

## JUDGMENT OF THE COURT

17 September 2002

(Public service contracts in the transport sector - Directives 92/50/EEC and 93/38/EEC - Contracting municipality which organises bus transport services and an economically independent entity of which participates in the tender procedure as a tenderer - Taking into account of criteria relating to the protection of the environment to determine the economically most advantageous tender - Whether permissible when the municipal entity which is tendering meets those criteria more easily)

In Case C-513/99,

REFERENCE to the Court under Article 234 EC by the Korkein hallinto-oikeus (Finland) for a preliminary ruling in the proceedings pending before that court between

**Concordia Bus Finland Oy Ab**, formerly Stagecoach Finland Oy Ab,

and

**Helsingin kaupunki**,

**HKL-Bussiliikenne**,

on the interpretation of Articles 2(1)(a), (2)(c) and (4) and 34(1) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1), and Article 36(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann and F. Macken (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, M. Wathelet, R. Schintgen and V. Skouris (Rapporteur), Judges,

Advocate General: J. Mischo,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Concordia Bus Finland Oy Ab, by M. Heinonen, oikeustieteen kandidaatti,
- Helsingin kaupunki, by A.-L. Salo-Halinen, acting as Agent,
- the Finnish Government, by T. Pynnä, acting as Agent,
- the Greek Government, by D. Tsagkaraki and K. Grigoriou, acting as Agents,
- the Netherlands Government, by M.A. Fierstra, acting as Agent,
- the Austrian Government, by C. Pesendorfer, acting as Agent,
- the Swedish Government, by A. Kruse, acting as Agent,
- the Commission of the European Communities, by M. Nolin, acting as Agent, assisted by E. Savia, avocat,

having regard to the Report for the Hearing,

after hearing the oral observations of Concordia Bus Finland Oy Ab, represented by M. Savola, asianajaja; Helsingin kaupunki, represented by A.-L. Salo-Halinen; the Finnish Government, represented by T. Pynnä; the Greek Government, represented by K. Grigoriou; the Austrian Government, represented by M. Winkler, acting as Agent; the Swedish Government, represented by A. Kruse; the United Kingdom Government, represented by R. Williams, Barrister; and the Commission, represented by M. Nolin, assisted by E. Savia, at the hearing on 9 October 2001,

after hearing the Opinion of the Advocate General at the sitting on 13 December 2001,

gives the following

## **Judgment**

1.

By order of 17 December 1999, received at the Court on 28 December 1999, the Korkein hallinto-oikeus (Supreme Administrative Court) referred for a preliminary ruling under Article 234 EC three questions on the interpretation of Articles 2(1)(a), (2)(c) and (4) and 34(1) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1) ('Directive 93/38'), and Article 36(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

2.

Those questions were raised in proceedings between Concordia Bus Finland Oy Ab ('Concordia) and Helsingin kaupunki (City of Helsinki) and HKL-Bussiliikenne ('HKL) concerning the validity of a decision of the Liikepalvelulautakunta (commercial service committee) of the city of Helsinki awarding the contract for the operation of a route in the urban bus network of Helsinki to HKL.

### **Legal background**

#### *Community legislation*

Directive 92/50

3.

Article 1 of Directive 92/50 provides:

'For the purposes of this Directive:

(a) *public service contracts* shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of:

...

(ii) contracts awarded in the fields referred to in Articles 2, 7, 8 and 9 of Directive 90/531/EEC or fulfilling the conditions in Article 6(2) of the same Directive;

...

4.

Article 36 of Directive 92/50, headed 'Criteria for the award of contracts, reads as follows:

'1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting authority shall base the award of contracts may be:

(a) where the award is made to the economically most advantageous tender, various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, price; or

(b) the lowest price only.

2. Where the contract is to be awarded to the economically most advantageous tender, the contracting authority shall state in the contract documents or in the tender notice the award criteria which it intends to apply, where possible in descending order of importance.

Directive 93/38

5.

Article 2 of Directive 93/38 provides:

1. This Directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

(b) when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

2. Relevant activities for the purposes of this Directive shall be:

...

(c) the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service;

...

4. The provision of bus transport services to the public shall not be considered to be a relevant activity within the meaning of paragraph 2(c) where other entities are free to provide those services, either in general or in a particular geographical area, under the same condition as the contracting entities.

...

6.

