Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

10 May 2012 *

(Failure of a Member State to fulfil obligations — Directive 2004/18/EC — Procedures for the award of public works contracts, public supply contracts and public service contracts — Contract for the supply, installation and maintenance of dispensing machines for hot drinks, and the supply of tea, coffee and other ingredients — Article 23(6) and 23(8) — Technical specifications — Article 26 — Conditions for performance of the contract — Article 53(1) — Criteria for award of the contracts — Most economically advantageous tender — Products derived from organic agriculture and fair trade — Use of labels in the formulation of the technical specifications and the award criteria — Article 39(2) — Concept of 'additional information' — Article 2 — Principles for award of contracts — Principle of transparency — Articles 44(2) and 48 — Verification of the suitability and choice of participants — Minimum level of technical or professional abilities — Compliance with 'criteria of sustainability of purchases and socially responsible business')

In Case C-368/10,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 22 July 2010,

European Commission, represented by C. Zadra and F. Wilman, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by C. Wissels and M. de Ree, acting as Agents,

defendant,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, E. Juhász, G. Arestis and D. Šváby (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 October 2011,

after hearing the Opinion of the Advocate General at the sitting on 15 December 2011

gives the following

* Language of the case: Dutch.

Judgment

1 By its application, the European Commission requests the Court to find that, because in a tendering procedure for a public contract for the supply and management of automatic coffee machines which was the subject of a contract notice published in the *Official Journal of the European Union* on 16 August 2008, the province of North Holland:

— inserted in the technical specifications a condition requiring the Max Havelaar and EKO labels or in any event labels based on similar or the same criteria;

— included, for appraising the ability of operators, criteria and evidence concerning sustainable purchasing and socially responsible business, and

— included, when formulating award criteria, a reference to the Max Havelaar and/or EKO labels, or in any event labels based on the same criteria,

the Kingdom of the Netherlands failed to fulfil its obligations under, respectively, Article 23(6) and (8), Articles 2, 44(2) and 48(1) and (2) and Article 53(1) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and corrigendum OJ 2004 L 351, p. 44), as amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007 (OJ 2007 L 317, p. 34) ('Directive 2004/18').

I – Legal context

2 Directive 2004/18 contains inter alia the following recitals in its preamble:

'(2) The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.

...

(5) Under Article 6 of the [EC] Treaty [corresponding to Article 11 TFEU], environmental protection conditions are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of that [EC] Treaty [corresponding, in essence, to Article 3 TFEU to Article 6 TFEU and Article 8 TFEU], in particular with a view to promoting sustainable development. This Directive therefore clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts.

...

(29) The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To this end, it must be possible to submit tenders which reflect the diversity of technical solutions. Accordingly, it must be possible to draw up the technical specifications in terms of functional performance and conditions, and, where reference is made to the European standard or, in the absence thereof, to the national standard, tenders based on equivalent arrangements must be considered by contracting authorities. To demonstrate equivalence, tenderers should be permitted to use any form of evidence. Contracting authorities must be able to provide a reason for any decision that equivalence does not exist in a given case. Contracting authorities that wish to define environmental conditions for the technical specifications of a given contract may lay down the environmental characteristics, such as a given production method, and/or specific environmental effects of product groups or services. They can use, but are not obliged to use appropriate specifications that are defined in eco-labels, such as the European Eco-label, (multi-)national eco-labels or any other eco-label providing the conditions for the label are drawn up and adopted on the basis of scientific information using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and providing the label is accessible and available to all interested parties. … The technical specifications should be clearly indicated, so that all tenderers know what the conditions established by the contracting authority cover.

...

(33) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. For instance, mention may be made, amongst other things, of the conditions — applicable during performance of the contract — to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation.

...

(39) Verification of the suitability of tenderers, in open procedures, and of candidates, in restricted and negotiated procedures with publication of a contract notice and in the competitive dialogue, and the selection thereof, should be carried out in transparent conditions. For this purpose, non-discriminatory criteria should be indicated which the contracting authorities may use when selecting competitors and the means which economic operators may use to prove they have satisfied those criteria. In the same spirit of transparency, the contracting authority should be required, as soon as a contract is put out to competition, to indicate the selection criteria it will use and the level of specific competence it may or may not demand of the economic operators before admitting them to the procurement procedure.

...

(46) Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: “the lowest price” and “the most economically advantageous tender”.

To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation — established by case-law — to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting authorities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. ...

Where the contracting authorities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications and the value for money of each tender to be measured.

In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental conditions, may enable the contracting authority to meet the needs of the public concerned, as expressed in the specifications of the contract. Under the same conditions, a contracting authority may use criteria aiming to meet social conditions, in response in particular to the needs — defined in the specifications of the contract — of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong.'

3 According to Article 1(2)(c) of Directive 2004/18, public supply contracts are public contracts other than those referred to in point (b) of that subparagraph, having as their object the purchase, lease, rental or hire purchase, with or without option to buy, of products, and a public contract having as its object the supply of products and which also covers, as an incidental matter, siting and installation operations is to be considered a public supply contract. Under Article 7 of that directive, the directive is applicable to such a contract, unless it has been awarded in the defence field or by a central purchasing body, the value of which exclusive of value added tax is estimated to be equal to or greater than EUR 206 000 when it is awarded by a contracting authority not covered by Annex IV to the directive. That annex does not refer to provinces in relation to the Kingdom of the Netherlands.

4 Article 2 of Directive 2004/18 provides:

'Principles of awarding contracts

Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

5 Paragraph 1(b) of Annex VI to Directive 2004/18 defines the concept of 'technical specification', in relation to public supply contracts, as 'a specification in a document defining the required characteristics of a product … such as quality levels, environmental performance levels, design for all conditions … and conformity assessment, performance, use of the product, safety or dimensions, including conditions relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures.'

6 Article 23 of that directive provides:

‘1. The technical specifications as defined in point 1 of Annex VI shall be set out in the contract documentation …

2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

3. ... the technical specifications shall be formulated:

...

b) or in terms of performance or functional conditions; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;

...

6. Where contracting authorities lay down environmental characteristics in terms of performance or functional conditions as referred to in paragraph 3(b) they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) national eco-labels, or by and any other eco-label, provided that:

— those specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract,

— the conditions for the label are drawn up on the basis of scientific information,

— the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and,

— they are accessible to all interested parties.

