Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 15 December 2011 [1]

Case C-368/10

European Commission
v

Kingdom of the Netherlands

(Public supply contracts — Organic productsFair trade — Environmental and social sustainability of products — Sustainable agriculture — 'Max Havelaar' and 'EKO' labels — Procurement principles — Technical specifications — Environmental characteristics — Suitability and selection of participants — Technical and professional ability — Award criteria — Most economically advantageous tender — Articles 2, 23, 26, 44, 48 and 53 of Directive 2004/18/EC)

Table of contents

I — Introduction 3

II — Legal framework 3

III — Facts and pre-litigation procedure 6

A — Procurement procedure 6

1. Notice of the procurement procedure 6

2. Specifications 7

3. Information notice 7

4. Award of the contract 8

B — Labels referred to in the conditions of the contract 8

C — Pre-litigation procedure 8

IV — Forms of order sought by the parties and procedure before the Court 9

1 — Original language: German.

V — Assessment 9

A — First plea: reference to the 'Max Havelaar' and 'EKO' labels in the technical specifications for the coffee and tea to be supplied 10

1. First part of the first plea: reference to the 'EKO' label in respect of the coffee and tea to be supplied (Article 23(6) of Directive 2004/18) 10

(a) Applicability of Article 23 of Directive 2004/18 11

(b) No general prohibition on reference to environment labels when laying down the environmental characteristics of a product 11

(c) Prohibition on making use of a particular eco-label mandatory 12

(d) Interim conclusion 14

2. Second part of the first plea: reference to the 'Max Havelaar' label in respect of the coffee and tea to be supplied (Article 23(8) of Directive 2004/18) 14

(a) Applicability of 23(8) of Directive 2004/18 14

(b) In the alternative: compatibility of the reference to the 'Max Havelaar' label with Directive 2004/18 16

(i) Applicable provision: Article 26 of Directive 2004/18 16

(ii) Examination of the reference to the 'Max Havelaar' label in the light of Article 26 of Directive 2004/18 16

3. Summary of the first plea 18

B — Third plea: reference in the award criteria to the 'Max Havelaar' and 'EKO' labels with regard to the ingredients to be supplied 18

1. Preliminary remark 18

2. First argument in support of the third plea: purported absence of a link between the subject-matter of the contract and the two labels 19

3. Second argument supporting the third plea: reference to the labels instead of the underlying criteria 20

C — Second plea: purported reference to sustainable purchasing and socially responsible conduct as a suitability criterion 22

1. First part of the second plea: purported unlawful requirements relating to evidence of tenderers' technical ability (Article 48(1) of Directive 2004/18, in conjunction with Article 48(2) thereof) 22

2. Second part of the second plea: purported lack of a connection between the suitability requirements on tenderers and the subject-matter of the contract (Article 44(2) of Directive 2004/18) 23

3. Third part of the second plea: purported infringement of the general transparency rule (Article 2 of Directive 2004/18) 24

D — Summary 25

VI — Costs 25

VII— Conclusion 26

I – Introduction

1. Not only consumers, but also undertakings and public authorities are attaching increasing importance to the sustainability of their consumption. The question at the heart of the present infringement proceedings is the extent to which contracting authorities can, in procurement procedures, make the environmental and social sustainability of the products to be supplied a condition for the award of a contract.

2. In 2008, a Netherlands regional body referred to the 'Max Havelaar' and 'EKO' quality labels in connection with the procedure for the award of a public contract for the supply and management of automatic coffee machines. This was intended to ensure that the successful tenderer supplied 'sustainable' products characterised in particular by their environmental and social sustainability. The European Commission complains that in using the two labels and various formulations in the tender documents the Kingdom of the Netherlands has failed to comply with the requirements of European Union law on public procurement.

3. Whether and to what extent environmental and social considerations may be taken into account and, in particular, reference may be made to environmental and fair trade labels, is a question of fundamental importance for the further development of the public procurement law. In giving its answer, the Court is faced with the challenge of finding an equitable balance between the requirements of the internal market and environmental and social concerns, without, however, ignoring the practical requirements of award procedures. On the one hand, there can be no discrimination between potential tenderers or partitioning of markets. On the other hand, contracting authorities must be allowed to procure environmentally friendly, organic and fair trade products without excessive administrative burdens.

II – Legal framework

4. The legal framework of this case is formed by 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. [2]

5. Article 2 of this directive, which appears in Title I under the heading 'Definitions and General Principles', lays down the following 'Principles of awarding contracts':

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

6. Among the 'procurement rules' in Title II of Directive 2004/18, Chapter IV contains a number of 'specific rules governing specifications and contract documents', of which Article 23 in conjunction with Annex VI, on the one hand, and Article 26, on the other, are of interest in the present case.

2 — OJ 2004 L 134, p. 114.

7. As is clear from Article 23 of Directive 2004/18, in conjunction with point 1(b) of Annex VI thereto, the expression 'technical specifications' means, in the case of public supply contracts,

'a specification in a document defining the required characteristics of a product …, such as quality levels, environmental performance levels, design for all requirements … and conformity assessment, performance, use of the product, safety or dimensions, including requirements 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'.

8. With reference to this definition, Article 23 of Directive 2004/18 contains a rule on technical specifications which is worded as follows (extracts):

'1. The technical specifications as defined in point 1 of Annex VI shall be set out in the contract documentation, such as contract notices, contract documents or additional documents.

…

2. Technical specifications shall afford equal access for candidates and tenderers and not have the effect of creating unjustified obstacles to competitive tendering.

3. Without prejudice to legally binding national technical rules, to the extent that they are compatible with Community law, the technical specifications shall be formulated:

(a) either by reference to technical specifications defined in Annex VI … Each reference shall be accompanied by the words "or equivalent";

(b) or in terms of performance or functional requirements; 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;

(c) or in terms of performance or functional requirements as mentioned in subparagraph (b), with reference to the specifications mentioned in subparagraph (a) as a means of presuming conformity with such performance or functional requirements;

(d) or by referring to the specifications mentioned in subparagraph (a) for certain characteristics, and by referring to the performance or functional requirements mentioned in subparagraph (b) for other characteristics.

…

6. Where contracting authorities lay down environmental characteristics in terms of performance or functional requirements 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:

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

— the requirements 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".'

9. Article 26 of Directive 2004/18 also provides, as regards the '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.'

10. Directive 2004/18 contains provisions on 'Conduct of the procedure' in Title II, Chapter VII; Articles 44, 48 and 53 thereof are relevant.

11. Article 44 of Directive 2004/18 is one of the general provisions on the conduct of the procedure and provides, under the heading 'Verification of the suitability and choice of participants and award of contracts', inter alia, as follows:

'1. Contracts shall be awarded …, after the suitability of the economic operators … has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52 …

2. 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.

These minimum levels shall be indicated in the contract notice.'

12. Article 48 of Directive 2004/18 contains rules on the 'Technical and/or professional ability' of economic operators, which are worded, in extract, as follows:

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

2. Evidence of economic operators' technical abilities may, as a general rule, 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:

…

(c) 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;

…

6. The contracting authority shall specify, in the notice or in the invitation to tender, which references under paragraph 2 it wishes to receive.'

13. Finally, Article 53(1) of Directive 2004/18 provides as follows under the heading 'Contract award criteria':

'Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the 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, or

(b) the lowest price only.'

III – Facts and pre-litigation procedure

A – *Procurement procedure*

14. In January 2008, the Netherlands province of Noord-Holland conducted a procurement procedure for a contract for the supply and management of automatic coffee machines. The contract was to be entered into for a period of three years with the possibility of a one-year extension.

1. Notice of the procurement procedure

15. The notice of the procurement procedure, which was published in the *Official Journal of the European Union* on 16 August 2008,[3] contained inter alia the following text which was headed 'Short description of the contract or purchase(s)':

'The Province of Noord-Holland has entered into 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 Noord-Holland to increase the use of organic and fair trade products in automatic coffee machines.'[4]

16. Under the heading 'Other particular conditions to which the performance of the contract is subject' the notice stated 'No'.[5] The contract was to be awarded to the economically most advantageous tender.[6]

3 — OJ 2008, S 158-213630.

4 — Section II.1.5 of the notice.

5 — Section III.1.4 of the notice.

