communication on integrating environmental considerations into public procurement¹⁸, the public procurement directives¹⁹ contain a set of provisions regarding technical rules. According to these provisions, the technical specifications that have to be met by the supplies, services or works must be indicated in the general documents or in the contract documents for each contract.

subject to the provisions of the EC Treaty, which means, among other things, that there must be a sufficient degree of transparency, and respect of the principle of equal treatment of tenderers.

¹⁷ Council and European Parliament Communication on the Internal Market and the Environment, COM(1999) 263 final of 8.6.1999, pp. 8 and 9.

¹⁸ See Chapter II, point 1, of the Communication on the possibilities for incorporating environmental considerations into public procurement cited above, in which the Commission examines the concept of "technical specifications" within the meaning of the public procurement directives.

¹⁹ See Article 14 of Directive 92/50/EEC, Article 8 of Directive 93/36/EEC, Article 10 of Directive 93/37/EEC, and Article 18 of Directive 93/38/EEC.

Under the public procurement directives, contracting authorities can use technical specifications that define the subject-matter of the purchase or service more precisely, provided that they comply with the rules set out in the directives, and that they do not eliminate or favour a given tenderer²⁰.

In the above-mentioned Communication, the Commission states that the provisions of the public procurement directives on technical specifications apply without prejudice to legally binding national technical rules that are compatible with Community law²¹. These national rules can include, among others, requirements concerning product safety, public health and hygiene or access for the disabled to certain buildings or public transport (for example, accessibility standards on the width of corridors and doors, adapted toilets, access ramps), or access to certain products or services (for example, in the field of information technology²²).

Thus, for public works contracts, for example, contracting authorities may be subject to the provisions of Directive 92/57/EEC on health and safety on construction sites²³. Directive 92/57/EEC contains rules on the technical organisation of construction sites. In practice, it can lead to technical requirements relating to a given contract being included in the contract documents, whose aim is to ensure the safety and health of workers and others on the construction site. Such requirements can include measures to avoid accidents at work, such as sign-posting, conditions for storage of dangerous products or plans of routes for the passage of equipment.

In addition to such specifications, which incorporate regulations in the social field, technical specifications with a social connotation exist which serve to characterise in an objective way a product or service²⁴.

Contracting authorities may, among other things, require that products be manufactured using a specific production process, provided that this characterises the product in relation to other competing products, and in such a way as to meet the needs of the contracting authority²⁵. As regards the use of "social labels" that concern the "social" capacity of an undertaking, see Point 1.3.2, below²⁶.

Moreover, contracting authorities may take account of variants²⁷. Variants allow contracting authorities to choose the option which best meets their needs in financial

²⁰ In this context, see Article 8(6) of Directive 93/36/EEC, Article 10(6) of Directive 93/37/EEC, Article 14(6) of Directive 92/50/EEC and Article 18(5) of Directive 93/38/EEC.

²¹ This means that they must comply, among other things, with the case law of the Court of Justice regarding measures having an equivalent effect to quantitative restrictions.

²² The e-Europe initiative calls upon contracting authorities, in order to achieve the objective of an "information society for all", to ensure the widest possible access to information technologies for persons with special needs, and to adopt the "web accessibility" initiative for Internet sites.

²³ This obliges contracting authorities to take account of the health and safety of workers on construction sites both in the award and the execution of their works contracts.

²⁴ For example, the purchase of computer equipment or services adapted to the needs of the visually impaired. Such requirements are used to define the technical characteristics of the product and therefore relate to the subject-matter of the contract.

²⁵ As stated in the Communication on the possibilities for incorporating environmental considerations into public procurement cited above, requirements which bear no relation to the product or the service itself, such as a requirement relating to the way in which an undertaking is managed, are not technical specifications within the meaning of the public procurement directives and cannot therefore be imposed. Thus, requirements concerning the use in a contractor's office of recycled paper, the application of specific waste disposal methods on the contractor's premises, or the recruitment of staff from certain groups of persons (ethnic minorities, disabled persons, women) would not qualify as technical specifications.

²⁶ A "social label" relating to the "social" capacity of an undertaking cannot currently be considered a "technical specification" within the meaning of the public procurement directives.

²⁷ All the directives allow the contracting authorities, when the criterion used is that of the most economically advantageous offer, to take account of variants which are submitted by a tenderer and which meet the minimum requirements set by the contracting authorities. Contracting authorities must state in the contract documents the minimum technical specifications to be respected by

and social terms, while fulfilling the minimum conditions set out in the contract documents. Variants may, for example, concern different technical solutions concerning the ergonomic characteristics of a product, or be intended to ensure access for disabled persons to given equipment or services, including tools and services provided "on line" or electronically.

1.3. Selection of candidates or tenderers

The directives essentially contain two sets of rules on selection.

On the one hand, the directives contain an exhaustive list of cases in which the personal situation of a candidate or tenderer may lead to its exclusion from a procurement procedure. These cases essentially concern bankruptcy, conviction of an offence, grave professional misconduct or non-payment of statutory contributions. The causes of exclusion are interpreted strictly. However, application of these provisions on exclusion remains optional for contracting authorities.

On the other hand, the directives provide that the suitability of tenderers or candidates to participate in a procurement procedure or to submit a tender must be assessed on the basis of criteria relating to their economic, financial or technical capacity²⁸. The directives set out exhaustive and mandatory, qualitative selection criteria, which can be used to justify the choice of candidates or tenderers²⁹. Selection criteria different from those set out in the directives would thus not comply with the current directives.

In the Beentjes case cited above, the Court found that a condition regarding the employing of long-term unemployed persons had no relation to the checking of tenderers' suitability on the basis of their economic and financial standing and their technical knowledge and ability (ground 28 of the judgment)³⁰. The Commission notes in this respect that contracting authorities can include a condition relating to the employment of long-term unemployed when setting conditions relating to the execution of a contract (see point 1.6, below).

With regard to economic and financial standing, the directives set out a number of references which can be provided to prove the good standing of candidates or tenderers in respect of a given contract. This list of references is not exhaustive. However, any other reference required by the contracting authority must be necessary, from an objective point of view, to prove the economic and financial standing of the tenderers as regards a specific contract³¹. In view of the references which may currently be required in order to assess the economic and financial standing of tenderers, it is not possible for social considerations to be included in such references.

the variants and any specific requirements to be met. They must indicate in the contract notice if variants are not authorised (Article 24 of Directive 92/50/EEC, Article 16 of Directive 93/36/EEC, Article 19 of Directive 93/37/EEC and Article 34(3) of Directive 93/38/EEC).