Contracting authorities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents; they must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body.

...

8. Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraphs 3 and 4 is not possible; such reference shall be accompanied by the words “or equivalent”.’

7 Article 26 of Directive 2004/18 provides:

‘Conditions for performance of contracts

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.'

8 Article 39(2) of Directive 2004/18 states:

'Provided that it has been requested in good time, additional information relating to the specifications and any supporting documents shall be supplied by the contracting authorities or competent departments not later than six days before the deadline fixed for the receipt of tenders.'

9 Article 44(1) of Directive 2004/18, under the heading 'Verification of the suitability and choice of participants and award of contracts', provides that contracting authorities, after checking the suitability of the tenderers not excluded, in accordance with the criteria concerning, inter alia, professional and technical knowledge or ability referred to in Article 48 of the directive, are to award the contracts on the basis of the criteria referred to, in essence, in Article 53 of that directive. Pursuant to Article 44(2) of the directive:

'The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48.

The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract.

...'

10 Article 48(1) of Directive 2004/18, entitled 'Technical and/or professional ability':

'The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.'

11 Pursuant to Article 48(2), evidence of the economic operators' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services. With regard to public supply contracts, points (a)(ii), (b) to (d) and (j) of that provision refer to the following elements:

— the submission of a list of the principal deliveries effected in the past three years;

— an indication of the technicians or technical bodies involved, which may not directly belong to the undertaking, especially those responsible for quality control;

— a description of the technical facilities and measures used by the supplier for ensuring quality and the undertaking's study and research facilities;

— where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by or on behalf of the contracting authorities on the production capacities of the supplier and, if necessary, on the means of study and research which are available to it and the quality control measures it will operate;

— with regard to the products to be supplied, samples, descriptions and/or photographs, or certificates attesting the conformity of products to certain specifications or norms.

12 Under the aforementioned Article 48(6), the contracting authority is to specify, in the notice or in the invitation to tender, which references under paragraph 2 it wishes to receive.

13 Article 53 of Directive 2004/18 provides:

‘Contract award criteria

1. ... [T]he criteria on which the contracting authorities shall base the award of public contracts shall be either:

a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion;

...’

II – The background to the action

A – *The contract notice*

14 On 16 August 2008, at the request of the province of Noord Holland in the Netherlands, a contract notice was published in the *Official Journal of the European Union* for the supply and management of automatic coffee machines as from 1 January 2009 (‘the contract notice’).

15 Section II, point 1.5 of that notice describes the contract as follows:

‘The province of North Holland has a contract for the management of automatic coffee machines. The contract expires on 1 January 2009. The province intends to enter into a new contract from 1 January 2009 by means of a European tender procedure. An important aspect is the desire of the province of North Holland to increase the use of organic and fair trade products in automatic coffee machines.’

16 Section III, point 1 of the contract notice deals with the conditions relating to the contract. Following information concerning the deposits and guarantees, the main terms concerning financing and payment and the legal form of recourse to sub-contractors, point 1.4 of that section contains the word ‘no’ under the heading ‘Other particular conditions to which the performance of the contract is subject’.

17 Section IV, point 2.1 of the contract notice states that the contract will be awarded to the most economically advantageous tender. It follows from paragraph 3.4 of the same section that the time-limit for receipt of tenders was set as 26 September 2008 at 12 noon.

B – *The specifications*

18 The contract notice referred to specifications, entitled ‘Call for tenders’, dated 11 August 2008 (‘the specifications’).

19 Under the heading ‘Context of the contract’ sub-chapter 1.3 of the specifications reproduces, in its first paragraph, the content of point 1.5 of section II of the contract notice. The second paragraph of that sub-chapter states as follows:

‘The tenders shall be evaluated both on the basis of qualitative and environmental criteria and on the basis of price.’

20 Sub-chapter 1.4 of the specifications describes the content of the contract, in summary form, as follows:

'The province of North Holland places an order for the supply, installation and maintenance of semi-automatic (full-operational) machines for the dispensing of hot and cold drinks, on a hire basis. The province of North Holland also places an order for the supply of ingredients for the dispensing machines … Sustainability and functionality constitute important aspects.'

21 According to section 1.5 of the specifications, the contract concerned was to be of three years' duration, capable of being extended by one year.

22 In accordance with sub-chapter 3.4 of the specifications, concerning the conditions for registration, the presentation of alternatives was not authorised. Interested parties and tenderers were obliged to carry out research concerning the relevant market conditions, inter alia by asking questions of the contracting authority which should produce responses in an information notice.

23 The information notice was defined in section 5 of sub-chapter 2.3 of the specifications as a document containing the replies to the questions posed by interested parties in addition to possible amendments to the specifications or to other contract documents, forming part of the specifications and taking precedence over the other parts thereof including the annexes. It was also laid down, in sections 3 and 5 of that sub-chapter, that the information notice would be published online on the province of North Holland's tender procedure website, with all interested parties receiving notice by email as soon as replies were published on the site.

24 Sub-chapter 4.4 of the specifications was entitled 'Suitability conditions/minimum conditions'. Those conditions were defined, in the introductory part of the specifications, as conditions to be satisfied by a tenderer in order that his tender could be taken into consideration, expressed either as grounds for exclusion or minimum conditions.

25 Sections 1 to 5 of the aforementioned sub-chapter 4.4 concerned, respectively, turnover, professional risk indemnity insurance, the tenderer's experience, quality conditions and the evaluation of customer satisfaction.

26 Section 4 of the aforementioned sub-chapter 4.4, headed 'Quality conditions' contained a point 2, drafted as follows:

'In the context of sustainable purchasing and socially responsible business the Province of North Holland requires that the supplier fulfil the criteria concerning sustainable purchasing and socially responsible business. In what way do you fulfil the criteria concerning sustainable purchasing and socially responsible business? It is also necessary to state in what way the supplier contributes to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production …'

27 That condition was reiterated in section 6, the last point of that same sub-chapter 4.4, which contained a summary, inter alia of 'Quality standards' in the following terms:

'11. Sustainability of purchases and [socially responsible business: knock-out criterion]'.

28 Headed 'Minimum condition 1: Schedule of conditions', section 1 of sub-chapter 5.2 of the specifications referred back to a separate annex and laid down that the tenderers had to comply with the schedule of conditions as set out therein.