6 — Section IV.2.1 of the notice.

2. Specifications

17. The specifications,[7] which were available on request to any interested parties, stated inter alia that not only price but also quality and environmental criteria would be relevant in assessing tenders. In that respect, emphasis was placed on the desire of the Province of Noord-Holland to use more organic and fair trade products in its automatic coffee machines.

18. The specifications contained both the suitability criteria to be satisfied by the tenderers and the award criteria for assessing the economically most advantageous tender. In addition, they made it clear that only tenders which met the suitability criteria would be assessed on the basis of the award criteria.

19. Sub-chapter 4.4 of the specifications, which was entitled 'Suitability requirements/Minimum requirements', contained the following wording under heading 4.4.4, which was entitled 'Quality requirements':

'In the context of sustainable purchasing and socially responsible conduct the Province of Noord-Holland requires that the supplier fulfil the criteria concerning sustainable purchasing and socially responsible conduct. In what way do you fulfil the criteria concerning sustainable purchasing and socially responsible conduct? 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.'

The same quality requirement was also classified as a 'knock-out criterion' in summary heading 4.4.6 of the contract documents entitled 'Summary of minimum requirements'.

20. Attached as Annex A to the specifications was a 'Requirements Profile', with which each tenderer had to declare its agreement. The profile contained both 'requirements' and 'preferences' of the contracting authority, the former being minimum requirements to be satisfied to avoid the tenderer being excluded from the award procedure, and the latter being award criteria, compliance with which by the individual tenderers was to be assessed on the basis of a points system.

21. Point 31 of the Requirements Profile set out the following 'requirement' relating to the coffee and tea to be supplied:

'The Province of Noord-Holland uses the Max Havelaar and EKO labels in relation to the consumption of coffee and tea.'

22. Furthermore, point 35 of the Requirements Profile concerning the 'ingredients' to be supplied — in particular sugar, milk powder and cocoa — contained the following 'preference' of the contracting authority, fulfilment of which could be rewarded with up to 15 points:

'If possible, the ingredients should comply with the EKO and/or Max Havelaar label.'

23. According to the specifications, the submission of alternative tenders was not permitted. Similarly, conditional tenders were not allowed.

3. Information notice

24. According to the specifications, potential tenderers had the possibility of putting questions to the province, as the contracting authority, to which they would receive answers in the form of an information notice. This downloadable notice was to form part of the specifications and take precedence over other parts thereof.

7 — 'Offerteaanvraag, Koffieautomaten' of 11 August 2008 (reference: PNH-45096).

25. On 9 September 2008 the Province of Noord-Holland did in fact issue such an information notice which contained inter alia two answers to questions submitted by potential tenderers concerning the 'Max Havelaar' and 'EKO' labels used in the specifications.

— As regards point 31 of the Requirements Profile, the province responded to the question 'Can it be assumed that "or equivalent" applies in respect of the prescribed labels?' as follows: 'provided that they are based on the same or similar criteria' (point 11 of the information notice).

— As regards point 35 of the Requirements Profile, the province responded to the question 'Can it be assumed that "or equivalent" applies in respect of the prescribed labels?' as follows: 'The ingredients may bear a label which is based on the same criteria' (point 12 of the information notice).

4. Award of the contract

26. According to the notice of 24 December 2008, at the end of the procurement procedure the contract was awarded to the Netherlands undertaking Maas International B.V., established in Eindhoven. [8]

B – *Labels referred to in the conditions of the contract*

27. The 'Max Havelaar' [9] label has been awarded by the Stichting Max Havelaar, a foundation incorporated under Netherlands private law, since 1988. Products bearing this label have been purchased at a fair price and under fair terms of trade from organisations made up of small groups of farmers in developing countries. Four criteria are applied for awarding the label: a break-even minimum price, a premium on the world market price, pre-financing and long-term trading relationships between producer and importer. The setting of standards, auditing and certification are carried out by an international umbrella organisation, the Fairtrade Labelling Organization (FLO), [10] with its headquarters in Bonn, Germany.

28. The 'EKO' label is also a label established under Netherlands private law. It has been issued since 1985 by the Stichting Skal, a foundation incorporated under Netherlands private law, to products made up of at least 95% organic ingredients. The Stichting Skal works in collaboration with the Netherlands Ministry of Agriculture, Nature Management and Fisheries.

29. Both 'Max Havelaar' and 'EKO' are registered as Community trade marks with the Office for Harmonisation in the Internal Market (Trade Marks and Designs).

C – *Pre-litigation procedure*

30. Following receipt of a complaint, the Commission initiated the present proceedings for failure to fulfil obligations. Both in its letter of formal notice of 14 May 2009 and its reasoned opinion of 29 October 2009 the Commission essentially raised the same pleas on which the present action is based. It alleges that the Netherlands conducted the procurement procedure in breach of Directive 2004/18.

8 — Contract notice, OJ 2008, S 250-333033.

9 — According to the information provided by the Netherlands Government, the name 'Max Havelaar' is borrowed from the title of a well-known book of Netherlands literature: *Max Havelaar of de koffieveilingen der Nederlandsche Handelsmaatschappij* (**Max Havelaar or the coffee auctions of the Dutch Trading Company**). The author of this 1859 book is Multatuli (a pseudonym for Eduard Douwes Dekker). It is about the social injustices in coffee cultivation in the former Dutch East Indies (present-day Indonesia) resulting from Netherlands colonial policy.

10 — See, in this regard, the website www.fairtrade.net (viewed most recently on 25 October 2011).

31. Both in its response of 17 August 2009 to the letter of formal notice and its written observations of 31 December 2009 on the Commission's reasoned opinion, the Netherlands contests the claim that it failed to fulfil its obligations.[11]

IV – Forms of order sought by the parties and procedure before the Court

32. By application of 20 July 2010, received at the Court on 22 July 2010, the Commission brought the present action against the Netherlands under the second paragraph of Article 258 TFEU.

33. The Commission asks the Court to:

1. Declare that, by virtue of the fact that in the tender procedure for a public contract for the supply and management of automatic coffee machines, published under No 2008/S 158-213630, the contracting authority,

   — inserted in the technical specifications a requirement for the Max Havelaar and EKO labels, or in any event labels based on similar or the same criteria, contrary to Article 23(6) and (8) of Directive 2004/18/EC,

   — included, for appraising the ability of operators, criteria and evidence concerning sustainable purchasing and socially responsible conduct, contrary to Article 48(1) and (2), Article 44(2), and in any event Article 2, of Directive 2004/18/EC and

   — included, when formulating the award criteria, a reference to the Max Havelaar and/or EKO labels, or in any event labels based on the same criteria, contrary to Article 53(1) of Directive 2004/18/EC, the Kingdom of the Netherlands failed to fulfil its obligations under the abovementioned articles of Directive 2004/18/EC;

2. Order the Kingdom of the Netherlands to pay the costs.

34. The Netherlands contends for its part that the Court should,

1. Dismiss the action; and

2. Order the Commission to pay the costs.

35. The Court received written submissions on the Commission's action, followed by oral argument, on 26 October 2011. The Kingdom of Denmark, which was granted leave to intervene in support of the Netherlands' submissions by an order of the President of the Court of 11 February 2011, took no further part in the procedure and withdrew from it by letter of 17 October 2001.

V – Assessment

36. For a long time the pursuit of environmental and social objectives was disapproved of in public procurement law, as was manifested not least in the use of the phase 'objectives irrelevant to the contract'. However, it is now generally recognised that contracting authorities may also take account of environmental and social factors when awarding contracts,[12] and the Commission has not

11 — In its response to the letter of formal notice, the Netherlands Government at least acknowledged that Articles 2, 23(6) and 53 of Directive 2004/18 'had not been fully complied with to the letter'. However, no such statement is to be found in the response to the reasoned opinion.

12 — See the leading cases in this regard: Case 31/87 *Beentjes* [1988] ECR 4635, paragraphs 28 to 30; Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraphs 53 to 69; and recitals (1), (5), (29), (33), (44) and (46) in the preamble to Directive 2004/18.

challenged this in principle. On the one hand, this is clear generally from its public statements on this matter.[13] On the other, in the present case the Commission expressly recognised — not least at the hearing — that contracting authorities may in particular make the purchase of organic and fair trade products the subject-matter of public supply contracts.