²⁸ Article 15 of Directive 93/36/EEC, Article 18 of Directive 93/37/EEC, Article 23 of Directive 92/50/EEC and Article 31(1) of Directive 93/38/EEC.

²⁹ In the Beentjes judgment of 20.9.1988 in Case 31/87, the Court stated that, according to the public procurement directives, "the suitability of contractors is to be checked by the authorities awarding contracts in accordance with the criteria of economic and financial standing and of technical knowledge or ability" (point 17 of the judgment).

³⁰ Similarly, a criterion regarding the good standing of executives of an undertaking was rejected by the Court of Justice, on the basis that it «constituted a means of proof which does not come within the closed category authorised by directive» 71/305/EEC on economic and financial standing of undertakings, in its judgment of 10.2.82 in Case 76/81, Transporoute (points 9 and 10).

³¹ See the Transporoute judgment referred to above, point 9.

As regards proof of technical capacity, the directives permit social considerations to be taken into account to a certain extent. The possibilities for taking social considerations into account under the directives are set out below (see point 1.3.2, below).

The Directives specify³² that the information required as evidence of an operator's financial and economic standing and its technical capability must be confined to the subject-matter of the contract.

In the "utilities" sectors, the contracting authorities' discretion in this respect is wider, due to the fact that Article 31(1) of Directive 93/38/EEC requires only that "objective rules and criteria" be used, which are laid down in advance and made available to interested candidates or tenderers.

1.3.1. *Exclusion of candidates or tenderers for non-compliance with social legislation*

In its above-mentioned 1998 Communication, the Commission reiterated the fact that the public procurement directives currently in force contain provisions that permit the exclusion, at the selection stage, of candidates or tenderers who "breach national social legislation, including those relevant to the promotion of equality of opportunities".

The public procurement directives permit the exclusion of a tenderer who "has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority"³³.

The public procurement directives also permit the exclusion of a tenderer who "has been convicted of an offence concerning his professional conduct by a judgment which has the force of *res judicata*" or who "has been guilty of grave professional misconduct proved by any means which the contracting authorities can justify"³⁴.

A tenderer who has been convicted by a judgment that has the force of *res judicata* for failure to comply with national legislation concerning, for example, the prohibition of clandestine employment, may be excluded from a public procurement procedure in accordance with the provisions mentioned above³⁵.

In addition, the public procurement directives permit contracting authorities in Member States that have provided for this possibility in their national legislation, to exclude from a public procurement procedure any candidate or tenderer who has not respected the provisions of such legislation.

Circumstances can thus be envisaged in which tenderers who have not complied with social legislation can be excluded from public procurement procedures, where such

³² See, for example, Article 32(4) of Directive 92/50/EEC.

³³ See Articles 20(e) of Directive 93/36/EEC and 24(e) of Directive 93/37/EEC, to which reference is made in Articles 31(2) of Directive 93/38/EEC and 29(e) of Directive 92/50/EEC.

³⁴ See Articles 20(c) and (d) of Directive 93/36/EEC, 24(c) and (d) of Directive 93/37/EEC, to which reference is made in Articles 31(2) of Directive 93/38/EEC and 29(c) and (d) of Directive 92/50/EEC.

³⁵ Conviction for infringement of the prohibition on employing unregistered workers can, under Article L362.-6.2 of the French Labour Code, lead to temporary exclusion (of up to 5 years) or definitive exclusion from participation in public procurement procedures.

non-compliance is deemed to constitute grave professional misconduct or an offence having a bearing on its professional conduct. These exclusion clauses can also include, for example, non-compliance with provisions on equality of treatment, or on health and safety, or with provisions in favour of certain categories of persons³⁶. A contracting authority may, for example, exclude a tenderer from its Member State who has not introduced an equal opportunities policy as required by the national legislation of the Member State where the contracting authority is established, provided that non-compliance with such legislation constitutes grave misconduct in the Member State in question.

Grave professional misconduct is a concept that is not yet defined by European legislation or case law³⁷. It is thus for the Member States to define this concept in their national legislation and to determine whether non-compliance with certain social obligations constitutes grave professional misconduct.

1.3.2. *Taking social considerations into account when verifying the technical capability of candidates or tenderers*

The public procurement directives lay down the means by which the technical capability of a candidate or tenderer can be demonstrated. The directives contain an exhaustive list of references or evidence that candidates or tenderers can be required to provide in order to demonstrate their technical capability in view of the nature, quantity and purpose of the contract in question³⁸. Hence, each particular requirement laid down by the contracting authority with regard to the technical capability of the candidate or tenderer must be based on one of the references listed in the directives.

The purpose of the selection phase is to identify those tenderers who are considered by the contracting authority to be capable of executing a given contract. Requirements must therefore have a direct link to the subject-matter of the contract in question³⁹.

At this stage of selection, a contracting authority can require references concerning tenderers' experience and know-how⁴⁰. It may, for example, verify the composition and management of the personnel of the enterprise, its technical equipment and its quality control system, in order to ensure that it has the capability, in terms of staff qualifications and resources, to properly perform the contract.

³⁶ In Spain, non-compliance with legislation on the employment of the disabled constitutes grave professional misconduct, and can lead to the exclusion of the tenderer in question. In France, there are approximately 30 possible grounds for exclusion for non-compliance with employment legislation (for example, labour legislation requires undertakings with more than 100 employees to employ two disabled persons; the head of the company can be punished by the works inspectorate; this may allow a contracting authority to exclude the enterprise for serious professional misconduct).

³⁷ Final report on the Falcone study on public procurement and organised crime (1998) – Volume I: 24.5.1999 - Institute of Advanced Legal Studies – University of London.

³⁸ Article 23 of Directive 93/36/EEC, Article 27 of Directive 93/37/EEC and Article 32 of Directive 92/50/EEC.

³⁹ Article 32(2) of Directive 92/50/EEC expressly states that these requirements must be defined according to the nature, quantity and purpose of the services to be provided.

⁴⁰ For service contracts, the capability of service providers to provide certain services may be evaluated in particular with regard to their skills, efficiency, experience and reliability (Article 32.1 of Directive 92/50/EEC). In this context, see also the Beentjes judgment cited above, point 37.

If a contract requires specific know-how in the "social" field, specific experience may be used as a criterion as regards technical capability and knowledge in proving the suitability of candidates⁴¹.