29 Annex A to the specifications, headed ‘Schedule of conditions’ contained inter alia the following points:

‘31 The province of North Holland uses the Max Havelaar and EKO labels for coffee and tea consumption. … [Assessment:] condition [.]

...

35 If possible, the ingredients should comply with the EKO and/or Max Havelaar labels. … [Maximum] 15 [points. Assessment:] preferred[.]’

30 According to the annexes and the general scheme of the specifications that point 35 relates to certain ingredients used for the preparation of drinks with the exception of tea and coffee, such as milk, sugar and cocoa (‘the ingredients’).

C – *The information notice*

31 On 9 September 2008, the province of North Holland published points 11 and 12 of the information notice provided for under sub-chapter 2.3 of the specifications. Those points relate to a question concerning points 31 and 35 of Annex A to the specifications, worded as follows: ‘Can we assume in respect of the stated labels “or equivalent” applies[?]’ The contracting authority replied as follows:

‘00011 ... [point] 31 ...

...

In so far as the criteria are equivalent or identical.

00012 ... [point] 35 ...

...

The ingredients may bear a label based on the same criteria.’

32 According to the notice published in the *Official Journal of the European Union* on 24 December 2008, the contract was awarded to the Netherlands company Maas International.

D – *The EKO and MAX HAVELAAR labels*

33 According to the Commission’s arguments, which are not disputed in that regard by the Kingdom of the Netherlands, the EKO and MAX HAVELAAR labels have the following characteristics.

1. The EKO label

34 The private Netherlands label EKO is granted to products made up of at least 95% of ingredients from organic agricultural production. It is administered by a foundation established under Netherlands private law which has the objective of promoting organic agriculture such as that covered, at the time of the facts in the main proceedings, by Council Regulation (EEC) No 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs (OJ 1991 L 198, p. 1), as amended by Council Regulation (EC) No 392/2004 of 24 February 2004 (OJ 2004 L 65, p. 1) (‘Regulation No 2092/91’) and to combat fraud. That foundation was designated as the competent authority responsible for checking compliance with the obligations laid down by that regulation.

35 EKO is a trade mark registered at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM).

2. The MAX HAVELAAR label

36 The MAX HAVELAAR label is also a private label administered by a foundation established under Netherlands private law, in conformity with the rules laid down by an international umbrella organisation, the Fairtrade Labelling Organisation (FLO). It is used in a number of countries, including the Netherlands.

37 The label is intended to promote the marketing of fair trade products and certifies that the products in respect of which it is granted are purchased at a fair price and under fair conditions from organisations made up of small-scale producers in developing countries. In that regard, the grant of that label is based on compliance with four criteria: the price must cover all the costs; it must contain a premium compared to the market price; production must be subject to pre-financing and the importer must have long-term trading relationships with the producers. The FLO carries out both the audit and the certification.

38 MAX HAVELAAR is also a trade mark registered at OHIM.

III – The pre-litigation procedure and the procedure before the Court of Justice

39 The Commission sent a letter of formal notice to the Kingdom of the Netherlands on 15 May 2009. According to that letter, the specifications stipulated by the province of North Holland in the context of the contract at issue infringed Directive 2004/18 by imposing the MAX HAVELAAR and EKO labels, or labels based on comparable or identical criteria, in respect of the tea or coffee to be supplied, by using those labels as an award criterion for the ingredients and evaluating the technical and professional abilities of tenderers on the basis of suitability criteria which do not form part of the complete system provided for in that regard by that directive.

40 By letter of 17 August 2009, the Kingdom of the Netherlands admitted that the contract at issue contained lacunae with regard to that directive, which however did not have effect of disadvantaging certain economic operators who may be interested, while disputing a number of the Commission's complaints.

41 On 3 November 2009, the Commission sent the Netherlands a reasoned opinion in which it repeated the complaints already made, calling upon the Netherlands to take all the measures necessary to comply with that opinion within the period of two months from receipt thereof.

42 By letter of 31 December 2009, that Member State argued that there was no foundation for the position supported by the Commission.

43 Consequently, the Commission decided to bring the present action.

44 By order of the President of the Court of 11 February 2011, the Kingdom of Denmark was granted leave to intervene in support of the form of order sought by the Kingdom of the Netherlands. Note was taken of the withdrawal of that intervention by order of the Third Chamber of the Court of 14 November 2011.

IV – The action

45 The Commission submits three pleas in law in support of its action.

46 The first and third pleas concern the use of the labels EKO and MAX HAVELAAR in the context, first, of the technical specifications of the contract at issue concerning the coffee and tea to be supplied and, second, of the award criteria concerning the ingredients to be supplied. The first plea contains two parts, alleging, first, infringement of Article 23(6) of Directive 2004/18, regarding the use of the EKO label and, second, Article 23(8) of that directive regarding the use of the MAX HAVELAAR label. The third plea relates to the infringement of Article 53(1) of that directive and is based on two complaints, the Commission claiming that the latter provision precludes the use of labels and that the abovementioned labels were not linked to the subject-matter of the contract at issue.

47 The second plea refers to the compliance, by the tenderers, with the 'criteria of sustainable purchasing and socially responsible business'. It is subdivided into three parts alleging the infringement, respectively, of Articles 44(2), first subparagraph, and 48 of Directive 2004/18, since that condition does not correspond to one of those linked to the subject-matter of the contract, and of the transparency obligation provided for in Article 2 of that directive, since the concepts 'sustainable purchasing' and 'socially responsible business' lacked sufficient clarity.

A – *Preliminary observations*

1. Applicability of Directive 2004/18

48 It must be noted, first, that the contract at issue, which consists in the making available, in the context of a hire contract, and in the maintenance of drinks dispensers and the supply of the products required for them to function, constitutes a public supply contract within the meaning of Article 1(2)(c) of Directive 2004/18.

49 Second, the estimate made by the Commission concerning the estimated value of the contract, that is EUR 760 000, is not disputed by the Kingdom of the Netherlands. It must therefore be held that the directive applies to that contract in the light of the thresholds laid down in Article 7 thereof.