37. In practical terms, however, the conditions under which, and the form in which, the contracting authorities' environmental and social views may affect a specific award procedure is fiercely disputed. In the present case, the Commission considers that Directive 2004/18 has been infringed. It objects to the action of the Province of Noord-Holland in three respects, each of which it covers with a separate plea in its application. They relate principally to the reference to the 'Max Havelaar' and 'EKO' labels in the tender documents.

38. The Netherlands does not challenge the applicability of Directive 2004/18 to the public supply contract at issue, but does dispute the claim that the Province of Noord-Holland infringed that directive.

A – *First plea: reference to the 'Max Havelaar' and 'EKO' labels in the technical specifications for the coffee and tea to be supplied*

39. By its first plea, the Commission alleges that the Netherlands infringed Article 23(6) and (8) of Directive 2004/18, which set out how the contracting authority can define product characteristics ('technical specifications').

40. As the Commission made clear at the hearing, it does not consider that the decision of the Province of Noord-Holland to purchase organic and fair trade products[14] is contrary to European Union law per se. The alleged infringement of Article 23 of Directive 2004/18 is claimed to lie instead in the fact that in laying down the technical specifications for the coffee and tea to be supplied to it the Province of Noord-Holland made reference to the 'Max Havelaar' and 'EKO' labels, or at least to labels with the same or similar criteria.

41. This plea relates specifically to paragraph 31 of the Requirements Profile in which suppliers were informed by way of a 'requirement' that the Province of Noord-Holland 'uses' the 'Max Havelaar' and 'EKO' labels in relation to the consumption of coffee and tea. Note should also be taken of point 11 of the information notice in which the contracting authority made it clear that it would also accept 'equivalent' labels 'provided that they are based on the same or similar criteria'.

42. The first part of the first plea deals with the 'EKO' label (see also in this regard Section 1), whilst the second part concerns the 'Max Havelaar' label (see Section 2 below).

1. First part of the first plea: reference to the 'EKO' label in respect of the coffee and tea to be supplied (Article 23(6) of Directive 2004/18)

43. The first part of the first plea concerns the 'EKO' label, the inclusion of which in point 31 of the Requirements Profile infringes, in the view of the Commission, Article 23(6) of Directive 2004/18.

13 — Commission interpretative communication of 4 July 2001 on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement (COM(2001) 274 final, OJ 2001, C 333, p. 12); Interpretative communication of the Commission of 15 October 2001 on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement (COM(2001) 566 final, OJ 2001, C 333, p. 27); Communication from the Commission of 16 July 2008 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Public procurement for a better environment (COM(2008) 400 final); Communication from the Commission of 5 May 2009 to the Council, the European Parliament and the European Economic and Social Committee – Contributing to Sustainable Development: the role of Fair Trade and non-governmental trade-related sustainability assurance schemes (COM(2009) 215 final, p. 10); Communication from the Commission of 3 March 2010: EUROPE 2020 A strategy for smart, sustainable and inclusive growth (COM(2010) 2020 final, p. 18 and 19).

14 — See, to that effect, the general contract specifications in the notice and in the contract documents (reproduced in extract in points 15 and 17 of this Opinion).

44. It must be observed in that regard that contracting authorities are free to determine themselves what products they wish to procure. However, in laying down product characteristics, including environmental characteristics, they must comply with certain provisions of European Union law which are intended to ensure that the relevant contract procedure is transparent, that there is no discrimination amongst potential suppliers, and that no unjustified obstacles are created to the opening-up of public procurement to competition. These provisions include Article 23 of Directive 2004/18.

(a) Applicability of Article 23 of Directive 2004/18

45. Article 23 of Directive 2004/18 contains detailed provisions on the use of technical specifications by contracting authorities in the contract documents. According to point 1(b) of Annex VI to this directive, 'technical specification', in the case of public supply contracts, means a specification in a document defining the required characteristics of a product. As examples of technical specifications, point 1(b) of Annex VI refers inter alia to environmental performance levels, symbols, packaging, marking and labelling, and production processes and methods.

46. The reference by a contracting authority to an eco-label such as the 'EKO' label certainly meets this definition of technical specification since this label indicates a particular production method and provides information on particular environmental characteristics of this coffee and tea.

47. Consequently, the use of the EKO label in the Requirements Profile of the Province of Noord-Holland must be assessed in the light of Article 23 of Directive 2004/18.

(b) No general prohibition on reference to environment labels when laying down the environmental characteristics of a product

48. Under Article 23(3)(b) of Directive 2004/18, contracting authorities may lay down in relation to the product to be supplied environmental characteristics in terms of performance or functional requirements. To this end, they may, under Article 23(6) of Directive 2004/18, use the detailed specifications, or, if necessary, parts thereof, as defined by European, (multi-) national or other eco-labels.

49. The Commission appears to construe these rules as meaning that contracting authorities may refer, when setting out their requirements on potential tenderers, only to concrete specifications — as it were, to the 'small print' — whilst they are prohibited from making any direct reference to eco-labels.

50. However, contrary to the view of the Commission, no such categorical prohibition on the use of eco-labels can be construed from the wording of Article 23(6) of Directive 2004/18 or appears justified in the light of the purpose of this provision or the context in which it is used.

51. Article 23(6) of Directive 2004/18 indeed emphasises the 'detailed specifications' which the contracting authorities are to use to describe the environmental characteristics of products.

52. However, that does not mean necessarily that contracting authorities must list separately in their contract documents every individual specification which forms part of an eco-label. Rather, the contracting authorities are free to refer in the contract documents, by a simple reference to eco-labels, in general to all the specifications on which those labels are based. The fact that Article 23(6) of Directive 2004/18 allows contracting authorities to use 'detailed specifications' 'as defined … by eco-labels' must be construed in this way.

53. According to the clear wording of the rules, such a general reference is allowed not only with regard to 'European' eco-labels — for example 'EU ecolabels' within the meaning of Regulation (EC) No 1980/2000 [15] or Regulation (EC) No 66/2010 [16] — but also with regard to 'national', 'plurinational' and 'other' eco-labels, where they satisfy the criteria laid down in the fourth indent of Article 23(6) of Directive 2004/18. [17]

54. Contrary to the Commission's view, moreover, the general reference to all specifications on which an eco-label is based is normally entirely compatible with the principle of transparency, which is one of the fundamental principles of European public procurement law. [18]

55. The principle of transparency merely requires that technical specifications afford *equal access* for tenderers (Article 23(2) of Directive 2004/18) and that the environmental characteristics of the products to be supplied be sufficiently precise to allow tenderers *to determine the subject-matter of the contract* (Article 23(3)(b) of Directive 2004/18). [19]

56. A general reference to the specifications on which an eco-label is based is normally entirely sufficient in this regard since a reasonably well-informed tenderer of normal diligence [20] can indeed be expected to be familiar with the eco-labels used on the relevant market or at least to obtain information on such labels from the bodies certifying them.

57. Furthermore, the administrative burden involved in laying down the requirements on contracting authorities cannot be overlooked. That burden should always be proportionate to the objectives pursued in public procurement law. If the environmental characteristics of a product can be described with sufficient precision from the point of view of a reasonably well-informed tenderer solely by means of a general reference to the specifications underlying an eco-label, it would be excessively formalistic nevertheless to require the contracting authority to list all these specifications individually.

58. A glance at the final subparagraph of Article 23(6) of Directive 2004/18 also shows that a direct reference to eco-labels is not prohibited in principle. This provision expressly permits contracting authorities to presume that products and services bearing a particular eco-label comply with the technical specifications laid down in the contract documents. That rule would be pointless if the contracting authorities were allowed only to mention individual specifications but not also to refer to the associated eco-label.

59. Therefore, the fact that in the present case the Province of Noord-Holland referred to an eco-label in the contract documents without listing in detail the technical specifications underlying it does not in itself constitute an infringement of Article 23(6) of Directive 2004/18.

(c) Prohibition on making use of a particular eco-label mandatory

60. It must still be examined, however, whether an infringement of Article 23(6) of Directive 2004/18 arises from the way in which the Province of Noord-Holland referred in the present case to the 'EKO' label at point 31 of the Requirements Profile.