The references permitted by the public procurement directives⁴² allow account to be taken of the "social capacity" of the undertaking (sometimes also known as "social responsibility"⁴³) only if this demonstrates the technical capability, within the meaning set out above, of the undertaking to perform a given contract.

1.4. Award of the contract

Once the candidates or tenderers have been selected, contracting authorities enter the phase of evaluation of tenders, leading to the award of the contract.

Selection of candidates or tenderers and the award of a contract are two distinct operations that are governed by separate rules.

For the award of public procurement contracts, the public procurement directives⁴⁴ permit the use of two different criteria, namely the lowest price and the most economically advantageous tender.

When a contract is to be awarded to the most economically advantageous tender, the public procurement directives require the contracting authority to indicate in the contract documents or in the contract notice the award criteria it will apply, where possible in descending order of importance. As a result, the contracting authority is required to state all the criteria it intends to use when evaluating tenders, and is required, at the time of evaluation of tenders, not to use criteria other than those set out in the contract notice or contract documents.

1.4.1. The criterion of the most economically advantageous tender

The public procurement directives list, by way of example, a number of criteria that the contracting authorities can use as a basis to identify which tender would be the most advantageous from an economic point of view⁴⁵. Other criteria may also be applied.

⁴¹ For example, specific experience of management of a crèche, or of training services for the long-term unemployed.

⁴² Of all the references listed exhaustively in the public procurement directives for establishing the technical capability of a tenderer, the following are those which might concern social considerations in certain cases: (1) a list of projects completed in the previous five years, accompanied by certificates of due performance for the most important projects, or a list of the major services provided in the previous three years; (2) a description of the supplier's technical facilities, its measures for ensuring quality and its study and research facilities; or (3) a statement of the technicians or technical bodies which the candidate can call upon for executing the contract, whether or not they belong to the firm, especially those responsible for quality control.

⁴³ The terms "responsibility" or "social capacity" reflect a trend on the part of businesses to gradually take greater account of social and ethical (and environmental) considerations in their business and investment plans, sometimes over and above simple compliance with social legislation. Businesses' approach to social responsibility varies considerably depending on the sector and on national - or even regional - cultures. In its Green Paper "Promoting a European framework for corporate social responsibility", COM(2001) 366 of 18.7.2001, the Commission stresses the importance of corporate social responsibility, as it can be a positive contribution to the strategic goal decided in Lisbon (cf. point 6 of the Green Paper). With this Green Paper, the Commission aims to launch a broad debate on how the European Union could promote such social responsibility at both European and international level (point 7). Moreover, various "social labels" of a voluntary nature are currently emerging on the market. In its Green Paper, the Commission defines the concept of "social label" as "words and symbols on products which seek to influence the purchasing decisions of consumers by providing an assurance about the social and ethical impact of a business process on other stakeholders".

⁴⁴ Article 26 of Directive 93/36/EEC, Article 30 of Directive 93/37/EEC, Article 36 of Directive 92/50/EEC and Article 34 of Directive 93/38/EEC.

⁴⁵ The criteria cited as examples in the directives are price, delivery or performance dates, running costs, cost-effectiveness, quality, the aesthetic and functional character, the technical value, after-sales service and technical assistance.

As a general rule, the public procurement directives impose two conditions with regard to criteria used for determining the most economically advantageous tender. First, the principle of non-discrimination has to be observed⁴⁶. Second, the criteria used should generate an economic advantage for the contracting authority. The European Court of Justice has confirmed that the aim of the public procurement directives is to avoid the risk of preference being given to national tenderers or candidates whenever a contract is awarded by contracting authorities, and to avoid the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations that are not economic in nature⁴⁷.

The common factor shared by all criteria used for evaluation of offers is that they must, like the criteria cited as examples, all concern the nature of the work which is the subject-matter of the contract or the manner in which it is carried out⁴⁸. They must permit the contracting authority to compare tenders in an objective way in order to determine which tender best meets its needs in respect of a given contract. An award criterion must allow the intrinsic qualities of a product or service to be assessed.

Award criteria must therefore be linked to the subject-matter of the contractor or the manner in which it is performed⁴⁹.

Social criteria are not included among the various criteria given as examples in the public procurement directives. However, if the term "social criterion" is construed as a criterion that makes it possible to evaluate, for example, the quality of a service intended for a given category of disadvantaged persons⁵⁰, such a criterion may legitimately be used if it assists in the choice of the most economically advantageous tender within the meaning of the directives.

The use of quotas to reserve contracts for a given category of supplier⁵¹ or the use of price preferences⁵² would, however, be incompatible with the current public procurement directives. This would also be the case for criteria relating to whether tenderers employ a certain category of person or have set up a programme for the promotion of equal opportunities, as they would be considered criteria which are unrelated to the subject-matter of a given contract or to the manner in which the contract is executed. Such criteria, which do not assist in the choice of the most economically advantageous tender, are not permitted under the public procurement

⁴⁶ A criterion that favours local tenderers, and that is likely to make it more difficult for potential tenderers established in other Member States to be awarded the contract in question and to perform the services which are the subject-matter of the contract, would constitute a restriction on the freedom to provide services within the meaning of Article 49 (ex 59) of the EC Treaty.

⁴⁷ Judgment of the Court of 3.10.2000 in Case C-380/98 "University of Cambridge", point 17, in which the Court refers to the judgments of 15.1.1998, *Mannesmann Anlagenbau Austria et al.*, Case C-44/96, ECR p. I-73, point 33; and *BFI Holding*, of 10.11.98, Case 360/96, points 42 and 43. See also the judgment of 1.2.2001 in Case C-237/99, *Commission v. French Republic*, "HLM", points 41 and 42.

⁴⁸ Conclusions of Advocate General Darmon of 4.5.1988 in the *Beentjes* case cited above, point 35.

⁴⁹ See, for example, Article 30(1) of Directive 93/37/EEC. In this context, see also the conclusions of Advocate-General Colomer presented on 5 June 2001 in joined cases C-285/99 and C-286/99, *Lombardini*, footnote 23.

⁵⁰ In the context of a contract to provide computer services to all the employees of a local authority (services under Annex IA), a criterion relating to the method proposed by the tenderer to ensure, at all times and in a satisfactory fashion, a quality service which meets the needs of any disabled person, may, in principle, be one of the criteria to be taken into account in determining the most economically advantageous tender.