2. Consideration of the scope of the conditions and of the preference referred to in the context of the first and third pleas

50 The parties disagree with regard to the meaning of the condition and of the preference mentioned, respectively, in points 31 and 35 of Annex A to the specifications. The Commission submits, with reference to those points, that that condition and preference refer to the fact that the products concerned are to bear the EKO and/or MAX HAVELAAR labels, or at least labels based on equivalent or identical criteria, if points 11 and 12 of the information notice are taken into consideration. According to the Kingdom of the Netherlands, it is apparent on the contrary from section II, point 1.5 of the contract notice and sub-chapter 1.3 of the specifications that the contracting authority required or expressed the preference that products of organic agricultural production and fair trade be supplied, the mentioning of those labels or of equivalent labels being only illustrative of the criteria to be complied with.

51 It must, first, be held that the specifications cannot be interpreted as proposed by the Kingdom of the Netherlands.

52 In that regard, it must be recalled that the meaning of the specifications must be determined by adopting the perspective of potential tenderers since the aim of the procedures for the award of public works contracts laid down in Directive 2004/18 is precisely to guarantee to potential tenderers established in the European Union access to public contracts of interest to them (see Case C-220/05

Auroux and Others [2007] ECR I-385, paragraph 53). Thus, in the present case, the specifications could be understood by the potential tenderers only as referring to the possession of the labels mentioned in the context of the requirement or preference in question.

53 That requirement and preference were stated in the annex to the specifications containing the 'Requirements Schedule' with which, in conformity with sub-chapter 5.2, section 1 of the specifications, the tenders had to comply, as it was drafted. Points 31 and 35 of that schedule referred explicitly and without reservation to the EKO and MAX HAVELAAR labels, to the exclusion of all alternatives, the submission of which was in any case prohibited under sub-chapter 3.4 of the specifications. In those circumstances, it cannot be conceded that the reference, which is lacking in clarity, to the effect that '[a]n important aspect is the desire of the province of North Holland to increase the use of organic and fair trade products in automatic coffee machines' contained in section II, point 1.5, of the contract notice and sub-chapter 1.3 of the specifications, that is to say, not in the parts of the contract documents dealing with conditions or preferences of the contracting authority, was such as to show that the requirement and preference in question alluded in a generic fashion to the fact that the products concerned were organic or fair trade produce.

54 Second, the later clarifications in points 11 and 12 of the information notice, according to which the reference to the EKO and MAX HAVELAAR labels in the condition and preference also covered equivalent labels, that is to say based on identical or comparable award criteria, cannot be taken into consideration under Article 39(2) of Directive 2004/18.

55 While, as the Advocate General states in paragraph 71 of her Opinion, additional information relating to the specifications and any supporting documents, referred to in that provision, may clarify certain points or supply certain information, they cannot change, even by means of corrections, the meaning of the essential contractual conditions, to which category the technical specifications and the award criteria belong, as those conditions were formulated in the specifications, upon which the economic operators concerned legitimately relied in taking the decision to prepare to submit a tender or, on the other hand, not to participate in the procurement procedure concerned. That is apparent both from the very use, in Article 39(2), of the expression 'additional information' and from the brief period of time, that is to say six days, allowed between the communication of such information and the deadline for receipt of the tenders, in accordance with that provision.

56 In that regard, both the principle of equal treatment and the obligation of transparency which flows from it require the subject-matter of each contract and the criteria governing its award to be clearly defined from the beginning of the award procedure (see, to that effect, Case C-299/08 *Commission* v *France* [2009] ECR I-11587, paragraphs 41 and 43).

57 It must therefore be held that the contractual documents which determine the subject-matter and criteria governing the award of the contract required, first, that the coffee and tea to be supplied were to bear the EKO and MAX HAVELAAR labels and, second, expressed the preference that the ingredients to be supplied should bear the same labels.

B – *The first plea in law, alleging infringement of Article 23(6) and (8) of Directive 2004/18 concerning the technical specifications concerning the coffee and tea to be supplied*

58 The first plea relied upon by the Commission concerns the requirement mentioned in point 31 of Annex A to the specifications, which states that 'The province of North Holland uses the MAX HAVELAAR and EKO labels for consumption of coffee and tea'.

1. The first plea relied on by the Commission alleging the infringement of Article 23(6) of Directive 2004/18 concerning the use of the EKO label in the context of the technical specifications relating to the coffee and tea to be supplied.

a) Arguments of the parties

59 By the first branch of the first plea, the Commission submits, in essence, that the requirement that the coffee and tea to be supplied must bear the EKO label or equivalent, that is to say certifying that they are products of organic agriculture, constitutes a description of the required characteristics of the products concerned, and therefore a technical specification subject to Article 23 of Directive 2004/18. Article 23(6) of the directive which authorises, subject to certain conditions, use of an eco-label, in order to describe environmental characteristics, does not however allow an eco-label as such to be prescribed.

60 For the Kingdom of the Netherlands, given that it is well known to economic operators active in the sector of activity concerned, the EKO label refers unequivocally, in the mind of such operators, to products of organic agriculture, by reference, at the time when the contractual documents were drafted, to Regulation No 2092/91. In any case, an economic operator concerned displaying ordinary care would have discovered without difficulty on the internet the description of the criteria referring to that label or could have asked the contracting authority about it. It would therefore be unrealistic to consider that the reference to the EKO label ran the risk of undermining the principle of equal treatment on the ground that a potential tenderer who did not understand that reference would have lost interest in the contract at issue or decisively delayed his actions.

b) Findings of the Court

61 As a preliminary point, it should be pointed out that, under Article 23(3)(b) of Directive 2004/18, the technical specifications may be formulated in terms of performance or functional requirements which may include environmental characteristics. According to recital 29 in the preamble to that directive, a given production method may constitute such an environmental characteristic. Therefore, as is agreed by the parties, the EKO label, in so far as it is based on environmental characteristics and fulfils the conditions listed in Article 23(6) of Directive 2004/18, constitutes an 'eco-label' within the meaning of that provision. Second, by laying down a requirement with regard to a characteristic of the tea and coffee to be supplied in connection with that label, the Province of North Holland has established, in that regard, a technical specification. It is therefore in the light of that last mentioned provision that this part of the first plea must be considered.

62 It must be recalled that under Article 2 of Directive 2004/18, which lays down the principles of awarding contracts, contracting authorities are to treat economic operators equally and non-discriminatorily and are to act in a transparent way. Those principles are of crucial importance with regard to the technical specifications, in the light of the risks of discrimination linked to the choice of those specifications or the manner in which they are formulated. Thus, Article 23(2) and (3)(b) and the last sentence of recital 29 in the preamble to Directive 2004/18 state that the technical specifications must afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition and be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contracts, being clearly indicated, so that all tenderers know what the requirements established by the contracting authority cover. It is therefore in the light of those considerations that Article 23(6) of Directive 2004/18 must be interpreted.