Under Article 34 of Directive 93/38:

1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting entities shall base the award of contracts shall be:

(a) the most economically advantageous tender, involving various criteria depending on the contract in question, such as: delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance, commitments with regard to spare parts, security of supplies and price; or

(b) the lowest price only.

2. In the case referred to in paragraph 1(a), contracting entities shall state in the contract documents or in the tender notice all the criteria which they intend to apply to the award, where possible in descending order of importance.

...

7.

Article 45(3) and (4) of Directive 93/38 states:

'3. Directive 90/531/EEC shall cease to have effect as from the date on which this Directive is applied by the Member States and this shall be without prejudice to the obligations of the Member States concerning the deadlines laid down in Article 37 of that Directive.

4. References to Directive 90/531/EEC shall be construed as referring to this Directive.

*National legislation*

8.

Directives 92/50 and 93/38 were transposed into Finnish law by the Julkisista hankinnoista annettu laki (Law on Public Procurement) 1505/1992, as amended by Laws 1523/1994 and 725/1995 ('Law 1505/1992).

9.

Under Paragraph 1 of Law 1505/1992, State and local authorities and other contracting entities specified in the law must comply with the provisions of the law in order to create competition and ensure fair and non-discriminatory treatment of participants in tender procedures.

10.

Under Paragraph 2 of Law 1505/1992, contracting entities include municipal authorities.

11.

Paragraph 7(1) of Law 1505/1992 provides, first, that contracts are to be awarded as favourably as possible and, second, that the tender to be approved is the one which is cheapest in price or most advantageous in overall economic terms.

12.

Procedures for the award of public contracts in Finland are regulated in more detail by Regulation 243/1995 on supply, service and works contracts exceeding the threshold values and by Regulation 567/1994 on contracts of entities operating in the water, energy, transport and telecommunications sectors exceeding the threshold value, as amended by Regulation 244/1995 ('Regulation 567/1994).

13.

Paragraph 4(1) of Regulation 243/1995 excludes from the scope of that regulation contracts to which Regulation 567/1994 applies. Paragraph 1(10) of the latter excludes from its scope contracts to which Regulation 243/1995 applies.

14.

Paragraph 43 of Regulation 243/1995 provides:

'1. The contracting entity must approve either the tender which is economically most advantageous overall according to the assessment criteria for the contract or the tender which is lowest in price. Criteria for assessment of overall economic advantage may be, for example, the price, delivery period, completion date, costs of use, quality, life cycle costs, aesthetic or functional characteristics, technical merit, maintenance services, reliability of delivery, technical assistance and environmental questions.

...

15.

Similarly, Paragraph 21(1) of Regulation 567/1994 lays down that the contracting entity must approve the tender which is economically most advantageous overall according to the assessment criteria for the supply, service or works, or the tender which is lowest in price. Criteria for assessment of overall economic advantage may be, for example, the price, delivery period, costs of use, life cycle costs, quality, environmental effects, aesthetic and functional characteristics, technical merit, maintenance services and technical assistance.

### **The main proceedings and the questions referred for a preliminary ruling**

#### *Organisation of bus transport services in the city of Helsinki*

16.

It appears from the order for reference that the Helsinki city council decided on 27 August 1997 to introduce tendering progressively for the entire bus transport network of the city of Helsinki, in such a way that the first route to be awarded would start operating from the autumn 1998 timetable.

17.

- Under the rules governing public transport in the city of Helsinki, the planning, development, implementation and other organisation and supervision of public transport, unless provided otherwise, are the responsibility of the Joukkoliikennelautakunta (public transport committee) and the Helsingin kaupungin liikennelaitos (transport department of the city of Helsinki, 'the transport department) which is subordinate to it.
18. According to the regulations applicable, the commercial service committee of the city of Helsinki is responsible for decisions on awarding public transport services within the city in accordance with the objectives adopted by the Helsinki city council and the public transport committee. In addition, the purchasing unit of the city of Helsinki is responsible for carrying out operations relating to contracts for urban public transport services.
19. The transport department is a commercial undertaking of the municipality which is divided operationally and economically into four production units (buses, trams, metro, and track and property services). The production unit for buses is HKL. The department also includes a head unit, which consists of a planning unit and an administrative and economic unit. The planning unit acts as an order-placing office concerned with the preparation of proposals for the public transport committee, the routes to be put out to tender, and the level of service to be required. The production units are economically distinct from the rest of the transport department and have separate accounting and balance sheets.
- The tender procedure at issue in the main proceedings*
20. By letter of 1 September 1997 and a notice published in the *Official Journal of the European Communities* of 4 September 1997, the purchasing unit of the city of Helsinki called for tenders for operating the urban bus network within the city of Helsinki, in accordance with routes and timetables described in a document in seven lots. The main proceedings concern lot 6 of the tender notice, relating to route 62.
21. It appears from the documents in the case that, according to the tender notice, the contract would be awarded to the undertaking whose tender was most economically advantageous overall to the city. That was to be assessed by reference to three categories of criteria: the overall price of operation, the quality of the bus fleet, and the operator's quality and environment management.
22. As regards, first, the overall price asked, the most favourable tender would receive 86 points and the number of points of the other tenders would be calculated by using the following formula: Number of points = amount of the annual operating payment of the most favourable tender divided by the amount of the tender in question and multiplied by 86.
- 23.