⁵¹ In the United States, 20% of contracts are reserved for "small minority businesses", i.e., undertakings controlled by minorities. The United States has a derogation to this effect in the Agreement on Government Procurement.

⁵² Certain categories of tenderer benefit from a price preference where the tender submitted by tenderer A, despite the fact that it is higher than that of tenderer B, is considered equivalent to that of B insofar as A applies a given social policy, for example, an active policy for the promotion of women.

directives, given the objective of the directives, which is to allow the intrinsic qualities of a product or service to be assessed. Moreover, such criteria would be considered incompatible with the commitments entered into by the Member States under the Agreement on Government Procurement concluded under the auspices of the WTO⁵³.

Criteria involving social considerations may be used to determine the most economically advantageous tender where they provide an economic advantage for the contracting authority which is linked to the product or service which is the subject-matter of the contract⁵⁴.

The question arises whether the concept of "most economically advantageous tender" implies that each individual award criterion has to provide an economic advantage which directly benefits the contracting authority, or if it is sufficient that each individual criterion has to be measurable in economic terms, without the requirement that it directly provides an economic advantage for the contracting authority in the given contract.

This question was put to the European Court of Justice in case C-513/99. The judgment in this case is expected by the end of 2001. This judgment, which concerns a question relating to the environment, could be applied by analogy to provide elements for a response as regards use of social considerations⁵⁵.

Both in its Green Paper⁵⁶ and in the above-mentioned Communication on public procurement⁵⁷, the Commission clearly favoured the first interpretation.

The Commission notes that contracting authorities have the possibility to set certain conditions for the execution of a contract and that, at that stage, they can take account of certain social objectives (see point 1.6, below).

1.4.2. "Additional criterion"

This concept was first developed by the European Court of Justice⁵⁸.

The concept was first mentioned in the Beentjes case cited above, where the Court held that a criterion relating to the employment of long-term unemployed persons

⁵³ Certain states that are signatories to the Agreement on Government Procurement made express reservations to allow their contracting authorities to apply a social criterion when awarding contracts. The United States, for example, reserved the right to reserve certain contracts for minorities. However, no such reservation was made by the European Community. As a result, such criteria must be considered as being contrary to the provisions of the public procurement directives, especially where they relate to the award of contracts.

⁵⁴ In one case handled by the Commission, a contracting authority had based itself principally on the following elements to award a contract to the local transport company: the fact that the company was based in the area had repercussions both from a taxation point of view and in terms of the creation of stable jobs. Moreover, the local purchase of large quantities of equipment and services by the service provider guaranteed local jobs. The Commission considered that these criteria could not constitute criteria on the basis of which contracting authorities could evaluate tenders insofar as they did not make it possible to measure an economic advantage inherent in the service which was the subject-matter of the contract to the benefit of the contracting authority. Moreover, these elements had the effect of discriminating against other tenderers insofar as this resulted in giving an advantage in the evaluation of tenders to the only service provider established in the area concerned. This was therefore an infringement of the general principle of non-discrimination between service providers set out in Article 3 of Directive 92/50/EEC. Case C-513/99 Stagecoach Finland Oy/AB, OJ C 102/10 of 8.4.2000.

⁵⁵ Green Paper on "Public procurement in the European Union: Exploring the way forward", COM(1996) 583 of 27.11.1996.

⁵⁷ See Chapter 4.3 of the 1998 Communication cited above on the integration of environmental considerations into public procurement. See also point 48 of the Communication on *Social and regional aspects of public procurement*, COM(89) 400 adopted by the Commission on 22.9.1989 (OJ C 311, 12.12.1989).

⁵⁸ See Beentjes case cited above (at point 29) and Case C-255/98, Commission of the European Communities v. French Republic, judgment of 26.9.2000, School buildings - Nord-Pas-de-Calais Region (ECR 2000, I-7445).

was not relevant either to the checking of a candidate's economic and financial suitability or of the candidate's technical knowledge and ability, or to the award criteria listed in the relevant directive. The Court also held that this criterion was nevertheless compatible with the public procurement directives if it complied with all relevant principles of Community law.

In Case C-225/98, the Court of Justice held⁵⁹ that contracting authorities can base the award of a contract on a condition related to the combating of unemployment, provided that this condition was in line with all the fundamental principles of Community law, but only where the said authorities had to consider two or more economically equivalent tenders. This condition was regarded by the Member State in question as an additional, non-determining criterion and was considered only after tenders were compared from a purely economic point of view. Finally, the Court of Justice stated that the application of the award criterion regarding combating unemployment must not have any direct or indirect impact on those submitting bids from other Member States of the Community and must be explicitly mentioned in the contract notice so that potential contractors were able to ascertain that such a condition existed.

This might also be the case for other conditions in the social field.

1.5. Abnormally low tenders

Under the current public procurement directives⁶⁰, where contracting authorities consider a tender to be abnormally low, their only obligation is to ask for an explanation from the tenderer before being able to reject the tender. The contracting authority must verify the content of the tender in question, and can reject it if it appears to be unreliable, although it is not required by the directives to do so. In Member States that have adopted legislation to this effect, contracting authorities can nevertheless be required to reject abnormally low tenders where this is due, for example, to non-compliance with employment or labour law rules.

The public procurement directives list, by way of example, certain elements that the contracting authority can take into account such as the economy of the manufacturing process, technical solutions and exceptionally favourable conditions available to the tenderer. Elements relating to non-compliance with rules on safety or employment can, under the current public procurement directives, be taken into consideration to reject an abnormally low tender. In keeping with the general approach of the directives, the practical rules regarding such verification are governed by national law, it being understood that such rules must permit the tenderer to present its position.

⁵⁹ See the General Report on the Activities of the European Union, 2000, point 1119, p. 407.

⁶⁰ Article 27 of Directive 93/36/EEC, Article 30 of Directive 93/37/EEC, Article 37 of Directive 92/50/EEC and Article 34(5) of Directive 93/38/EEC.

1.6. Execution of a contract

One way to encourage the pursuit of social objectives is in the application of contractual clauses or of conditions for execution of the contract, provided that they are implemented in compliance with Community law and, in particular, that it does not discriminate directly or indirectly against tenderers from other Member States.

Contracting authorities can impose contractual clauses relating to the manner in which a contract will be executed. The execution phase of public procurement contracts is not currently regulated by the public procurement directives.