15 — Regulation (EC) No 1980/2000 of the European Parliament and of the Council of 17 July 2000 on a revised Community eco-label award scheme (OJ 2000 L 237, p. 1).

16 — Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel (OJ 2010 L 27, p. 1). This regulation replaced Regulation No 1980/2000 with effect from 19 February 2010.

17 — See, to that effect, the explanations given by the Commission on Amendment 45 in Amended proposal for a European Parliament and Council Directive concerning the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts, COM(2002) 236 final (OJ 2002 C 203 E, p. 210, 215, right-hand column). When the Court raised this point at the hearing, it was not disputed by the parties.

18 — Article 2 of Directive 2004/18 and recital (2) in the preamble thereto.

19 — See also the final sentence of recital (29) in the preamble to Directive 2004/18; see, to the same effect, Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 111.

20 — As regards the criterion relating to a reasonably well-informed tenderer of normal diligence, see Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 57, and *Commission* v *CAS Succhi di Frutta*, cited in footnote 19, paragraph 111.

61. The parties interpret the facts of the case differently in that regard. Whilst the Commission considers that the 'EKO' label was made mandatory in respect of the coffee and tea to be supplied, the Netherlands takes the view that the Province of Noord-Holland merely wished to order organically produced tea and coffee and the reference to the 'EKO' label in the Requirements Profile was intended only to illustrate that product requirement.

62. The better arguments support the Commission's view.

63. Although the Province of Noord-Holland did in fact stress both in the notice of its plan in the *Official Journal of the European Union* and in the specifications its desire to use more organic and fair trade products in its automatic coffee machines, in the Requirements Profile it stated merely under the heading 'requirements' that it 'uses' coffee and tea bearing the 'EKO' label. At the same time it defined 'requirement' in terms of mandatory minimum conditions which must be satisfied to prevent a tenderer from being excluded from the award procedure. [21]

64. Potential tenders, whose understanding is decisive in interpreting the conditions of the contract, [22] could construe all this only as meaning that they were required to supply coffee and tea with the 'EKO' label and that they would be excluded from the award procedure if their products did not bear precisely that label.

65. Such a requirement is contrary to the principle of non-discrimination and the principle of opening-up of public procurement to competition (Article 23(2) of Directive 2004/18, in conjunction with Article 2 thereof), which must also be observed under Article 23(6) of Directive 2004/18. First, undertakings — in particular those from other Member States — whose tea and coffee bears a label other than the 'EKO' label used in the Netherlands, are disadvantaged. Second, undertakings which have organically produced coffee and tea in their product range, without having a label for them, are placed in a less favourable position.

66. Consequently, the Province of Noord-Holland went beyond what it is permitted to do by Article 23(6) of Directive 2004/18, in conjunction with Article 23(3)(b) thereof, in laying down the environmental characteristics of the products to be supplied. It did not merely refer generally to the 'detailed specifications' underlying the 'EKO' label (first paragraph of Article 23(6)) and did not simply presume that products bearing the 'EKO' label complied with the tender conditions (final subparagraph of Article 23(6)). Rather, it made the 'EKO' label compulsory per se and thus only coffee and tea bearing that specific label could be supplied, to the exclusion of all other coffees and teas.

67. That finding is not altered by the fact that, in its information notice concerning the two signs it used for coffee and tea, the contracting authority subsequently accepted, when requested, the additional words 'or equivalent'.

68. There are no concerns in principle over the use of the additional words 'or equivalent'. After all, the European Union legislature has itself expressly made similar provision, albeit in a different context (see the final sentence of Article 23(3)(a) and Article 23(8) of Directive 2004/18). In particular, contrary to the Commission's view, the additional words 'or equivalent' cannot be rejected on grounds of the legal uncertainty purportedly created. It is an inherent feature of every public contract for the contracting authority to assess the compatibility of the tenders submitted to it with the conditions of the contract and, where necessary, to carry out an examination of equivalence. [23]

21 — See, to that effect, point 20 above.

22 — See, to that effect, in relation to determination of the value of a public works contract, Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 53.

23 — See also, to that effect, the second half of the last sentence of Article 23(6) of Directive 2004/18 and recital (29) (in particular the fifth sentence thereof) in the preamble thereto.

69. However, as the Commission rightly points out, in the present case the clarification 'or equivalent' was not made in the information notice until several weeks after the contract documents had been distributed to interested parties. In these circumstances it cannot be ruled out that in the meantime one or more potential tenders were deterred from submitting a tender by the more restrictive formulations in the contract documents which seem to indicate that the 'EKO' label is compulsory, without any examination of equivalence.

70. The Netherlands objects that the Province of Noord-Holland produced its information notice containing the clarification 'or equivalent' within the time-limit laid down by Article 39(2) of Directive 2004/18, that is to say at least six days before the deadline fixed for the receipt of tenders.

71. However, that objection cannot be accepted. The six-day time-limit under Article 39(2) of Directive 2004/18 applies only to 'additional information relating to the specifications and any supporting documents' which the contracting authority supplies to potential tenderers on request. Such information may indeed be used to provide certain clarifications and information. However, fundamental defects in the conditions of the contract cannot be remedied in this way since the contract documents must satisfy all legal requirements from the time at which they are made available to potential tenders and cannot be substantially corrected just a few days before the deadline fixed for the receipt of tenders.

(d) Interim conclusion

72. All in all, therefore, it must be found that there has been an infringement of Article 23(6) of Directive 2004/18 in that the Province of Noord-Holland made a particular eco-label — the 'EKO' label — compulsory in respect of the coffee and tea to be supplied. Consequently, the first part of the Commission's first plea is well founded.

2. Second part of the first plea: reference to the 'Max Havelaar' label in respect of the coffee and tea to be supplied (Article 23(8) of Directive 2004/18)

73. The second part of the Commission's first plea concerns the 'Max Havelaar' label the use of which in point 31 of the Requirements Profile, subsequently supplemented by point 11 of the information notice, infringes, in the view of the Commission, Article 23(8) of Directive 2004/18.

(a) Applicability of 23(8) of Directive 2004/18

74. It is necessary first to examine whether Article 23(8) of Directive 2004/18 is applicable at all in a case such as this.

75. The Commission appears to consider that it is, merely because in the course of the proceedings the Netherlands submitted observations on the substance of Article 23(8) of Directive 2004/18. However, the Commission overlooks the fact that the Netherlands commented only in the alternative on Article 23(8), the applicability of which to the 'Max Havelaar' label it continues vehemently to dispute. Nevertheless, even if the Netherlands had entered into discussion of Article 23(8) without making any objection, it would still be for the Court to examine whether or not this provision is applicable. That is because, in an action for failure to fulfil obligations, it is for the Court to determine whether or not the alleged breach of obligations exists, even if the State concerned does not deny, or no longer denies, the

breach.[24] Accordingly, the Court cannot look on while an incorrect provision is applied, even though the parties agree on its applicability.[25] As Advocate General Léger rightly stated, the role of the Court is not a passive one and it cannot be expected to be merely 'the mouthpiece of the parties'.[26]

76. Article 23(8) of Directive 2004/18, the provision at issue, concerns — like all the preceding parts of this provision — technical specifications by which the contracting authority sets out the subject-matter of the contract. What therefore has to be examined is whether, by referring to the 'Max Havelaar' label, the Province of Noord laid down a technical specification in relation to the coffee and tea to be supplied.

77. As already mentioned, technical specifications within the meaning of Directive 2004/18 are, according to point 1(b) of Annex VI thereto, a specification in a document defining the required characteristics of a product. Therefore, they must be information which defines the properties of a product. That assessment is confirmed by the list contained in point 1(b) of Annex VI to Directive 2004/18: all the technical specifications given as examples therein concern the product itself, its packaging and its performance.

78. The 'Max Havelaar' label, on the other hand, does not concern the characteristics of the product, but rather the terms of trade granted to the producers of agricultural products in developing countries. The label provides no information on how a product is produced, but rather whether it was traded fairly, in particular with regard to the prices and terms of trade granted to the farmers concerned.

79. In the context of the present case, this means that the 'Max Havelaar' label says nothing about the characteristics or method of production of the coffee or tea to be supplied — such as its taste, caffeine content or the use of pesticides — but merely permits inferences to be drawn as to the conditions under which this coffee or tea was purchased from the relevant producers. As the parties correctly pointed out, it relates to the purchasing policy of potential tenderers.