- As regards, next, the quality of the vehicle fleet, a tenderer could receive a maximum of 10 additional points on the basis of a number of criteria. Thus points were awarded *inter alia* for the use of buses with nitrogen oxide emissions below 4 g/kWh (+2.5 points/bus) or below 2 g/kWh (+3.5 points/bus) and with external noise levels below 77 dB (+1 point/bus).
24. As regards, finally, the operator's quality and environment programme, additional points were to be awarded for various certified quality criteria and for a certified environment protection programme.
25. The purchasing office of the city of Helsinki received eight tenders for lot 6, including those from HKL and from Swebus Finland Oy Ab ('Swebus, subsequently Stagecoach Finland Oy Ab ('Stagecoach), then Concordia). The latter's tender comprised two offers, designated A and B.
26. The commercial service committee decided on 12 February 1998 to choose HKL as the operator for the route in lot 6, as its tender was regarded as the most economically advantageous overall. According to the order for reference, Concordia (then Swebus) had submitted the lowest-priced tender, obtaining 81.44 points for its A offer and 86 points for its B offer. HKL obtained 85.75 points. As regards the bus fleet, HKL obtained the most points, 2.94 points, Concordia (then Swebus) obtaining 0.77 points for its A tender and -1.44 points for its B tender. The 2.94 points obtained for vehicle fleet by HKL included the maximum points for nitrogen oxide emissions below 2 g/kWh and a noise level below 77 dB. Concordia (then Swebus) did not receive any extra points for the criteria relating to the buses' nitrogen oxide emissions and noise level. HKL and Concordia obtained maximum points for their quality and environment certification. In those circumstances, HKL received the greatest number of points overall, 92.69. Concordia (then Swebus) took second place with 86.21 points for its A offer and 88.56 points for its B offer.

*The proceedings before the national courts and tribunals*

27. Concordia (then Swebus) made an application to the Kilpailuneuvosto (Finnish Competition Council) for the decision of the commercial service committee to be set aside, arguing *inter alia* that the award of additional points to a fleet with nitrogen oxide emissions and noise levels below certain limits was unfair and discriminatory. It submitted that additional points had been awarded for the use of a type of bus which only one tenderer, HKL, was in fact able to offer.
28. The Kilpailuneuvosto dismissed the application. It considered that the contracting entity was entitled to define the type of vehicle it wanted to be used. The selection criteria and their weight had to be determined objectively, however, taking into account the needs of the contracting entity and the quality of the service. The

contracting entity had to be able, if necessary, to give reasons to justify its choice and the application of its criteria of assessment.

29.

The Kilpailuneuvosto observed that the city of Helsinki's decision to give preference to low-pollution buses was an environment policy decision aimed at reducing the harm caused to the environment by bus traffic. That did not constitute a procedural defect. If that criterion was applied to a tenderer unfairly, it was possible to intervene. The Kilpailuneuvosto found, however, that all the tenderers had the possibility, if they so wished, of acquiring buses powered by natural gas. It therefore concluded that it had not been shown that the criterion in question discriminated against Concordia.

30.

Concordia (then Stagecoach) appealed to the Korkein hallinto-oikeus to have the decision of the Kilpailuneuvosto set aside. It argued that awarding additional points to the least polluting and least noisy buses favoured HKL, the only tenderer which was able in practice to use a fleet which could obtain those points. It further submitted that, in the overall assessment of the tenders, no account can be taken of ecological factors which are not directly linked to the subject-matter of the tender.

31.