However, the clauses or conditions regarding execution of the contract must comply with Community law and, in particular, not discriminate directly or indirectly against non-national tenderers⁶¹ (see point 3.2, below).

In addition, such clauses or conditions must be implemented in compliance with all the procedural rules in the directives, and in particular with the rules on advertising of tenders⁶². They should not be (disguised) technical specifications. They should not have any bearing on the assessment of the suitability of tenderers on the basis of their economic, financial and technical capacity, or on the award criteria⁶³. Indeed, "the contract condition should be independent of the assessment of the bidders' capacity to carry out the work or of award criteria"⁶⁴.

Transparency must also be ensured by mentioning such conditions in the contract notice, so they are known to all candidates or tenderers⁶⁵.

Finally, a public procurement contract should, in any event, be executed in compliance with all applicable rules, including those in the social and health fields (see Chapter III, below).

Contract conditions are obligations which must be accepted by the successful tenderer and which relate to the performance of the contract. It is therefore sufficient, in principle, for tenderers to undertake, when submitting their bids, to meet such conditions if the contract is awarded to them. A bid from a tenderer who has not accepted such conditions would not comply with the contract documents and could not therefore be accepted⁶⁶. However, the contract conditions need not be met at the time of submitting the tender.

Contracting authorities have a wide range of possibilities for determining the contractual clauses on social considerations. Listed below are some examples of

⁶¹ By way of example, a clause stipulating that a successful tenderer must employ a certain number or percentage of long-term unemployed or apprentices, without requiring the unemployed or apprentices to be from a particular region or registered with a national body, for instance for the execution of a works contract, should not, *a priori*, amount to discrimination against tenderers from other Member States.

⁶² See point 31 of the Beentjes judgment cited above.

⁶³ See point 28 of the Beentjes judgment cited above.

⁶⁴ Communication on *Regional and Social Aspects of Public Procurement*, cited above, point 59.

⁶⁵ "In order to meet the directive's aim of ensuring development of effective competition in the award of public works contracts, the criteria and conditions which govern each contract must be given sufficient publicity by the authorities awarding contracts" (see the Beentjes judgment cited above, point 21).

⁶⁶ The judgment of the Court of Justice of 22.6.1992 in Case C-243/89 "Storebaelt" stated that a contracting authority must reject bids which do not comply with the tender conditions to avoid infringing the principle of equal treatment of tenderers, which lies at the heart of the public procurement directives.

additional specific conditions which a contracting authority might impose on the successful tenderer while complying with the requirements set out above, and which allow social objectives to be taken into account:

- the obligation to recruit unemployed persons, and in particular long-term unemployed persons, or to set up training programmes for the unemployed or for young people during the performance of the contract;
- the obligation to implement, during the execution of the contract, measures that are designed to promote equality between men and women or ethnic or racial diversity⁶⁷;
- the obligation to comply with the substance of the provisions of the ILO core conventions during the execution of the contract, in so far as these provisions have not already been implemented in national law;
- the obligation to recruit, for the execution of the contract, a number of disabled persons over and above what is laid down by the national legislation in the Member State where the contract is executed or in the Member State of the successful tenderer.

It should be noted that it would appear more difficult to envisage contractual clauses relating to the manner in which supply contracts are executed, since the imposition of clauses requiring changes to the organisation, structure or policy of an undertaking established on the territory of another Member State might be considered discriminatory or to constitute an unjustified restriction of trade.

II PUBLIC PROCUREMENT CONTRACTS NOT COVERED BY THE DIRECTIVES

The public procurement directives apply only to certain public procurement contracts, and in particular those whose value equals or exceeds the relevant threshold set out in the directives.

Under Community law, it is for Member States to decide whether public procurement contracts not covered by the Community directives should be subject to national rules.

Member States are also free, within the limits laid down by Community law, to decide whether public procurement contracts not covered by the directives may - or must - be used to pursue objectives other than the objective of "best value for money" pursued by the public procurement directives.

Without prejudice to national legislation in the field, contracting authorities remain free, in respect of such contracts, to define and apply, in their procurement procedures, selection and award criteria of a social nature, provided that they comply

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In the case of services contracts, this might for example involve establishing a policy aimed at promoting ethnic and racial diversity in the workplace, through instructions given to the persons in charge of recruitment, promotion or staff training. It may also involve the appointment by the contractor of a person responsible for implementing such a policy in the workplace.

with the general rules and principles of the EC Treaty⁶⁸. This implies, among other things, an appropriate degree of transparency and compliance with the principle of equality of treatment of tenderers.

Practices that reserve contracts to certain categories of persons, for example to disabled persons ("sheltered workshops") or to the unemployed, are permitted. Such practices must not, however, constitute direct or indirect discrimination as regards tenderers from other Member States⁶⁹, or constitute an unjustified restriction on trade⁷⁰. Thus, reservation of a contract for national tenderers would be contrary to the rules and general principles of the EC Treaty. However, where for example, contracts are also open to sheltered workshops from other Member States, this should not in principle be discriminatory. In such cases, award of the contract should be made in accordance, among other things, with the principles of equality of treatment of tenderers and of transparency⁷¹ (see also Chapter III, below).

Contracting authorities have a certain freedom not only as regards contracts not covered by the directives, but also as regards the services listed in Annex IB to Directive 92/50/EEC and Annex XVIB to Directive 93/38/EEC, which cover most services of a "social" nature (for example, health and social services). Such contracts are subject only to the provisions of the public procurement directives on technical specifications and advertising (award notice). The detailed rules in the directives on selection of candidates and award of contracts do not apply to contracts for such services. However, procurement in respect of such service contracts remains subject to national law and to the rules and principles of the EC Treaty, as outlined above.

III SOCIAL PROVISIONS APPLICABLE TO PUBLIC PROCUREMENT

3.1. Introduction

From the outset, it must be reiterated that, even if the public procurement directives do not contain a specific provision to this effect, all Community, international and national regulations, rules and provisions, which are applicable in the social field shall apply fully during the performance of a public procurement contract following award of the contract. Where necessary, they should be stated in the contract notice or contract documents. The public procurement directives already permit⁷² contracting authorities to identify, or for them to be obliged by a Member State to identify, in the contract documents the national competent authority or authorities from whom tenderers may obtain relevant information on obligations regarding

⁶⁸ For more details, see Chapter III of the Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, cited above.