80. Therefore, the contracting authority did not, by referring to the 'Max Havelaar' label, lay down technical specifications within the meaning of Directive 2004/18, but rather brought social considerations into the award procedure.

81. Consequently, Article 23(8) of Directive 2004/18 is not applicable to the present case. As I will explain below,[27] the contracting authority's reference to a fair trade label such as 'Max Havelaar' should properly have been assessed in the light of Article 26 of Directive 2004/18.

82. It follows that the second part of the Commission's first plea must be dismissed as unfounded.

83. Contrary to what the Commission appears to suggest, its plea based on Article 23(8) of Directive 2004/18 cannot simply be reinterpreted as a plea pursuant to Article 26 of that directive since, according to settled case-law,[28] the subject-matter of an action for failure to fulfil obligations is circumscribed by the pre-litigation procedure. The Commission may not expand its scope in the proceedings before the Court. Therefore, if the Commission pleads an infringement of Article 23(8) of

24 — Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353, paragraph 30, and Case C-438/07 *Commission* v *Sweden* [2009] ECR I-9517, paragraph 53.

25 — See, to that effect, order of 27 September 2004 in Case C-470/02 P *UIER* v *M6 and Others*, paragraph 69, and Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden* v *API and Commission* [2010] ECR I-8533, paragraph 65.

26 — Opinion of Advocate General Léger in Case C-252/96 P *Parliament* v *Gutiérrez de Quijano y Lloréns* [1998] I-7421, paragraph 36.

27 — See points 85 to 87 below.

28 — See, inter alia, Case C-34/04 *Commission* v *Netherlands* [2007] ECR I-1387, paragraph 49, and Case C-211/08 *Commission* v *Spain* [2010] ECR I-5267, paragraph 33.

Directive 2004/18 in the pre-litigation procedure, it cannot be found in subsequent proceedings that there has been an infringement of Article 26 of Directive 2004/18. Furthermore, a plea to that effect would also be inadmissible under Article 42(2) of the Rules of Procedure of the Court of Justice since it was first raised in the Commission's rejoinder without any sound reasons for the delay being evident.

(b) In the alternative: compatibility of the reference to the 'Max Havelaar' label with Directive 2004/18

84. For the sake of completeness, I now wish briefly to address, in the alternative, the question whether the reference by the Province of Noord-Holland to the 'Max Havelaar' label was compatible with Directive 2004/18.

(i) Applicable provision: Article 26 of Directive 2004/18

85. As the Netherlands correctly pointed out, the lawfulness of a contracting authority's references to a fair trade label must be assessed not in the light of Article 23(8) of Directive 2004/18, but Article 26 thereof. Under the latter provision, 'contracting authorities may lay down special conditions relating to the performance of a contract' which 'may, in particular, concern social and environmental considerations.'

86. Part of the performance of a contract is not least the purchase by the contractor of the products to be supplied to the contracting party. Whether or not a product such as coffee or tea which is to be supplied to a contracting authority is fair trade depends on the contractor's purchasing policy based on social criteria.

87. The truth is therefore that by referring to the 'Max Havelaar' label in connection with the performance of the public supply contract at issue the Province of Noord-Holland laid down a condition based on social considerations within the meaning of Article 26 of Directive 2004/18, even though the province itself may have considered that no such conditions were contained in the contract documents. [29]

(ii) Examination of the reference to the 'Max Havelaar' label in the light of Article 26 of Directive 2004/18

88. As to the substance, I agree with the Commission that Article 26 of Directive 2004/18 does not permit the contracting authority to exercise unlimited influence over the purchasing policy of its future contractor. Its requirements in respect of that purchasing policy must relate specifically to the subject-matter of the public supply contract [30] and may not concern, for example, the contractor's purchasing policy in general. The contracting authority cannot therefore require that potential tenders have only fair trade products in their product range, but merely that the products to be supplied to it specifically under a public contract be fair trade. The Province of Noord-Holland has laid down no other requirement in the present case.

89. Having regard to the transparency rule, which must be complied with under Article 26 of Directive 2004/18, [31] there is likewise in principle no reason why a contracting authority should not refer to a fair trade label to clarify the social conditions which it has laid down for the performance of the contract and at the same time opt not to list in detail the criteria underlying that label, since, as already stated above in connection with eco-labels, [32] a reasonably well-informed tenderer of normal diligence can be expected to be familiar with the fair trade labels used on the relevant market or at least to obtain information on such labels from the bodies certifying them.

29 — See, to that effect, point 16 above.

30 — See, to that effect, albeit in relation to environmental award criteria, *Concordia Bus Finland*, cited in footnote 12, paragraph 59, final sentence, and 64, and *EVN and Wienstrom*, cited in footnote 20, paragraph 66.

31 — See Article 2 of Directive 2004/18 and recital (33) in the preamble thereto.

32 — See point 56 above.

90. Conducting the procurement procedure and also performing the contract subsequently can even be made considerably easier if the undertakings concerned are permitted to prove that they have satisfied the social conditions laid down by the contracting party with reference to fair trade labels. The administrative burden on the contracting authority, potential tenderers, and the subsequent contractor is thereby minimised.

91. Contrary to the Commission's assertion at the hearing, contracting authorities absolutely cannot in any event be required to set out in their tender conditions their own ideas on fair trade. Most of them would probably not have the technical knowledge necessary to do so. Furthermore, the contracting authorities' different ideas of what constitutes fair trade (for example, as regards the price level, the appropriate length of the supply relationship between the traders and producers in developing countries, and the nature and extent of pre-financing of production [33]) would lead to a serious risk of fragmenting the market. Therefore, it is in the interests of both potential tenderers and contracting authorities for reference to fair trade labels to be permitted when awarding public supply contracts.

92. None the less, the social conditions relating to the performance of a contract laid down by the contracting authority pursuant to Article 26 of Directive 2004/18 must be compatible with European Union law. That means in particular that there must be no direct or indirect discrimination. [34]

93. That requirement is not satisfied in the present case since the Province of Noord-Holland did not use the 'Max Havelaar' label merely to explain its social ideas about fair trade. Nor did it simply establish a presumption that products bearing the 'Max Havelaar' label satisfied its social requirements for performance of the contract. Instead, it made the 'Max Havelaar' label compulsory per se and thus only coffee and tea bearing this specific label could be supplied, to the exclusion of all other coffees and teas. [35]

94. Therefore, firstly, it disadvantaged undertakings — in particular those from other Member States — whose tea and coffee bears a label other than the 'Max Havelaar' label used primarily in the Netherlands and Belgium. Secondly, it placed undertakings which have fair trade coffee and tea in their product range, without having a label for them, in a less favourable position. [36]

95. In the light of the foregoing, it can be concluded that the action of the Province of Noord-Holland in making a specific fair trade label — the 'Max Havelaar' label — compulsory in respect of the coffee and tea to be supplied was not compatible with Article 26 of Directive 2004/18.

96. As stated above, [37] that assessment is not altered by the subsequent clarification on the part of the contracting authority in point 11 of its information notice, which states that the reference to the 'Max Havelaar' label is to be read with the additional words 'or equivalent'.

97. I would point out merely in passing that the considerations set out above in respect of Article 26 of Directive 2004/18 also apply to Article 23(8) of that directive, should the Court find, contrary to my comments above, [38] that that provision is applicable.

33 — Moreover, what terms of trade are appropriate can vary enormously from product to product and from producer country to producer country. In cases of doubt, the certifying body awarding a fair trade label is able to make a better and more objective assessment than a supplier or a contracting authority.

34 — Recital (29) in the preamble to Directive 2004/18; see, to that effect, *Beentjes*, cited in footnote 12, paragraph 30.

35 — See also, to that effect, point 66 above regarding the 'EKO' label.

36 — See also, to that effect, point 65 above regarding the 'EKO' label.

37 — See, to that effect, point 67 above.

38 — See points 74 to 81 above.

3. Summary of the first plea

98. The Commission's first plea is only partly well founded. It must be upheld in so far as it claims an infringement of Article 23(6) of Directive 2004/18, whilst it must be rejected in so far as it is based on an infringement of Article 23(8) of that directive.