In its order for reference, the Korkein hallinto-oikeus states, first, that in order to decide whether Regulation 243/1995 or Regulation 567/1994 is applicable in the present case, it is necessary to examine whether the contract at issue in the main proceedings falls within the scope of Directive 92/50 or Directive 93/38. It notes that Annex VII to Directive 93/38 mentions, with respect to Finland, both the public or private entities which operate bus transport in accordance with the Laki luvanvaraisesta henkilöliikenteestä tiellä (Law on licensed passenger transport by road) 343/1991, and also the transport department which operates the metro and tram networks in Helsinki.

32.

It states, next, that examination of the case also requires the interpretation of provisions of Community law as to whether a municipality, when awarding a contract of the kind at issue in the main proceedings, may take account of ecological considerations concerning the bus fleet tendered. If Concordia's argument as regards the points awarded for the environmental criteria and in other respects were accepted, that would mean that the number of points obtained by its B offer exceeded the points obtained by HKL.

33.

It observes that Article 36(1)(a) of Directive 92/50 and Article 34(1)(a) of Directive 93/38 do not mention environmental questions in the list of criteria for determining the economically most advantageous tender. It notes that the Court has ruled in Case 31/87 *Gebroeders Beentjes* [1988] ECR 4635 and Case C-324/93 *Evans Medical and Macfarlan Smith* [1995] ECR I-563 that in selecting the most economically advantageous tender the contracting authorities are free to choose the criteria to be used in awarding the contract. Their choice may relate

only, however, to criteria designed to identify the most economically advantageous tender.

34.

It refers, finally, to the Commission's communication of 11 March 1988, 'Public Procurement in the European Union (COM(1998) 143 final), in which the Commission considers that it is legitimate to take environmental considerations into account for the purpose of choosing the economically most advantageous tender overall, if the organiser of the tender procedure itself benefits directly from the ecological qualities of the product.

35.

In those circumstances, the Korkein hallinto-oikeus decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Are the provisions on the scope of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors ..., in particular Article 2(1)(a), (2)(c) and (4), to be interpreted as meaning that that directive applies to a procedure of a city which is a contracting entity for the award of a contract concerning the operation of bus transport within the city, if

- the city is responsible for the planning, development, implementation and other organisation and supervision of public transport in its area,

- for the above functions the city has a public transport committee and a city transport department subordinate thereto,

- within the city transport department there is a planning unit which acts as an ordering unit which prepares proposals for the public transport committee on which routes should be put out to tender and what level of quality of services should be required, and

- within the city transport department there are production units, economically distinct from the rest of the transport department, including a unit which provides bus transport services and takes part in tender procedures relating thereto?

2. Are the Community provisions on public procurement, in particular Article 36(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts ... or the equivalent Article 34(1) of Directive 93/38/EEC, to be interpreted as meaning that, when organising a tender procedure concerning the operation of bus transport within the city, a city which is a contracting entity may, among the criteria for awarding the contract on the basis of the economically most advantageous tender, take into account, in addition to the tender price and the quality and environment programme of the transport operator and various other characteristics of the bus fleet, the low nitrogen oxide emissions and low noise

level of the bus fleet offered by a tendering undertaking, in a manner announced beforehand in the tender notice, such that if the nitrogen oxide emissions or noise level of the individual buses are below a certain level, extra points for the fleet may be taken into account in the comparison?

3. If the answer to the above question is affirmative, are the Community provisions on public procurement to be interpreted as meaning that the awarding of extra points for the abovementioned characteristics relating to nitrogen oxide emissions and noise level of the fleet is, however, not permitted if it is known beforehand that the department operating bus transport belonging to the city which is the contracting entity is able to offer a bus fleet possessing the above characteristics, which in the circumstances only a few undertakings in the sector are otherwise able to offer?

### **The questions referred for a preliminary ruling**

36.

It should be observed to begin with that, as may be seen from the order for reference, the arguments put forward by Concordia in support of its appeal to the Korkein hallinto-oikeus relate solely to the alleged unlawfulness of the points system for the criteria relating to the bus fleet specified in the invitation to tender at issue in the main proceedings.

37.

Thus by its second and third questions the national court essentially asks, first, whether Article 36(1) of Directive 92/50 or Article 34(1)(a) of Directive 93/38 permits the inclusion, among the criteria for the award of a public contract on the basis of the most economically advantageous tender, of a reduction of the nitrogen oxide emissions or the noise level of the vehicles in such a way that if those emissions or that noise level is below a certain ceiling additional points may be awarded for the comparison of tenders.