63 The text of the first subparagraph of that provision, with regard to the requirements concerning environmental characteristics, confers on contracting authorities the option to use the detailed specifications of an eco-label, but not the eco-label as such. The requirement to be precise, laid down

in Article 23(3)(b) of Directive 2004/18 — to which Article 23(6) of the directive refers — and expressly stated in the last sentence of recital 29 in the preamble to the directive, precludes an extensive interpretation of that provision.

64 Admittedly, in order to facilitate compliance with such a requirement, the second sub-paragraph of Article 23(6) also authorises the contracting authorities to indicate that the products bearing the eco-label, the detailed specifications of which they used, are presumed to comply with the specifications concerned. That second sub-paragraph does not however extend the scope of Article 23(6) because it permits recourse to the eco-label itself only indirectly, as proof of compliance with 'the technical specifications laid down in the contract documents'.

65 According to that second sub-paragraph of Article 23(6) of Directive 2004/18, the contracting authorities must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body.

66 As to the remainder, it should be noted that while, as is also pointed out by the Kingdom of the Netherlands, the contracting authority has the right to expect that the economic operators concerned are informed and reasonably aware, such a legitimate expectation nevertheless assumes that the contracting authority itself formulated its requirements clearly (see, to that effect, Case C-423/07 *Commission* v *Spain* [2010] ECR I-3429, paragraph 58). *A fortiori*, that expectation cannot be relied upon to relieve the contracting authorities of the obligations imposed on them by Directive 2004/18.

67 Moreover, far from constituting an excessive regard for formalities, the obligation of the contracting authority to mention expressly the detailed environmental characteristics it intends to impose even where it refers to the characteristics defined by an eco-label, is indispensable in order to allow potential tenderers to refer to a single official document, coming from the contracting authority itself and thus without being subject to the uncertainties of searching for information and the possible temporal variations in the criteria applicable to a particular eco-label.

68 In addition, it must be noted that the objection of the Kingdom of the Netherlands that, since the EKO label provides information relating to the organic origin of products bearing that label, the reference to detailed characteristics would have required it to list all the requirements of Regulation No 2092/91, which would have been much less clear than referring to that label, is irrelevant. Directive 2004/18 does not preclude, in principle, a reference, in the contract notice or contract documents, to legislative or regulatory provisions for certain technical specifications where such a reference is, in practice, unavoidable, provided that it is accompanied by all the additional information required by that directive (see, by analogy, *Commission* v *Spain*, paragraphs 64 and 65). Thus, since the marketing, in the European Union, of products obtained from organic agriculture and presented as such must comply with relevant European Union legislation, a contracting party may, if appropriate, without disregarding the concept of 'technical specification' within the meaning of point 1(b) of Annex VI to Directive 2004/18 or Article 23(3) thereof, state in the contract documents that the product to be supplied must comply with Regulation No 2092/91 or with any other subsequent regulation replacing that regulation.

69 With regard to the later clarification made to point 11 of the information notice, according to which the reference to the EKO label also covered an equivalent label, it must be stated, in addition to what has been stated in points 54 to 56 above, that such a clarification cannot, in any event, compensate for the failure to identify the detailed technical specifications corresponding to the label concerned.

70 It follows from the foregoing considerations that by requiring, in the contract documents, that certain products to be supplied were to bear a specific eco-label, rather than using the detailed specifications defined by that eco-label, the province of North Holland established a technical specification which was incompatible with Article 23(6) of Directive 2004/18. Therefore, the first part of the first plea is well founded.

2. The second part of the first plea, alleging infringement of Article 23(8) of Directive 2004/18 concerning use of the MAX HAVELAAR label in relation to the technical specifications concerning the coffee and tea to be supplied

a) Arguments of the parties

71 By the second part of its first plea, the Commission submits, in essence, that the requirement that the coffee and tea to be supplied should bear the MAX HAVELAAR label or another equivalent label, that is to say showing that they are fair trade products, is a description of the required characteristics of the products concerned and therefore a technical specification subject to Article 23 of Directive 2004/18. That requirement would infringe Article 23(8) which prohibits, in principle, technical specifications from 'refer[ring] to a specific … source, or a particular process, or to trade marks … or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products': the abovementioned label, which corresponds to a registered mark, falls within each of those categories.

72 First, the Kingdom of the Netherlands disputes that the criteria on which the MAX HAVELAAR label is based may be construed as requirements relating to a process or method of production, submitting that they are social conditions applicable to the acquisition of the products to be supplied in the context of the performance of the contract in question, covered by the concept of 'conditions for performance of the contract' within the meaning of Article 26 of Directive 2004/18. In the alternative, supposing that the requirement concerning the label were to be regarded as a technical specification, it rejects the proposition that Article 23(8) applies.

b) Findings of the Court

73 As stated in paragraph 37 above, the MAX HAVELAAR label describes products of fair trade origin purchased at a price and under conditions more favourable than those determined by market forces from organisations made up of small-scale producers in developing countries. According to the file, that label is based on four criteria, that is to say: the price must cover all the costs; it must contain a supplementary premium compared to the market price; production must be subject to pre-financing and the importer must have long-term trading relationships with the producers.

74 Such criteria do not correspond to the definition of the concept of technical specification in paragraph 1(b) of Annex VI to Directive 2004/18, given that that definition applies exclusively to the characteristics of the products themselves, their manufacture, packaging or use, and not to the conditions under which the supplier acquired them from the manufacturer.

75 By contrast, compliance with those criteria does fall under the concept of 'conditions for performance of contracts' within the meaning of Article 26 of that directive.

76 Pursuant to the article, the conditions governing the performance of a contract may, in particular, refer to social considerations. Thus, to require that the tea and coffee to be supplied must come from small-scale producers in developing countries, subject to trading conditions favourable to them, falls within those considerations. Accordingly, the lawfulness of such a requirement must be examined in the light of the aforesaid Article 26.

77 It must however be noted that, in the context of the pre-litigation procedure and also in the application initiating proceedings, the Commission criticised the clause concerning the specifications on the basis of Article 23(8) of that directive alone, claiming only at the stage of its rejoinder that the arguments developed in that regard applied *mutatis mutandis* to a condition for performance governed by Article 26 thereof.