B – *Third plea: reference in the award criteria to the 'Max Havelaar' and 'EKO' labels with regard to the ingredients to be supplied*

99. On account of its closely connected subject-matter, it is appropriate to examine the Commission's third plea directly after its first. The third plea alleges infringement of Article 53(1)(a) of Directive 2004/18, which sets out which award criteria contracting authorities may lay down with regard to the award of a contract. That provision is said to have been infringed because in formulating its award criteria the Province of Noord-Holland referred to the 'Max Havelaar' 'and/or' 'EKO' labels, or at any rate to labels with the same criteria.

100. This plea relates specifically to point 35 of the Requirements Profile in which tenderers were informed of the 'preference' of the Province of Noord-Holland that the supplied 'ingredients' (in particular sugar, milk powder and cocoa) should 'where possible' comply with the 'EKO' and/or 'Max Havelaar' labels. Fulfilment of that 'preference' could be rewarded with up to 15 points in the award procedure. In point 12 of the information notice the contracting authority further made it clear that it would also accept 'equivalent' labels, adding that the ingredients may 'bear a label which is based on the same criteria' as the 'EKO' and 'Max Havelaar' labels.

1. Preliminary remark

101. Article 53(1)(a) of Directive 2004/18 applies where the contracting authority has decided — as it has in this case — to award the contract to the economically most advantageous tender.[39] As is clear from the wording of that provision, in particular the use of the expression 'for example' ('e.g.'), Directive 2004/18 itself does not lay down an exhaustive list of criteria for determining the economically most advantageous tender.[40]

102. Those criteria do not necessarily have to be of a purely economic nature. Factors which go beyond purely economic considerations may also influence the value of a tender from the point of view of the contracting authority. That is already evident from the wording of Article 53(1)(a) of Directive 2004/18, under which inter alia aesthetic, functional and environmental characteristics can be relevant in determining the economically most advantageous tender.[41]

103. Against that background, there is nothing to prevent a contracting authority from also taking into consideration environmental and social factors in determining the economically most advantageous tender.[42]

104. However, that does not mean that any criterion of that nature may be taken into consideration by the contracting authority. Rather, according to case-law, choice is limited to criteria aimed at identifying the tender which is in fact economically the most advantageous.[43]

39 — See point 16 above.

40 — See, to that effect, in relation to the predecessor provisions of Article 53(1)(a) of Directive 2004/18, *Concordia Bus Finland*, cited in footnote 12, paragraph 54; Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 35; Case C-315/01 *GAT* [2003] ECR I-6351, paragraph 63; and Case C-532/06 *Lianakis and Others* [2008] ECR I-251, paragraph 29.

41 — See, to that effect, already, *Concordia Bus Finland*, cited in footnote 12, paragraph 55.

42 — See also the fourth paragraph of recital (46) in the preamble to Directive 2004/18.

43 — *Beentjes*, cited in footnote 12, paragraph 19; *SIAC Construction*, cited in footnote 40, paragraph 36; *Concordia Bus Finland*, cited in footnote 12, paragraph 59; *GAT*, cited in footnote 40, paragraph 64; and *Lianakis and Others*, cited in footnote 40, paragraphs 29 and 30.

105. The contracting authority does not have unrestricted freedom of choice in that regard.[44] As is clear from the wording of Article 53(1)(a) of Directive 2004/18, the criteria which it takes as a basis must be linked to the subject-matter of the contract.[45] They must be capable of establishing the tender which offers best value for money.[46] Furthermore, they must be 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.[47]

106. In the view of the Commission, in the present case these principles were infringed in two respects: one, the 'Max Havelaar' and 'EKO' labels have no link with the subject-matter of the contract (see Section 2 below), and two, the Province of Noord-Holland elevated both labels as such to the status of award criteria rather than merely taking account of the substantive requirements underlying them (see Section 3 below). I will examine these two arguments put forward by the Commission in greater detail below.

2. First argument in support of the third plea: purported absence of a link between the subject-matter of the contract and the two labels

107. Firstly, the Commission claims that there is no link between the subject-matter of the contract and the two 'EKO' and 'Max Havelaar' labels which the Province of Noord-Holland took as a basis because those labels relate solely to the general purchasing policy of potential tenderers.

108. That argument is unconvincing and, moreover, contradicts what the Commission itself stated in its first plea.[48] Contrary to the view of the Commission, both labels at issue have a sufficient link with the subject-matter of the contract.

109. For example, the 'EKO' label directly concerns the product characteristics — more precisely the environmental characteristics — of the ingredients to be supplied. A label which the Commission itself classified as a technical specification to determine functional performance and requirements under Article 23(6) of Directive 2004/18, in conjunction with Article 23(3) thereof, cannot be denied any link with the subject-matter of the contract under Article 53(1) of Directive 2004/18.

110. As regards the 'Max Havelaar' label, it is true it does not define any product characteristics in the strict sense, such as those relevant to the technical specifications (Article 23 of Directive 2004/18).[49] That label does, however, provide information on whether or not the goods to be supplied were traded fairly. Such a factor can be taken into consideration in connection with conditions relating to performance of a contract (Article 26 of Directive 2004/18).[50] It cannot therefore be denied at the outset that it lacks any connection with the subject-matter of the contract (in this case, the supply of 'ingredients' such as sugar, milk powder and cocoa). From the point of view of a contracting authority which, as the contract documents show, attaches importance to socially responsible trade, the question

44 — *Beentjes*, cited in footnote 12, paragraph 26; *SIAC Construction*, cited in footnote 40, paragraph 37; *Concordia Bus Finland*, cited in footnote 12, paragraphs 61 and 64; and Case C-331/04 *ATI EAC e Viaggi di Maio and Others* ('ATI EAC') [2005] ECR I-10109, paragraph 21.

45 — See, to the same effect, back in *Concordia Bus Finland*, cited in footnote 12, paragraph 59, final sentence, and paragraph 64; *EVN and Wienstrom*, cited in footnote 20, paragraph 66; and *ATI EAC*, cited in footnote 44, paragraph 21.

46 — Third paragraph of recital (46) in the preamble to Directive 2004/18; see also recital (5) in the preamble to that directive.

47 — First paragraph of recital (46) and recital (2) in the preamble to Directive 2004/18; see, to the same effect, *Concordia Bus Finland*, cited in footnote 12, and *ATI EAC*, cited in footnote 44, paragraph 21.

48 — In its first plea the Commission regarded both the 'EKO' label and the 'Max Havelaar' label as technical specifications and examined them in the light of Article 23(6) and (8) of Directive 2004/18.

49 — See points 74 to 81 above.

50 — See points 85 to 87 above.

whether or not the goods to be supplied were purchased from the producer thereof on fair conditions can indeed be relevant in determining best value for money. Of course the taste of sugar does not vary depending on whether it was traded fairly or unfairly. A product placed on the market on unfair conditions does however leave a bitter taste in the mouth of a socially responsible customer.

111. It would certainly be going too far for a contracting authority, in determining the economically most advantageous tender, to want to assess the general purchasing policy of potential tenderers and to take into consideration whether all the goods in its product range were fair trade, irrespective whether or not they are the subject-matter of the contract.[51]

112. However, in the present case there is certainly no such extensive consideration of the fair trade factor. As the Netherlands has correctly pointed out, in point 35 of the Requirements Profile the Province of Noord-Holland merely took into account whether the 'ingredients' to be supplied to it bore a label capable of certifying their fair trade origin. Accordingly, the use of the 'Max Havelaar' label in the contract documents at issue had a clear and specific connection with the subject-matter of the contract.

113. Consequently, the Commission's first argument in support of its third plea must be dismissed.

3. Second argument supporting the third plea: reference to the labels instead of the underlying criteria

114. It remains to be considered whether an infringement of Article 53(1)(a) of Directive 2004/18 arises from the way in which the Province of Noord-Holland referred in the present case to the 'EKO' and 'Max Havelaar' labels in point 35 of the Requirements Profile.

115. The parties interpret the facts of the case differently in this regard. Whereas the Commission considers that the contracting authority made the 'EKO' and 'Max Havelaar' labels as such the award criterion in respect of the 'ingredients' to be supplied (in particular sugar, milk powder and cocoa), the Netherlands takes the view that the Province of Noord-Holland merely intended to refer to the substantive requirements underlying the two labels.