38.

It also asks, second, whether the rules laid down by those directives, in particular the principle of equal treatment, permit the taking into account of such criteria where it appears from the outset that the transport undertaking which belongs to the municipality organising the tender procedure is one of the few undertakings able to offer buses which satisfy those criteria.

39.

It is clear that the provisions of Article 36(1)(a) of Directive 92/50 and Article 34(1)(a) of Directive 93/38 have substantially the same wording.

40.

Moreover, as appears from the order for reference, there was no discussion in the main proceedings as to the national or Community legislation applicable.

41.

As may be seen from the wording of the first question, the Korkein hallinto-oikeus is not asking the Court about the applicability of Directive 92/50, but only about the applicability of Directive 93/38 to the main proceedings.

42.

It must therefore be considered, first, that the second and third questions relate to the compatibility with the relevant provisions of Directive 92/50 of award criteria such as those at issue in the main proceedings, and, second, that by its first question the national court essentially asks whether the answer to those questions would be different if Directive 93/38 were applicable. It follows that the second and third questions should be considered in turn, followed by the first question.

*The second question*

43.

By its second question, the national court essentially asks whether Article 36(1)(a) of Directive 92/50 is to be interpreted as meaning that, where in the context of a public contract for the provision of urban bus transport services the contracting authority decides to award that contract to the tenderer submitting the most economically advantageous tender, it may take into account the reduction of nitrogen oxide emissions or the noise level of the vehicles in such a way that, if those emissions are or that noise level is below a certain ceiling, additional points may be awarded for the purposes of comparing the tenders.

Observations submitted to the Court

44.

Concordia contends that in a public tender procedure the criteria for the decision must, in accordance with the wording of the relevant provisions of Community law, always be of an economic nature. If the objective of the contracting authority is to satisfy ecological or other considerations, recourse should be had to a procedure other than a public tender procedure.

45.

On the other hand, the other parties to the main proceedings, the Member States which have submitted observations and the Commission submit that it is permissible to include ecological criteria in the criteria for the award of a public contract. They refer, first, to Article 36(1)(a) of Directive 92/50 and Article 34(1)(a) of Directive 93/38, which list merely as examples factors which the contracting entity may take into account when awarding such a contract; next, they refer to Article 6 EC, which requires environmental protection to be integrated into the other policies of the Community; finally, they refer to the *Beentjes* and *Evans Medical and Macfarlan Smith* judgments, which allow a contracting entity to choose the criteria it regards as relevant when it assesses the tenders submitted.

46.

In particular, the city of Helsinki and the Finnish Government state that it is in the interest of the city and its inhabitants for noxious emissions to be limited as much as possible. For the city of Helsinki itself, which is responsible for protection of the environment within its territory, direct economies follow from this, especially in the medico-social sector, which represents about 50% of its overall budget.

- Factors which contribute even on a modest scale to improving the overall state of health of the population enable it to reduce its charges rapidly and to a considerable extent.
47. The Greek Government adds that the discretion given to the national authorities as to the choice of the criteria for awarding public contracts presumes that that choice is not arbitrary and the criteria taken into consideration do not infringe the provisions of the EC Treaty, in particular the fundamental principles enshrined in it, such as freedom of establishment, freedom to provide services and prohibition of discrimination on grounds of nationality.
48. The Netherlands Government states that the criteria for awarding public contracts applied by the contracting authority must always have an economic dimension. It contends, however, that that condition is satisfied in the main proceedings, as the city of Helsinki is both the contracting authority and the body with financial responsibility for environment policy.
49. The Austrian Government submits that Directives 92/50 and 93/38 introduce two essential restrictions on the choice of the criteria for awarding public contracts. First, the criteria chosen by the contracting entity must relate to the contract to be awarded and make it possible to determine the most economically advantageous tender for it. Second, the criteria must be capable of guiding the discretion of the contracting entity on an objective basis and must not include elements of arbitrary choice. Moreover, according to the Government, the award criteria must be directly linked to the subject-matter of the contract, have effects which can be measured objectively, and be quantifiable at the economic level.
50. Similarly, the Swedish Government submits that the contracting entity's choice is limited, in that the award criteria must be related to the contract to be awarded and suitable for determining the most advantageous tender from the economic point of view. It adds that the criteria must also be consistent with the Treaty provisions on the free movement of goods and services.
51. According to the United Kingdom Government, the provisions of Article 36(1) of Directive 92/50 and Article 34(1) of Directive 93/38 must be interpreted as meaning that, when arranging an award procedure for the operation of bus transport services, a contracting authority or entity may, among other criteria for awarding the contract, take environmental criteria into consideration for assessing the economically most advantageous tender, provided that those criteria allow a comparison of all the tenders, are linked to the services to be provided, and have been published beforehand.
52. The Commission contends that the criteria for the award of public contracts which may be taken into consideration when assessing the economically most advantageous tender must satisfy four conditions. They must be objective, apply