78 Since the subject-matter of the proceedings under Article 258 TFEU is delimited by the pre-litigation procedure provided for in that provision, those proceedings must be based on the same grounds and pleas as the reasoned opinion, meaning that if a complaint was not included in the reasoned opinion, it is inadmissible at the stage of proceedings before the Court (see, to that effect, Case C-305/03 *Commission* v *United Kingdom* [2006] ECR I-1213, paragraph 22 and case-law cited).

79 Accordingly, the second part of the first plea must be rejected as inadmissible.

C – The third plea, alleging infringement of Article 53(1) of Directive 2004/18 concerning the award criteria relating to the ingredients to the supplied

80 The third plea is linked to the first, since the Commission refers therein to the resort, in the contract documents, to the EKO and MAX HAVELAAR labels, but as an award criterion within the meaning of Article 53 of Directive 2004/18.

81 As a preliminary point, it must be noted that, as held in paragraphs 51 to 57 above, by reference to the contract documents which determine the award criteria for the contract, the province of North Holland established an award criterion which consists in the fact that the ingredients to be supplied are to bear the EKO and/or MAX HAVELAAR labels.

1. Arguments of the parties

82 The Commission submits, in essence, that such an award criterion infringes Article 53 of Directive 2004/18 in two respects. First, it is not linked to the subject-matter of the contract, in so far as the criteria underlying the EKO and MAX HAVELAAR labels do not concern the products to be supplied themselves, but the general policy of the tenderers, especially in the case of the MAX HAVELAAR label. Second, that award criterion is not compatible with the requirements regarding equal access, non-discrimination and transparency, having the effect inter alia of disadvantaging potential tenderers who are not from the Netherlands or who do not hold the EKO and/or MAX HAVELAAR labels for their products.

83 According to the Kingdom of the Netherlands, the award criterion in question is transparent, objective and non-discriminatory. Those labels are well-known to the economic operators in the sector of activity concerned, they are based on underlying criteria derived from the European Union legislation concerning organic production of agricultural products (with regard to the EKO label), or determined by the body which grants the label and potentially accessible to all the economic operators concerned (with regard to the MAX HAVELAAR label) and a potential tenderer exercising ordinary care can in any case easily inform himself about those underlying criteria. In addition, Directive 2004/18 does not impose, with regard to the award criteria, the same requirements as for the technical specifications, as provided for in Article 23 of that directive, and logically so, since it is not necessary that all the tenderers should be able to fulfil an award criterion. Finally, the award criterion at issue is linked to the subject-matter of contract, which concerns inter alia the supply of organic fair trade products, compliance with that criterion providing an indication of the quality of the tenders so making it possible to assess their value for money.

2. Findings of the Court

84 It must be pointed out, first, that under Article 53(1)(a) of Directive 2004/18, where, as in the present case, a contracting authority decides to award a contract to the tenderer who submits the most economically advantageous tender from the point of view of that authority, the authority must base its

decision on various criteria which are for it to determine in compliance with the requirements of the directive, that provision containing, as follows from the use of the phrase 'for example', a non-exhaustive list of the possible criteria.

85 Article 53 of Directive 2004/18 is further elucidated by recital 46 in the preamble to the directive, the third and fourth paragraphs of which lay down that the award criteria may, in principle, be not only economic but also qualitative. Thus, among the examples referred to in Article 53(1)(a) of the directive, are environmental characteristics. As the Advocate General points out in point 103 of her Opinion, the fourth paragraph of that recital also indicates that 'a contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs — defined in the specifications of the contract — of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong'. It must therefore be accepted 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.

86 Second, Article 53(1)(a) of Directive 2004/18 requires that the award criteria be linked to the subject-matter of the contract. In that regard, recital 46 in the preamble lays down, in its third paragraph, that 'the determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured', the 'most economically advantageous tender' being '[that] which … offers the best value for money'.

87 Third, as follows from the first and fourth paragraphs of that recital, compliance with the principles of equality, non-discrimination and transparency requires that the award criteria are objective, ensuring that tenders are compared and assessed objectively and thus in conditions of effective competition. That would not be the case for criteria having the effect of conferring on the contracting authority an unrestricted freedom of choice (see, with regard to similar provisions of the predecessor directives to Directive 2004/18, Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraph 61 and case-law cited).

88 Fourth and finally, as noted in the second paragraph of that recital, the same principles require the contracting authority to ensure the procedure for awarding a public contract complies at every stage with both the principle of the equal treatment of potential tenderers and the principle of transparency of the award criteria, the formulation of the award criteria being such as to allow all reasonably well-informed tenderers exercising ordinary care to know the exact scope thereof and thus to interpret them in the same way (see, inter alia, with regard to the provisions of the predecessor directives to Directive 2004/18, Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraphs 56 to 58).

89 In order to assess the validity of the claim that there is an insufficient link between the award criterion at issue and the subject-matter of the contract, it is necessary, first, to take into consideration the criteria underlying the EKO and MAX HAVELAAR labels. As is clear from paragraphs 34 and 37 above, those underlying criteria characterise the products derived from, respectively, organic agriculture and fair trade. With regard to the method of organic production subject to European Union legislation, that is, at the relevant time, Regulation No 2092/91, recitals (2) and (9) in the preamble to that regulation state that that method of production promotes environmental protection, inter alia because it implies significant restrictions on the use of fertilisers and pesticides. With regard to fair trade, it is clear from paragraph 37 above that the criteria laid down by the foundation which grants the MAX HAVELAAR label seek to promote the interests of small-scale producers in developing countries while maintaining trading relations with them which take into account the actual need of

those producers, and not only the dictates of the market. It follows from those statements that the award criterion at issue concerned environmental and social characteristics falling within the scope of Article 53(1)(a) of Directive 2004/18.

90 Second, it must be held that, in accordance with the description of the contract in sub-chapter 1.4 of the specifications, that contract concerned in particular the supply of coffee, tea and the other ingredients required for the manufacture of the drinks available in the dispensers. It also follows from the drafting of the award criterion at issue that it covered only the ingredients to be supplied in the framework of that contract, without any bearing on the general purchasing policy of the tenderers. Therefore, those criteria related to products the supply of which constituted part of the subject-matter of that contract.