116. The better arguments support the Commission's view.

117. Although the Province of Noord-Holland did stress in general terms both in the notice of its plan in the *Official Journal of the European Union* and in the specifications that it wished to use more organic and fair trade products in its automatic coffee machines, in point 35 of the Requirements Profile it expressed its 'preference' that the ingredients should 'where possible' comply with the 'EKO' 'and/or' the 'Max Havelaar' labels. In point 12 of the information notice it clarified that statement as meaning that the ingredients could bear another label which was based on the same criteria as the 'EKO' and 'Max Havelaar' labels. However, there was no mention in either the Requirements Profile or the information notice of organic and fair trade ingredients *without labels*.

118. The potential tenderers, whose understanding is decisive in interpreting the tender conditions,[52] could understand this only as meaning that the ingredients to be supplied by them had to bear the 'EKO' and/or 'Max Havelaar' label, or at least equivalent labels, in order to gain the most points in the award procedure.

51 — Similarly — albeit in a different context — *Beentjes*, cited in footnote 12, paragraph 28, on the general capacity of tenderers to employ long-term unemployed persons, and *EVN and Wienstrom*, cited in footnote 20, paragraphs 70 to 72, on the capacity of tenderers to provide the largest amount of electricity possible in excess of the amount laid down in the invitation to tender. See also point 88 above.

52 — See, to that effect, paragraph 64 above.

119. Such action by the contracting authority does not comply with the legal requirements applicable to the formulation of award criteria under Article 53(1)(a) of Directive 2004/18.

120. Contrary to the view expressed by the Commission, that is not because of a purported lack of transparency [53] in the reference to the two labels since, as stated above, [54] a reasonably well-informed tenderer of normal diligence can be expected to be familiar with the labels used on the relevant market or at least to obtain from the bodies certifying those labels information on the criteria applied by them.

121. It was also entirely possible that potential tenders offered goods with other labels based on the same criteria as the 'EKO' and 'Max Havelaar' labels since, according to the submissions made by the Netherlands Government, which are undisputed in that regard, the 'EKO' label [55] is based exclusively on the criteria laid down in the so-called 'EC organic regulation', [56] and the 'Max Havelaar' label is identical in content to the international 'Fairtrade' label which is awarded in numerous States by bodies brought together under the Fairtrade Labelling Organisation. [57]

122. However, it is contrary to the principle of non-discrimination [58] and the principle of opening-up of public procurement to competition, [59] which must be observed under Article 53(1)(a) of Directive 2004/18, [60] for a contracting authority — such as the Province of Noord-Holland in this case — to award in connection with award criteria extra points for the fact that products bear organic and fair-trade labels. Undertakings which have organically produced goods in their product range, without having a label for them, are thereby placed in a less favourable position. Potential tenderers must retain the possibility of proving that their goods satisfy fully the award criteria drawn up by the contracting authority, even if they bear labels other than those mentioned by the contracting party or bear no label at all.

123. In this connection, the objection raised by the Netherlands that the 'EKO' and 'Max Havelaar' labels were not mandatory requirements in respect of the 'ingredients' to be supplied, but merely non-binding 'preferences' of the contracting authority which were rewarded by a negligible number of points, must be rejected. On the one hand, just a few points can in some circumstances make the difference between success and failure in an award procedure with a points-based evaluation system, and, on the other, all award criteria — including those to which the contracting authority attaches little importance — must comply, without any reservation, with the fundamental procurement law principles of equal treatment and non-discrimination. According to settled case-law, those principles are to be observed at every stage of the award procedure. [61]

124. All in all, it must therefore be found that there has been an infringement of Article 53(1)(a) of Directive 2004/18. The Commission's third plea is well founded.

53 — First and second paragraph of recital (46) in the preamble to Directive 2004/18.

54 — See, to that effect, paragraph 56 above.

55 — See paragraph 28 above.

56 — 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), which was subsequently replaced by Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91 (OJ 2007 L 189, p. 1), was in force at the time the public supply contract at issue was being awarded.

57 — See paragraph 27 above

58 — First and fourth paragraph of recital (46) in the preamble to Directive 2004/18.

59 — Recital (2) in the preamble to Directive 2004/18.

60 — See, to that effect, *Beentjes*, cited in footnote 12, paragraph 29; Case C-225/98 *Commission* v *France* [2000] ECR I-7445, paragraph 50; *Concordia Bus Finland*, cited in footnote 12, paragraphs 63 and 64; and *EVN and Wienstrom*, cited in footnote 20, paragraph 69.

61 — See, to that effect, in various fields of public procurement law, Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraph 54; Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 93; *EVN and Wienstrom*, cited in footnote 20, paragraph 56; and *ATI EAC*, cited in footnote 44, paragraph 22.

C – Second plea: purported reference to sustainable purchasing and socially responsible conduct as a suitability criterion

125. The Commission's second plea is based on Articles 2, 44(2) and 48(1) and (2) of Directive 2004/18 which lay down the principle of transparency under procurement law (Article 2) and conditions relating to the assessment by the contracting authority of undertakings' ability (Articles 44 and 48). The Commission considers that those provisions were infringed in that the Province of Noord-Holland laid down criteria and required evidence which — in the view of the Commission — concerned quite generally the sustainable purchasing and socially responsible conduct of potential tenderers.

126. More specifically, this plea relates to heading 4.4.4 of the specifications in which the Province of Noord-Holland requires that potential tenderers fulfil 'the criteria concerning sustainable purchasing and socially responsible undertakings'. In that heading it also asks tenderers to explain how they fulfil 'the criteria concerning sustainable purchasing and socially responsible undertakings' and to state the extent to which they contribute 'to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production'. [62]

1. First part of the second plea: purported unlawful requirements relating to evidence of tenderers' technical ability (Article 48(1) of Directive 2004/18, in conjunction with Article 48(2) thereof)

127. The first part of the second plea specifically concerns the requirements relating to evidence of tenderers' technical ability. In the view of the Commission, the Province of Noord-Holland, by its statements on sustainable purchasing and the socially responsible conduct of potential tenderers in the contract documents, went beyond the narrow confines laid down by Article 48 of Directive 2004/18 in respect of the assessment and examination of the technical and professional abilities of economic operators.

128. However, as the Netherlands correctly points out, that part of the second plea is based on a misinterpretation of heading 4.4.4 of the specifications. The requirements placed therein on potential tenderers do not relate at all to their technical and professional abilities. It is apparent from the title of heading 4.4.4 that they are instead 'quality requirements' in relation to the services to be provided.

129. The overall context of heading 4.4.4 of the contract documents also confirms this impression. For example, sub-chapter 4.4 of the contract documents is headed 'Suitability requirements/Minimum requirements', which suggests that it relates not only to the suitability of potential tenderers (or their abilities) — such as heading 4.4.3, which concerns the tenderers' experience — but other aspects too. Those other aspects include, for example, the answer to the question at issue in the present case, namely how the tenderer concerned intends to meet the requirements relating to sustainability and socially responsible undertakings (heading 4.4.4 of the specifications).

130. Consequently, heading 4.4.4, the heading of the specifications at issue, does not, contrary to the view of the Commission, fall at all within the scope of Article 48(1) and (2) of Directive 2004/18 and cannot therefore be assessed in the light of that provision

131. If, however, the Court were nevertheless to apply that provision of the directive, it would not preclude a contract condition such as heading 4.4.4 of the specifications.

62 — See paragraph 19 above.

132. It is indeed undisputed that Article 48 of Directive 2004/18 contains an exhaustive list of the evidence of technical ability which contracting authorities may require from economic operators. [63]

133. However, by its 'quality requirements' in heading 4.4.4 of the specifications the Province of Noord-Holland was able to rely on one of the clauses in Article 48(2) of Directive 2004/18, that is to say, subparagraph (c) which provides specifically for a 'description of the … measures used … for ensuring quality'. The Netherlands rightly drew attention to this.