⁶⁹ In the United Kingdom, a preference scheme, the "Priority Suppliers Scheme", whose aim was to encourage employment of disabled workers through the award of government supply contracts, stipulated that certain undertakings registered on a list could submit a second tender to bring it into line with the lowest tender, a rule that could not benefit similar tenderers from other Member States. This scheme was discontinued at the time of negotiations on codified directive 93/36/EEC and was replaced in November 1994 by a procedure that complied with Community law, the "Special Contract Arrangement". Eligibility for the scheme was extended to employers of disabled persons throughout the European Union, and application of the scheme is limited to public procurement contracts whose value is below the thresholds set out in the directives.

⁷⁰ Article XXIII of the Agreement on Government Procurement ("Exceptions to the Agreement") provides the parties to the Agreement with the possibility of "imposing or enforcing measures [...] relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour", provided such measures do not "constitute a means of arbitrary or unjustifiable discrimination" and are not "a disguised restriction on international trade". This possibility was not implemented in the public procurement directives.

⁷¹ In this context, see the judgments of the Court of Justice of 18.11.1999 in Case C-275/98, Unitron, and of 7.12.2000 in Case C-324/98, Telaustria.

⁷² Article 23 of Directive 93/37/EEC, Article 28 of Directive 92/50/EEC and Article 29 of Directive 93/38/EEC.

safety and working conditions which are applicable at the place where the works are carried out or on the sites where the services are provided⁷³.

These obligations include respect of national rules deriving from Community directives in the social field. Of particular relevance in the context of public procurement are the directives on the health and safety of workers and the directives on the "transfer of undertakings" and the "posting of workers" (see Point 3.2.2.2, below), as well as recent directives on equality of treatment⁷⁴.

Such obligations may also derive from certain Conventions of the International Labour Organisation (ILO)⁷⁵. As regards core labour standards recognised at international level, the fundamental principles and rights at the workplace defined by the International Labour Organisation of course apply in their entirety to the Member States⁷⁶.

Bids from tenderers who have not taken account of obligations on employment protection provisions and working conditions identified by the contracting authority in the contract documents cannot be considered as complying with the contract documents. Moreover, where tenderers have not taken sufficient account of these obligations in their tenders, their tenders might be considered as abnormally low and, in some cases, might be rejected for this reason (see point 1.5, above).

Questions have frequently been asked⁷⁷ about the interpretation and application of certain rules or regulations of a social nature which must be complied with in respect of public procurement contracts and which might seem difficult to identify in the context of public procurement, and particularly during execution of the contract. Particularly frequent are questions on the application of labour law and the protection of working conditions in respect of workers posted by an undertaking in order to provide a service in another Member State, as particular account has to be taken of such conditions when tenderers are drawing up their bids. Another matter on which questions are frequently posed in respect of public procurement concerns cases where a successful tenderer takes over some or all of the employees of the organisation previously holding the contract.

⁷³ Under the current public procurement directives, contracting authorities that make use of this possibility and thus provide such information in the tender documents are required to ensure that tenderers have taken the obligations relating to protection provisions and working conditions into account in the preparation of their tenders, by asking tenderers to state this in their tenders. In this way, tenderers can obtain the necessary information in advance on the social obligations that will be applicable if the contract is awarded to them. It also permits tenderers to take account in the preparation of their tenders of the costs that compliance with such obligations would involve.

⁷⁴ Directive 2000/43/EC of 29.6.2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180/22) and Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303/16).

⁷⁵ Conventions No. 87 of 9.7.1948 and No. 98 of 1.7.1949 (on, respectively, freedom of association and protection of the right to organise, and application of the right to organise and collective bargaining); No. 29 of 28.6.1930 and No. 105 of 25.6.1957 (abolition of forced labour); No. 111 of 25.6.1958 (discrimination in employment and occupation); No. 100 of 29.6.1951 (principle of equal remuneration and abolition of all discrimination); No. 138 of 26.6.1973 and No. 182 of 17.6.1999 (minimum age and prohibition of the worst forms of child labour).

⁷⁶ Commission Communication on core labour standards, cited above, point 3.1. In this context, the Commission states that, since rapid ratification by all Member States of the eight core ILO Conventions goes hand in hand with the European Union's commitment to promoting core labour standards, on 15.9.2000 it sent the Member States a recommendation on ratifying the most recent basic Convention, i.e. Convention No. 182 cited above (recommendation published in OJ L 243 of 28.9.2000).

⁷⁷ The wish to improve social protection for workers and their working conditions is frequently behind such questions. Moreover, the objective of ensuring social protection of workers has been recognised by the Court of Justice as an imperative requirement of general interest which may justify national measures restricting the exercise of one of the fundamental freedoms of Community law (judgments of 17 December 1981, Webb, Case 279/80, ECR 3305; of 3.2.1982, Seco and Desquenne & Giral, Joined Cases 62/81 and 63/81, ECR. 223; of 27.3.1990, Rush Portuguesa, Case C-113/89, ECR I-345; of 28.3.1996, Guiot, Case C-272/94, ECR I-1905; of 23.11.1999, Arblade, Joined Cases C-369/96 and C-376/96).

Moreover, understanding the extent of relevant obligations in the social field may play an important role in dealing with and verifying tenders which are suspected of being abnormally low.

The Commission explains in this Communication the scope of Community provisions that are of particular relevance in answering such questions.

3.2. DETERMINING THE WORKING CONDITIONS APPLICABLE

In the case of national, international and Community standards and rules that must be applied in the social field, a distinction must be made between situations of a cross-border nature and other situations (which can, in principle, be considered purely national).

In "national" situations, the contracting authorities, tenderers and contractors must comply, as a minimum standard, with all obligations relating to employment protection conditions and working conditions, including those deriving from collective and individual rights, that arise from applicable labour legislation, case law and/or collective agreements, provided that they are compatible with Community legislation and the rules and general principles of Community law, and in particular the principles of equal treatment and non-discrimination.

In "cross-border" situations, requirements justified by overriding reasons in the general interest that are in force in the host country (the catalogue of such rules was put on a Community basis by Directive 96/71/EC, see point 3.2.1.2 below) must, among others, be complied with by service providers, in the respect of the principle of equal treatment.

In both situations, provisions more favourable to workers may, however, also be applied (and must then also be complied with), provided that they are compatible with Community law.

3.2.1. The limits laid down by Community law on the application of national provisions

3.2.1.1. The EC Treaty

Since the relevant provisions can be applied only if they are compatible with Community law, the limits and restrictions laid down by Community law should be examined.