91 Finally, as is apparent from point 110 of the Advocate General's Opinion, 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. The Court held thus, in paragraph 34 of *EVN and Wienstrom*, that European Union legislation on public procurement does not preclude, in the context of a contract for the supply of electricity, a contracting authority from applying an award criterion requiring that the electricity supplied be produced from renewable energy sources. There is therefore nothing, in principle, to preclude such a criterion from referring to the fact that the product concerned was of fair trade origin.

92 It must therefore be held that the award criterion at issue is linked — as required by Article 53(1)(a) of Directive 2004/18 — to the subject-matter of the contract concerned, meaning that the Commission's claim in that regard is unfounded.

93 With regard to the complaint that the province of North Holland required the possession of specific labels in its award criterion, it must be noted that, under point 35 in Annex A to the specifications, the contracting authority provided that where the ingredients to be supplied bore the EKO and/or MAX HAVELAAR labels that would result in the award of a certain number of points in the classification of the competing tenders for the purposes of the award of the contract. That condition must be examined in the light of the requirements of precision and objectivity which apply to contracting authorities in that regard.

94 With regard to the specific issue of the use of labels, the European Union legislature gave certain precise indications concerning the implications of those requirements in the context of the technical specifications. As is evident from paragraphs 62 to 65 above, after having stated, in Article 23(3)(b) of Directive 2004/18, that those specifications must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract, in Article 23(6) of the directive the legislature authorised the contracting authorities to have recourse to the criteria underlying an eco-label in order to establish certain characteristics of a product, but not to make an eco-label a technical specification, use of such a label being allowed only in order to create a presumption that the products bearing that label comply with the characteristics thus defined, expressly subject to any other appropriate means of proof being allowed.

95 Contrary to what is argued by the Kingdom of the Netherlands, there is no reason to consider that the consequences of the principles of equality, non-discrimination and transparency are different where award criteria are concerned, such criteria also being essential conditions of a public contract, since they will determine the choice of the successful tender from among those which satisfy the requirements expressed by the contracting authority in the technical specifications.

96 With regard to the clarification subsequently made to paragraph 12 of the information notice, according to which the reference to the EKO and MAX HAVELAAR labels also covered equivalent labels, it must be stated, in addition to what is said in paragraphs 54 to 56 above, that such a clarification cannot, in any event, compensate for the lack of precision regarding the criteria underlying the labels concerned.

97 It follows from all the foregoing considerations that by providing, in the specifications, that the fact that certain products to be supplied bore specific labels would give rise to the grant of a certain number of points in the choice of the most economically advantageous tender, without having listed the criteria underlying those labels and without having allowed proof that a product satisfies those underlying criteria by all appropriate means, the province of North Holland established an award criterion that was incompatible with Article 53(1)(a) of Directive 2004/18. Therefore, to that extent, the third plea in law is well founded.

D – *The second plea in law, alleging infringement of Articles 2, 44(2) and 48 of Directive 2004/18 concerning the requirement of compliance with the criteria of 'sustainability of purchases' and 'socially responsible business'*

98 The second plea, which is made up of four parts, refers to the requirement, laid down in point 2 of section 4 of sub-chapter 4.4. of the specifications, that the contracting authority, in essence, comply with the 'criteria of sustainability of purchases and socially responsible business', inter alia by contributing to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production, the tenderers having been asked to state how they meet those criteria.

1. Arguments of the parties

99 By the first part of this plea, the Commission submits that the requirement in question constitutes a minimum level of technical ability contrary to the first paragraph of Article 44(2) and to Article 48 of Directive 2004/18, in so far as it falls outside the criteria provided for in that article, which establishes a complete system. The Kingdom of the Netherlands contends, first, that that requirement amounts in reality to a condition for the performance of the contract governed by Article 26 of the directive. In the alternative, it considers that that requirement is part of the system established in Article 48 of Directive 2004/18, by reference to Article 48(2)(c) thereof, which refers to a description of the technical facilities and measures used by the supplier or service provider for ensuring quality and the undertaking's study and research facilities. By the same requirement, the tenderers could have shown that they were capable of performing the contract by meeting the necessary qualitative criteria.

100 The second part of this plea, alleging infringement of the second paragraph of Article 44(2) of Directive 2004/18 refers to the absence of a link, at least a sufficient one, between the requirement at issue and the subject-matter of the contract at issue, which is disputed by the defendant Member State since, in its view, the sustainability of purchases and socially responsible business are consistent with a market relating, inter alia, to the supply of coffee and tea derived from organic agriculture and fair trade.

101 By the third part of the second plea, the Commission claims that Article 2 of Directive 2004/18 has been infringed because the terms 'sustainability of purchases' and 'socially responsible business' lack sufficient clarity. That is not so, according to the Kingdom of the Netherlands since, inter alia, those expressions are understood by all reasonably informed undertakings and extensive information is available about them on the internet.

2. Findings of the Court

a) Classification of the clause concerned in the specifications

102 The parties disagree regarding the classification of the requirement at issue, according to which the tenderers must comply with the 'criteria of sustainability of purchases and socially responsible business', inter alia by contributing to improving the sustainability of the coffee market and to

environmentally, socially and economically responsible coffee production. The Commission submits that that requirement concerned the tenderers' general policy and therefore related to their technical and professional ability within the meaning of Article 48 of Directive 2004/18. By contrast, according to the Kingdom of the Netherlands, that requirement applied to the contract at issue, meaning that it was a condition for performance of the contract within the meaning of Article 26 of that directive.

103 The last mentioned argument cannot be accepted. The clause at issue appears in section 4 of sub-chapter 4.4 of the specifications, entitled 'Suitability requirements/minimum levels', which corresponds to the terminology used inter alia in the title and Article 44(2) of Directive 2004/18, which refers to Articles 47 and 48 thereof, entitled respectively 'Economic and financial standing' and 'Technical and/or professional ability'. Furthermore, the first three sections of that sub-chapter concerned the minimum levels required by the contracting authority with regard to turnover, professional risk indemnity insurance and the experience of the tenderers, that is to say factors to which reference is made expressly in those Articles 47 and 48. In addition, the «suitability requirements' were defined in the introductory part of the specifications as requirements expressed either as grounds for exclusion or minimum levels to be satisfied by a tenderer so that his tender could be taken into consideration, being thus distinct from the tender as such. Finally, the requirement at issue was formulated in a general way and not specifically in relation to the contract at issue.