134. Consequently, the allegation of infringement of Article 48 of Directive 2004/18 is unfounded.

2. Second part of the second plea: purported lack of a connection between the suitability requirements on tenderers and the subject-matter of the contract (Article 44(2) of Directive 2004/18)

135. The second part of the second plea is based on Article 44(2) of Directive 2004/18. That provision essentially provides that the contracting authority may set minimum levels of ability required of potential tenderers, provided that they are related and proportionate to the subject-matter of the contract. [64]

136. The Commission considers that Article 44(2) of Directive 2004/18 has been infringed because the statements in the specifications concerning the sustainable purchasing and socially responsible conduct of potential tenderers has, in its view, no connection with the subject-matter of the public procurement contract at issue in this case, but instead concerns the general purchasing policy of economic operators.

137. The Netherlands cannot be regarded as accepting that allegation simply because it mounted a relatively half-hearted defence to it in the pre-litigation procedure, [65] since according to settled case-law there is no rule of procedure which requires a Member State to put forward during the pre-litigation phase of an infringement procedure under Article 258 TFEU all the arguments in its defence. [66] In the court proceedings at any rate the Netherlands defended itself strenuously against the allegation of an infringement of Article 44(2) of Directive 2004/18.

138. However, the plea alleging infringement of Article 44(2) of Directive 2004/18 is also unfounded as to the substance since, as stated above, heading 4.4.4 of the specifications at issue in this case is not a requirement concerning the suitability or technical ability of potential tenderers, [67] meaning Article 44 of Directive 2004/18 does not apply at all and, secondly, there is no question of heading 4.4.4 of the specifications lacking a sufficient connection with the subject-matter of the contract.

139. The subject-matter of the contract was — in so far as it is relevant in this context — the supply of coffee, tea and other 'ingredients' for automatic coffee machines, with the contracting authority expressly attaching importance to 'sustainable' products which were to be both organic and fair trade. As explained in connection with the first plea, these requirements serve partly to describe the product characteristics of the goods to be supplied (environmental characteristics within the meaning of Article 23 of Directive 2004/18), and partly to describe the other conditions governing performance of the contract (social considerations within the meaning of Article 26 of Directive 2004/18).

63 — See also, to that effect, Case 76/81 *Transporoute* [1982] ECR 417, paragraphs 8, 9 and 15; Joined Cases 27/86 to 29/86 *CEI* [1987] ECR 3347, paragraph 9; and Case C-272/91 *Commission* v *Italy* [1994] ECR I-1409, paragraph 35, all in relation to rules similar to Article 48 of Directive 2004/18.

64 — See, in particular, the second subparagraph of Article 44(2) of Directive 2004/18.

65 — The Commission cites p. 6 of the Netherlands' response to the letter of formal notice in which the Netherlands purportedly conceded that the tender conditions at issue 'were not connected solely with the subject-matter of the contract'.

66 — Case C-414/97 *Commission* v *Spain* [1999] ECR I-5585, paragraph 19, and *Commission* v *Netherlands*, cited in footnote 28, paragraph 49 *in fine*.

67 — See also, in that respect, points 128 to 130 of this Opinion.

140. Accordingly, since sustainability and environmental impact played an important role in the performance of the public contract at issue, the contracting party could not be barred from asking potential tenderers how they fulfilled the 'criteria concerning sustainable purchasing and socially responsible undertakings' and to state the extent to which they contributed 'to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production'.

141. It is entirely legitimate for a contracting authority to ask potential tenderers for information on how they intend to meet the aims of the contract which it has laid down. Contrary to the view expressed by the Commission, this is not aimed primarily at the general purchasing policy of potential tenderers, but rather at their procurement of the goods specifically to be supplied, that is to say coffee, tea and other 'ingredients'. [68]

142. Consequently, the allegation of an infringement of Article 44(2) of Directive 2004/18 is likewise unfounded.

3. Third part of the second plea: purported infringement of the general transparency rule (Article 2 of Directive 2004/18)

143. Finally, in the third part of its second plea the Commission raises, in the alternative, an allegation of infringement of the general transparency rule, as contained in Article 2 of Directive 2004/18. [69]

144. That fundamental principle of European public procurement law is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It 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. [70]

145. The Commission complains that the requirements in heading 4.4.4 of the specifications are couched in excessively general and imprecise terms.

146. I agree. The passage of the specifications at issue does not show with sufficient clarity what kind of explanations and what kind of evidence the contracting authorities require from potential tenderers. Moreover, the wording chosen by the Province of Noord-Holland provides no certainty as to what is meant precisely by 'sustainable purchasing and socially responsible undertakings' and a contribution 'to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production'.

147. A more precise description of what the Province of Noord-Holland expected from potential tenderers would have been helpful. For example, the Province of Noord-Holland could have asked about any contractual agreements concerning fair trade or organic products which the potential tenderers might have entered into with their relevant suppliers. The province could also have required potential tenderers to state what measures they had taken to monitor compliance with such agreements.

68 — See, to that effect, my comments on the first and third pleas (in particular points 88 and 109 to 112 of this Opinion).

69 — See also recitals (2) and (39) in the preamble to Directive 2004/18.

70 — *Commission* v *CAS Succhi di Frutta*, cited in footnote 19, paragraph 111; similarly, see Case C-340/02 *Commission* v *France* [2004] ECR I-9845, paragraph 34, and Case C-299/08 *Commission* v *France* [2009] ECR I-11587, paragraph 41, according to which the principle of transparency requires the subject-matter of a public contract and the criteria governing its award to be clearly defined.

148. The Netherlands' objection that several international organisations had defined the concept of sustainability is in any event not sufficiently substantiated to invalidate the plea alleging lack of transparency.

149. Consequently, it must be found that there has been an infringement of Article 2 of Directive 2004/18. The third part of the Commission's third plea is therefore well founded.

D – *Summary*

150. All in all it can be found that Directive 2004/18 does indeed allow contracting authorities to take account of environmental and social considerations in procurement procedures, expressly including a reference in the tender conditions to environmental and fair trade labels.

151. However, the contracting authority cannot require that the goods to be supplied to it bear a particular label, but must permit other labels and also goods with no labels, provided that their environmental characteristics and the conditions under which they are produced and traded are equivalent to the requirements laid down by the contracting authority.

152. Furthermore, when awarding its contract the contracting authority may not take account of the tenderers' general purchasing policy, but only their purchasing in relation to the goods specifically to be supplied. Where the contracting authority requires from tenderers information or evidence relating to the sustainability of their products and their business policy, that requirement must have a sufficient connection with the subject-matter of the contract and be couched in specific terms.

153. In the present case, the Province of Noord-Holland only partially complied with those rules. In its conditions of contract governing the 2008 public supply contract at issue it infringed three provisions of European Union law: Article 2, Article 23(6) and Article 53(1)(a) of Directive 2004/18. On the other hand, it is not possible to find that there has been an infringement of the other provisions claimed by the Commission, in particular Article 23(8), Article 44(2) and Article 48(1) and (2) of Directive 2004/18.

VI – Costs

154. According to Article 69(3) of the Rules of Procedure, the Court may order that the costs be shared or that each party bear its own costs. That rule applies inter alia where each party succeeds on some and fails on other heads.

155. On the basis of my previous observations, in the present case the Commission is successful in respect of the first part of its first plea, the third part of its second plea and its third plea, but unsuccessful in respect of the second part of its first plea and the first and second parts of its second plea.

156. Against that background, it appears to me reasonable to order each party to bear its own costs. [71]

71 — See, to the same effect, for example Case C-160/08 *Commission* v *Germany* [2010] ECR I-3713, paragraph 133.

VII – Conclusion

157. On the basis of the foregoing I propose that the Court rule as follows:

(1) By virtue of the fact that in the tender procedure for a public contract for the supply and management of automatic coffee machines in 2008, the Province of Noord-Holland,

— made it compulsory for the coffee and tea to be supplied to bear the Max Havelaar and EKO labels, or labels with a similar basis, thus contrary to Article 23(6) of Directive 2004/18,

— formulated in the tender conditions unclear 'quality requirements' for potential tenderers as regards 'sustainable purchasing and socially responsible conduct', thus contrary to Article 2 of Directive 2004/18, and

— provided, as part of the award criteria, for extra points if the 'ingredients' to be supplied bore the Max Havelaar and/or EKO labels, or labels with a similar basis, thus contrary to Article 53(1)(a) of Directive 2004/18, the Kingdom of the Netherlands has failed to fulfil its obligations under the Treaty.

(2) The remainder of the application is dismissed.

(3) Each party is ordered to bear its own costs.