to all the tenders, be strictly linked to the subject-matter of the contract in question, and be of direct economic advantage to the contracting authority.

#### Findings of the Court

53.

Article 36(1)(a) of Directive 92/50 provides that the criteria on which the contracting authority may base the award of contracts may, where the award is made to the economically most advantageous tender, be various criteria relating to the contract, such as, for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, or price.

54.

In order to determine whether and under what conditions the contracting authority may, in accordance with Article 36(1)(a), take into consideration criteria of an ecological nature, it must be noted, first, that, as is clear from the wording of that provision, in particular the use of the expression 'for example, the criteria which may be used as criteria for the award of a public contract to the economically most advantageous tender are not listed exhaustively (see also, to that effect, Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 35).

55.

Second, Article 36(1)(a) cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature. It cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority. That conclusion is also supported by the wording of the provision, which expressly refers to the criterion of the aesthetic characteristics of a tender.

56.

Moreover, as the Court has already held, the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the free movement of services and goods (see, *inter alia*, *SIAC Construction*, paragraph 32).

57.

In the light of that objective and also of the wording of the third sentence of the first subparagraph of Article 130r(2) of the EC Treaty, transferred by the Treaty of Amsterdam in slightly amended form to Article 6 EC, which lays down that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities, it must be concluded that Article 36(1)(a) of Directive 92/50 does not exclude the possibility for the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender.

58.

However, that does not mean that any criterion of that nature may be taken into consideration by the contracting authority.

59.

- While Article 36(1)(a) of Directive 92/50 leaves it to the contracting authority to choose the criteria on which it proposes to base the award of the contract, that choice may, however, relate only to criteria aimed at identifying the economically most advantageous tender (see, to that effect, concerning public works contracts, *Beentjes*, paragraph 19, *Evans Medical and Macfarlan Smith*, paragraph 42, and *SIAC Construction*, paragraph 36). Since a tender necessarily relates to the subject-matter of the contract, it follows that the award criteria which may be applied in accordance with that provision must themselves also be linked to the subject-matter of the contract.
60. It should be recalled, first, that, as the Court has already held, in order to determine the economically most advantageous tender, the contracting authority must be able to assess the tenders submitted and take a decision on the basis of qualitative and quantitative criteria relating to the contract in question (see, to that effect, concerning public works contracts, Case 274/83 *Commission v Italy* [1985] ECR 1077, paragraph 25).
61. Further, it also appears from the case-law that an award criterion having the effect of conferring on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer would be incompatible with Article 36(1)(a) of Directive 92/50 (see, to that effect, *Beentjes*, paragraph 26, and *SIAC Construction*, paragraph 37).
62. Next, it should be noted that the criteria adopted to determine the economically most advantageous tender must be applied in conformity with all the procedural rules laid down in Directive 92/50, in particular the rules on advertising. It follows that, in accordance with Article 36(2) of that directive, all such criteria must be expressly mentioned in the contract documents or the tender notice, where possible in descending order of importance, so that operators are in a position to be aware of their existence and scope (see, to that effect, concerning public works contracts, *Beentjes*, paragraphs 31 and 36, and Case C-225/98 *Commission v France* [2000] ECR I-7445, paragraph 51).
63. Finally, such criteria must comply with all the fundamental principles of Community law, in particular the principle of non-discrimination as it follows from the provisions of the Treaty on the right of establishment and the freedom to provide services (see, to that effect, *Beentjes*, paragraph 29, and *Commission v France*, paragraph 50).
64. It follows from the above considerations that, where the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, in accordance with Article 36(1)(a) of Directive 92/50, it may take criteria relating to the preservation of the environment into consideration, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the

fundamental principles of Community law, in particular the principle of non-discrimination.

65.