The established case law of the Court, as summarised in the *Arblade* judgment⁷⁸, is that Article 49 (ex 59) of the EC Treaty requires not only the elimination of any discrimination against a service provider established in another Member State by reason of its nationality, but also the elimination of any restriction, even if it applies indiscriminately to national service providers and to those from other Member States, which is likely to prevent, hamper or make less attractive the activities of a service provider established in another Member State where it lawfully provides similar

⁷⁸ See the *Arblade* judgment, cited above, and in particular points 33-39.

services⁷⁹. Moreover, even in the absence of harmonisation in the field, as a fundamental principle of the EC Treaty, the freedom to provide services may be limited only by rules which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, insofar as that interest is not protected by the rules to which the service provider is subject in the Member State in which he is established⁸⁰. Moreover, application of such national rules of a Member State to service providers established in another Member State must be necessary to ensure attainment of the objective pursued and must not exceed what is necessary to attain the objective.⁸¹

The Court has already accepted worker protection⁸², including protection of workers in the construction sector⁸³, as an imperative reason in the general interest. However, purely administrative considerations would not justify such a derogation from Community law by a Member State, especially if the effect of the derogation is to restrict the exercise of one of the principal freedoms under Community law⁸⁴. It must be stressed that the imperative reasons in the general interest which justify the substantive provisions of a regulation may also justify the supervisory measures needed to ensure that they are complied with⁸⁵.

Exclusion from participation in a public procurement contract of an undertaking established in another Member State because it was not affiliated to a national collective agreement in force in the relevant sector in the country of the contracting authority would thus not only be contrary to the public procurement directives, but might also be an infringement of the freedom to provide services and, in certain cases, of the right of establishment⁸⁶.

3.2.1.2. Provisions of secondary legislation of particular relevance to public procurement

Directive 96/71/EC ("posting of workers")

According to the case-law of the Court of Justice⁸⁷, Community law does not prevent Member States from extending their legislation, or collective labour agreements entered into by the social partners, including as regards minimum wages, to any person who carries out work, even temporarily, within their territory, irrespective of the country in which the employer is established.

⁷⁹ See the judgments of 25.7.1991, *Säger*, Case C-76/90, ECR p. I-4221, point 12; of 9.8.1994, *Vander Elst v. OMI* of 9.8.1994 in Case C-43/93, ECR p. I-3803, point 14; of 12.12.1996, *Reisebüro Broede*, Case C-3/95, ECR p. I-6511, point 25; and of 9.7.1997, *Parodi*, Case C-222/95, ECR p. I-3899, point 18, and point 10 of the *Guiot* judgment, cited above.

⁸⁰ See, in particular, the *Webb* judgment cited above, point 17, and judgments of 26.2.1991, *Commission/Italy*, Case C-180/89, ECR p. I-709, point 17; *Commission v. Greece*, Case C-198/89, ECR p. I-727, point 18; *Säger*, cited above, point 15; *Vander Elst*, cited above, point 16, and *Guiot*, cited above, point 11.

⁸¹ See in particular the *Säger* judgment, cited above, point 15, and judgments of 31.3.1993, *Kraus*, Case C-19/92, ECR p. I-1663, point 32; of 30.11.1995, *Gebhard*, Case C-55/94, ECR p. I-4165, point 37, and *Guiot*, cited above, points 11 and 13.

⁸² See the *Webb* judgment, cited above, point 19, and judgments of 3.2.1982, *Seco and Desquenue & Giral*, cited above, point 14, and of 27.3.1990, *Rush Portuguesa*, cited above, point 18.

⁸³ *Guiot* judgment, cited above, point 16.

⁸⁴ See, in particular, the judgment of 26.1.1999, *Terhoeve*, Case C-18/95, ECR p. I-345, point 45.

⁸⁵ In this context, see the *Rush Portuguesa* judgment, cited above, point 18, and the *Arblade* judgment, cited above, points 61 to 63 and 74. However, although in the latter judgment, the Court confirmed the importance of social protection of workers and the justification for certain supervisory measures needed to ensure that it is complied with, it added that such supervisory measures could be accepted only "where there exists no organised system for cooperation or exchanges of information between Member States as provided for in Article 4 of Directive 96/71" (see point II.3.2, above). The organised system for cooperation or exchanges of information between Member States thus provided for will therefore make certain supervisory measures superfluous after expiry of the date for implementation of that Directive (16.11.1999). See also, in this context, the answer to Written Question E-00/0333 by Mrs B. Weiler.

⁸⁶ See, in this context, the conclusions of the Advocate-General in Case C-493/99, *Commission v. Germany*, of 5.4.2001.

⁸⁷ See, in particular, the *Rush Portuguesa* judgment, cited above, point 18.

Having regard to this case-law and the relevant provisions of the 1980 Rome Convention⁸⁸, Directive 96/71/EC concerning the posting of workers in the framework of a transnational provision of services aims to co-ordinate the legislation of Member States by preparing a list of mandatory rules of general interest at Community level and by rendering obligatory the existing “possibilities” for Member States as regards transnational situations. It seeks to guarantee both the fundamental freedoms under the EC Treaty and worker protection, and is intended to provide greater legal certainty to enterprises, as service providers, and to “posted” workers within the framework of the freedom to provide services. In Community labour law, the Directive provides a significant level of protection to workers. To this end, the Directive lays down a common list of rules for minimum protection of workers which employers must observe in the host country in respect of workers posted in the situations described above. It also guarantees a level playing field for all tenderers in the field of public procurement, and legal clarity as to the elements to be taken into account when preparing tenders.

This core of mandatory rules for minimum protection of workers is found either in legislation or in collective agreements which have been declared universally applicable within the meaning of the Directive, and covers the following matters:

- maximum work periods and minimum rest periods;
- minimum paid annual holidays;
- minimum rates of pay;
- conditions of hiring-out of workers (in particular by temporary employment undertakings);
- health, safety and hygiene at work;
- protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
- equality of treatment between men and women and other provisions on non-discrimination.

It should be noted that the Directive states that the rules laid down by collective agreements that have been declared universally applicable⁸⁹ are mandatory in the construction sector. Member States may, however, extend the application of these rules to other sectors. Rules that are laid down in legislative provisions apply to all sectors.

⁸⁸ On the law applicable to contractual obligations, OJ 1980 L 266.