104 It follows from those considerations that potential tenderers could have considered that requirement as referring only to a minimum level of professional capacity required by the contracting authority within the meaning of Articles 44(2) and 48 of Directive 2004/18. It is therefore in the light of those provisions that the lawfulness of that requirement must be assessed.

b) The alleged infringement of Articles 44(2) and 48 of Directive 2004/18

105 As Article 48(1) to 48(6) render apparent, Article 48 exhaustively lists the factors on the basis of which the contracting authority may evaluate and assess the technical and professional abilities of the tenderers. Moreover, while Article 44(2) authorises the contracting authority to establish minimum capacity levels which tenderers must satisfy in order that their tender can be taken into consideration for the award of the contract, those levels can be fixed only, pursuant to the first paragraph of Article 44(2), by reference to the factors listed in Article 48 of the directive, concerning technical and professional ability.

106 Contrary to what is argued by the Kingdom of the Netherlands, the requirement of respect for the 'criteria of sustainable purchasing and socially responsible business' is not connected to any of those factors.

107 In particular, the information requested pursuant to that requirement, that is to say the statement of '[in what way the tenderer] fulfils the criteria of sustainable purchasing and socially responsible business [and] contributes to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production' cannot be assimilated to 'a description of the technical facilities and measures used by the supplier or service provider for ensuring quality and the undertaking's study and research facilities' referred to in Article 48(2)(c) of Directive 2004/18. The term 'quality' which is used not only in that provision but also in subparagraphs (b), (d) and (j) of that paragraph must, in the context of that Article 48, be understood as the technical quality of the services provided or supplies of a kind similar to that of the services or supplies which constitute the subject-matter of the contract concerned, the contracting authority being entitled to require that the tenderers inform it how they check and guarantee the quality of those services or supplies, to the extent provided for in those subparagraphs.

108 It follows from those foregoing considerations that by requiring, on the basis of suitability requirements and minimum capacity levels stated in the specifications, that tenderers comply with the criteria of sustainable purchasing and socially responsible business and state how they comply with

those criteria and contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production, the province of North Holland established a minimum level of technical ability not authorised by Articles 44(2) and 48 of Directive 2004/18. Therefore, the first branch of the second plea is well founded.

c) Alleged infringement of Article 2 of Directive 2004/18

109 The principle of transparency implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract (see, inter alia, Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801).

110 As the Advocate General stated in paragraph 146 of her Opinion, it must be held that the requirements relating to compliance with the 'criteria of sustainability of purchases and socially responsible business' and the obligation to 'contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production' are not so clear, precise and unequivocal as to enable all reasonably informed tenderers exercising ordinary care to be completely sure what the criteria governing those requirements are. The same applies, and all the more so, in relation to the requirement addressed to tenderers that they state in their tender 'in what way [they] fulfil' those criteria or 'in what way [they] contribute' to the goals sought by the contracting authority with regard to the contract and to coffee production, without precisely indicating to them what information they must provide.

111 Therefore, by requiring tenderers, in the specifications at issue, to comply with 'the criteria of sustainable purchasing and socially responsible business', to 'contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production' and to state in their tender 'in what way [they] fulfil' those criteria or 'in what way [they] contribute' to the goals sought by the contracting authority with regard to the contract and to coffee production, the province of North Holland established a clause which does not comply with the obligation of transparency provided for in Article 2 of Directive 2004/18.

112 Accordingly, it follows from all of the foregoing considerations that because, in the tendering procedure for a public contract for the supply and management of coffee machines, which was the subject of a contract notice published in the *Official Journal of the European Union* on 16 August 2008, the province of North Holland:

— established a technical specification incompatible with Article 23(6) of Directive 2004/18 by requiring that certain products to be supplied were to bear a specific eco-label, rather than using detailed specifications;

— established award criteria incompatible with Article 53(1)(a) of that directive by providing that the fact that certain products to be supplied bore specific labels would give rise to the grant of a certain number of points in the choice of the most economically advantageous tender, without having listed the criteria underlying those labels and without having allowed proof that a product satisfies those underlying criteria by all appropriate means;

— established a minimum level of technical ability not authorised by Articles 44(2) and 48 of that directive by requiring, on the basis of suitability requirements and minimum capacity levels stated in the specifications, that tenderers comply with the 'criteria of sustainable purchasing and socially

responsible business' and state how they comply with those criteria and 'contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production', and

— prescribed a clause contrary to the obligation of transparency provided for in Article 2 of that directive by requiring that tenderers comply with 'the criteria of sustainable purchasing and socially responsible business' and state how they comply with those criteria and 'contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production',

the Kingdom of the Netherlands has failed to fulfil its obligations under the aforementioned provisions. Those considerations also mean that the action must be dismissed as to the remainder.

V – Costs

113 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of the Netherlands has been unsuccessful in its pleas, the latter must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

1. Declares that, on account of the fact that, in the tendering procedure for a public contract for the supply and management of coffee machines, which was the subject of a contract notice published in the *Official Journal of the European Union* on 16 August 2008, the province of North Holland:

— established a technical specification incompatible with Article 23(6) of Directive 2004/18 of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007, by requiring that certain products to be supplied were to bear a specific eco-label, rather than using detailed specifications;

— established award criteria incompatible with Article 53(1)(a) of Directive 2004/18 by providing that the fact that certain products to be supplied bore specific labels would give rise to the grant of a certain number of points in the choice of the most economically advantageous tender, without having listed the criteria underlying those labels and without having allowed proof that a product satisfies those underlying criteria by all appropriate means;

— established a minimum level of technical ability not authorised by Articles 44(2) and 48 of Directive 2004/18 by requiring, on the basis of suitability requirements and minimum capacity levels stated in the specifications applicable in the context of that contract, that tenderers comply with the 'criteria of sustainable purchasing and socially responsible business' and state how they comply with those criteria and 'contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production', and

— **prescribed a clause contrary to the obligation of transparency provided for in Article 2 of Directive 2004/18 by requiring that tenderers comply with 'the criteria of sustainable purchasing and socially responsible business' and state how they comply with those criteria and 'contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production',**

the Kingdom of the Netherlands has failed to fulfil its obligations under the aforementioned provisions;

2. **Dismisses the action as to the remainder;**

3. **Orders the Kingdom of the Netherlands to pay the costs.**

[Signatures]