With respect to the main proceedings, it must be stated, first, that criteria relating to the level of nitrogen oxide emissions and the noise level of the buses, such as those at issue in those proceedings, must be regarded as linked to the subject-matter of a contract for the provision of urban bus transport services.

66.

Next, criteria whereby additional points are awarded to tenders which meet certain specific and objectively quantifiable environmental requirements are not such as to confer an unrestricted freedom of choice on the contracting authority.

67.

In addition, as stated in paragraphs 21 to 24 above, the criteria at issue in the main proceedings were expressly mentioned in the tender notice published by the purchasing office of the city of Helsinki.

68.

Finally, whether the criteria at issue in the main proceedings comply in particular with the principle of non-discrimination falls to be examined in connection with the answer to the third question, which concerns precisely that point.

69.

Consequently, in the light of all the foregoing, the answer to the second question must be that Article 36(1)(a) of Directive 92/50 is to be interpreted as meaning that where, in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.

#### *The third question*

70.

By its third question, the national court essentially asks whether the principle of equal treatment precludes the taking into consideration of criteria concerned with protection of the environment, such as those at issue in the main proceedings, because the contracting entity's own transport undertaking is one of the few undertakings able to offer a bus fleet satisfying those criteria.

#### Observations submitted to the Court

71.

Concordia submits that the possibility of using buses powered by natural gas, which were in practice the only ones to meet the additional criterion of reducing

- the level of nitrogen oxide emissions and the noise level, was very limited. At the date of the invitation to tender, there was only one service station in the whole of Finland supplying natural gas. Its capacity enabled it to supply about 15 gas-powered buses. Shortly before the invitation to tender, HKL placed an order for 11 new gas-powered buses, which meant that the station's capacity was fully used and it was not possible to supply fuel to other vehicles. Moreover, the service station was only a provisional one.
72. Concordia concludes that HKL was the only tenderer which had a real possibility of offering gas-powered buses. It therefore proposes that the answer to the third question should be that awarding points according to the nitrogen oxide emissions and reduced noise levels of the buses cannot be permitted, at least in a case where not all the operators in the sector in question have, even theoretically, the possibility of offering services eligible for those points.
73. The city of Helsinki submits that it was not under any obligation to put its own bus transport services out to tender, either under Community legislation or under Finnish legislation. Since an award procedure always involves additional work and expense, it would have had no reasonable ground for organising that procedure if it had known that the undertaking it owns was the only one able to offer a bus fleet satisfying the conditions laid down in the tender notice, or if it had really wished to reserve to itself the operation of that transport.
74. The Finnish Government submits that assessing the objectivity of the criteria stated in the invitation to tender at issue in the main proceedings is ultimately a matter for the national court.
75. The Netherlands Government submits that it follows from the Court's case-law that the award criteria must be objective and that there must be no discrimination between tenderers. It says, however, that in paragraphs 32 and 33 of the judgment in Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697 the Court indeed held that where, following a procedure for the award of a public contract, only one tender remains, the contracting authority is not required to award the contract to the only tenderer judged to be suitable. But it does not follow that if, as a result of the award criteria applied, there is only one tenderer left, those criteria are unlawful. In any event, it is for the national court to determine whether, in the case at issue in the main proceedings, competition was in fact distorted.
76. According to the Austrian Government, the use of the award criteria at issue in the main proceedings may in principle be permitted, even in a case where, as here, only a comparatively small number of tenderers are able to satisfy those criteria. It appears, however, according to the Court's case-law (Case 45/87 *Commission v Ireland* [1988] ECR 4929), that there is a limit to the permissibility of certain minimum ecological standards where the criteria applied restrict the market for the services or goods to be supplied to the point where there is only one tenderer

- remaining. There is no indication, however, that that was the case in the main proceedings.
77. The Swedish Government submits that the taking into account of the criterion relating to nitrogen oxide emissions in the way in which this was done in the case at issue in the main proceedings meant that a tenderer which had buses powered by gas or alcohol was rewarded. According to the Government, there was nothing to prevent the other tenderers from acquiring such buses. They had been available on the market for some years.
78. The Swedish Government maintains that the award of additional points for low nitrogen oxide emissions and noise levels of the buses which the tenderer intends to operate does not constitute direct discrimination, but is applied without distinction. Moreover, it does not appear to be indirect discrimination, in the sense of necessarily having the effect of benefiting HKL.
79. According to the United Kingdom Government, Directive 93/38 does not prohibit the awarding of additional points in the assessment of tenders where it is known beforehand that few undertakings will be able to obtain those additional points, as long as the contracting entity has made it known at the stage of the tender notice that such additional points may be obtained.
80. The Commission considers that, in view of the divergent opinions of the parties in the context of the main proceedings, it is not in a position to determine whether the criteria which were applied breach the principle of equal treatment of tenderers. It is therefore for the national court to rule on that question and to determine, on the basis of objective, relevant and consistent evidence, whether those criteria were adopted with the sole purpose of selecting the undertaking which was eventually selected or were defined to that end.