⁸⁹ Article 3 of the “posting of workers” Directive lays down what is meant by collective agreements or arbitration awards which are “universally applicable” (Article 3(1)) or which have been “declared universally applicable” (Article 3(8)). In any event, application of such collective agreements must comply with the principle of equality of treatment as set out in the last paragraph of the Article in question. There is equality of treatment within the meaning of this provision “where national undertakings in a similar position are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1”, and “are required to fulfil such obligations with the same effects”.

The “posting of workers” Directive thus introduces certain “social clauses” into the relationship between service providers operating in one Member State and the party to whom the service is provided who is situated in another Member State (host Member State), which may be a public authority. The service provider who posts workers to a host Member State must comply with a minimum set of labour law requirements in force in that Member State.

Directive 2001/23/EC (Safeguarding workers' rights in the event of "transfers of undertakings")

If an undertaking takes over certain activities carried out previously by another undertaking, subsequent to a procedure for the award of a public procurement contract, this might fall within the scope of the Directive on "transfers of undertakings". Such a transfer may arise as part of a procedure for the award of public service contracts⁹⁰, as part of the privatisation of a sector where there is a transfer of an entity in the form of an administrative concession⁹¹, or as a result of a public procurement procedure, for example for a public services contract⁹².

The Community directive applicable in this field⁹³ aims to ensure the continuity of the existing employment relations of any person protected as an employee under national employment legislation⁹⁴, regardless of the nature of the post held by such person⁹⁵.

The essential and decisive criterion for establishing whether the "transfer of undertakings" Directive applies in particular instances, and particularly whether there is a transfer within the meaning of the Directive, is whether the economic entity transferred retains its identity after its transfer⁹⁶. This may be the case if, for example, its operations are genuinely continued or taken over⁹⁷. The term “entity” thus refers to an organised and stable set of persons and elements allowing the exercise of an economic activity in pursuit of a given objective⁹⁸. In order to establish whether the conditions for a transfer of an economic entity are met, it is necessary to take into account all the circumstances that characterise the operation in question. However, these elements are only some of the aspects of the overall assessment required and should only form part of the assessment by the national judge whose task it is to make this assessment⁹⁹.

Despite the fact that it may provide an indication that there has been no transfer within the meaning of the Directive, the absence of a contractual link between the transferor (that is, the entity that held the contract previously) and the transferee (the

⁹⁰ See, for example, the proposal for a Regulation of the European Parliament and of the Council on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway, 26.7.2000, COM (2000) 7, in particular Article 9(3).

⁹¹ Case C-343/98, Collino, judgment of 14.9.2000 on the transfer for value, in the form of an administrative concession, by an entity operating public telecommunications services (and managed by a public body forming part of central government) to a private-law company established by another public body which holds its entire capital.

⁹² Case C-172/99, Oy Liikenne, judgment of 25.1.2001 concerning bus services.

⁹³ Directive 2001/23/EC, cited above.

⁹⁴ See the judgments of 11.7.1985, Case 105/84, Danmols Inventar; of 19.5.1992, Case C-29/91, Sophie Redmond Stichting; and of 10.12.1998, joined cases C-173/96 and C-247/96, Sanchez Hidalgo *et al.*

⁹⁵ See the Collino case, cited above.

⁹⁶ Judgments of 14.4.1994, Case C-392/92, Schmidt; of 19.9.1995, Case C-48/94, Rygaard; of 26.9.2000, Case C-175/99, Mayeur.

⁹⁷ Judgments of 18.3.1986, Case 24/85, Spijkers; of 11.3.1997, Case C-13/95, Süzen; and of 10.12.1998, joined cases C-127/96, C-229/96 and C-74/97, Hernández Vidal, as well as the judgment of 2.12.1999 in the Allen *et al case*, Case C-234/98 and the Oy Liikenne case cited above.

⁹⁸ See, for example, the Süzen, Hidalgo *et al.*, Allen *et al.* and Oy Liikenne cases cited above.

⁹⁹ See the Spijkers, Süzen, Sanchez Hidalgo *et al.* and Hernández Vidal cases cited above.

new tenderer to whom the contract is awarded), should not be a deciding factor in this respect¹⁰⁰. The Directive applies in all cases where there is a change in contractual relations, in the natural or legal person responsible for operating the undertaking, and who therefore enters into the contractual obligations of an employer *vis-à-vis* the employees of the undertaking¹⁰¹.

As confirmed in the recent judgment in the *Oy Liikenne* case¹⁰², the fact that the transfer takes place following a public procurement procedure does not pose any specific problems as regards application of the “transfer of undertakings” Directive. Moreover, the two directives can be reconciled, due to their objectives¹⁰³. What is more, further to the case law of the Court of Justice on public procurement, contracting authorities have an obligation to inform tenderers of all conditions relating to the performance of a contract, so that tenderers can take them into account when preparing their tenders. An operator must thus be in a position to assess whether, if it is awarded the contract, it will be in its interests to buy major assets of the current holder of the contract and take over all or some of his staff, or whether it will be required to do so. In such event, it should be in a position to assess whether it will find itself in the situation of a transfer of undertaking within the meaning of Directive 2001/23/EC¹⁰⁴.

¹⁰⁰ Judgment of 10.2.1988, Case 324/86, *Tellerup*, known as “Daddy’s Dance Hall”, and the *Süzen*, *Hidalgo et al.*, *Mayeur* and *Oy Liikenne* cases cited above.

¹⁰¹ See *Tellerup* judgment, cited above, and the *Süzen*, *Hidalgo et al.*, *Mayeur* and *Oy Liikenne* cases cited above. Moreover, the Directive also applies subsequent to a transfer decision taken unilaterally by the public body (local authority), see judgment of 19.5.1992, Case C-29/91, *Sophie Redmond Stichting*. Moreover, the fact that the service was transferred by a public-law body, which was a local authority in the case in question, would not exclude application of the Directive because the activity involved is not covered by the exercise of public powers. See *Collino* (point 32) and *Hidalgo et al.* (point 24) cases cited above. On the other hand, a reorganisation of the structures of public administration or the transfer of administrative tasks between public administrations is not a transfer of an undertaking. See judgment of 15.10.1996, Case C-298/94, *Henke* and the *Mayeur* case cited above.

¹⁰² Judgment of 25.1.2001, Case C-172/99, in particular, point 21/22.

¹⁰³ See also the conclusions of Advocate-General Léger in Case C-172/99, in particular points 28 to 37; and point 22 of the judgment in this case.

¹⁰⁴ *Oy Liikenne* judgment cited above, point 23.