#### Findings of the Court

81. It must be stated that the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives, which are intended in particular to promote the development of effective competition in the fields to which they apply and which lay down criteria for the award of contracts which are intended to ensure such competition (see, to that effect, Case C-243/89 *Commission v Denmark* [1993] ECR I-3353, paragraph 33).
82. Thus, according to the case-law cited in paragraph 63 above, the award criteria must observe the principle of non-discrimination as it follows from the Treaty provisions on freedom of establishment and freedom to provide services.
83. In the present case, it should be noted, first, that, as is apparent from the order for reference, the award criteria at issue in the main proceedings were objective and

- applied without distinction to all tenders. Next, the criteria were directly linked to the fleet offered and were an integral part of a system of awarding points. Finally, under that system, additional points could be awarded on the basis of other criteria linked to the fleet, such as the use of low-floor buses, the number of seats and tip-up seats and the age of the buses.
84. Moreover, as Concordia acknowledged at the hearing, it won the tender for route 15 of the Helsinki urban bus network, even though that invitation to tender specifically required the operation of gas-powered vehicles.
85. It must therefore be held that, in such a factual context, the fact that one of the criteria adopted by the contracting entity to identify the economically most advantageous tender could be satisfied only by a small number of undertakings, one of which was an undertaking belonging to the contracting entity, is not in itself such as to constitute a breach of the principle of equal treatment.
86. In those circumstances, the answer to the third question must be that the principle of equal treatment does not preclude the taking into consideration of criteria connected with protection of the environment, such as those at issue in the main proceedings, solely because the contracting entity's own transport undertaking is one of the few undertakings able to offer a bus fleet satisfying those criteria.

*The first question*

87. By its first question, the national court essentially asks whether the answer to the second and third questions would be different if the procedure for the award of the public contract at issue in the main proceedings fell within the scope of Directive 93/38.
88. On this point, it must be noted, first, that the provisions of Article 36(1)(a) of Directive 92/50 and Article 34(1)(a) of Directive 93/38 have substantially the same wording.
89. Second, the provisions concerning award criteria of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and those of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) also have substantially the same wording as those of Article 36(1)(a) of Directive 92/50 and Article 34(1)(a) of Directive 93/38.
90. It should be observed, third, that those directives taken as a whole constitute the core of Community law on public contracts and are intended to attain similar objectives in their respective fields.
- 91.

In those circumstances, there is no reason to give a different interpretation to two provisions which fall within the same field of Community law and have substantially the same wording.

92.

It should also be noted that the Court has already held, in paragraph 33 of *Commission v Denmark*, that the duty to observe the principle of equal treatment lies at the very heart of all the public procurement directives. The documents in the main proceedings have not disclosed anything to show that, as regards the contracting entity's choice of award criteria, the interpretation of that principle should depend in this case on the particular directive applicable to the contract in question.

93.

The answer to the first question must therefore be that the answer to the second and third questions would not be different if the procedure for the award of the public contract at issue in the main proceedings fell within the scope of Directive 93/38.

#### **Costs**

94.

The costs incurred by the Finnish, Greek, Netherlands, Austrian, Swedish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Korkein hallinto-oikeus by order of 17 December 1999, hereby rules:

**1. Article 36(1)(a) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts must be interpreted as meaning that where, in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.**

**2. The principle of equal treatment does not preclude the taking into consideration of criteria connected with protection of the environment, such as those at issue in the main proceedings, solely because the contracting entity's own transport undertaking is one of the few undertakings able to offer a bus fleet satisfying those criteria.**

**3. The answer to the second and third questions would not be different if the procedure for the award of the public contract at issue in the main proceedings fell within the scope of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.**

Rodríguez Iglesias

Jann

Macken

Gulmann

Edward

La Pergola

Wathelet

Schintgen

Skouris

Delivered in open court in Luxembourg on 17 September 2002.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President

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Language of the case: Finnish.