Social and Environmental Considerations: connecting with best value for money

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Ladies and gentlemen,

My presentation today will be about social and environmental aspects in the new directives on public procurement. I will try to show you in the limited time frame of ten minutes - a time frame I as an Italian normally should have difficulties to keep to - that the directives do not so much expand the influence of environmental and social considerations, but rather clarify the use of them in order to avoid legal uncertainty. In case you - especially in view of this early hour- will be put asleep by my presentation, you will at least remember this bottom line

Public procurement is about spending taxpayers' money. This distinguishes it from normal private procurement. Governments and government bodies (or, if you prefer, "contracting authorities") have to exercise special care when spending this money; it comes with a number of responsibilities.

The first of these responsibilities resides in the fact that contracting authorities have to obtain the best value for money. In the words of the Office of Government Commerce in the UK, best value for money is "the optimum combination of whole-life cost and quality to meet the user's requirement".

The principle of best value for money has been recognized in the new public procurement directives. For the first time, the preambles state explicitly this principle, which is generally considered to be one of the most fundamental rules for public expenditure.

Achieving best results in view of price/quality ratio goes hand in hand with other principles in public procurement. As public procurement is about spending taxpayers' money, the Commission, in its capacity as guardian of the Treaty, is very strict on safeguarding transparency, non-discrimination and proportionality in public procurement.

But the question is: can *making the most economical purchase* therefore be the only objective?

The answer is negative. Public procurement does not operate in a political vacuum. Many member states have discovered that the economic impact of their purchasing can also be used to achieve other objectives that are of great importance to them, such as social and environmental considerations.

It is for example reported that in more than three out of four procurement procedures contracting authorities practice green procurement at some level and that about 20% of these authorities do this in more than half of their procurement.

Contracting authorities feel that through these instruments they do not only set an example as responsible buyers, but that such purchases can also initiate or develop markets for responsible products and services.

The European legislators could not be deaf to these developments. Under article 6 of the EC Treaty EU institutions are obliged to integrate environmental considerations into the Community policies and regulations. This obligation also relates to the area of public procurement.

In theory, there is no problem. But the following, more difficult, question was: how to reconcile the objective of best value for money, which is clearly an objective of economic nature, with considerations of environment and social policy? How to manage the high, I would say natural, risk of discrimination between potential suppliers that the integration of such policies in public procurement would have implied?

In 2001, the Commission made a first clarification effort, and issued two Interpretative Communications explaining the legal possibilities to integrate respectively social and environmental considerations into public procurement procedures.

These clarifications were complemented by case law produced by the Court of Justice. Judgments in particular cases such as Concordia Bus and Wienstrom have provided further elements to take into account.

The finally agreed legal text, which is the result of a long conciliation between the Council and the Parliament, has achieved what I genuinely believe is a balanced compromise integrating different views on the subject. It facilitates the integration of social and environmental considerations into public procurement and preserves at the same time the primary objective of best value for money.

The added value of the legislative package is therefore its clarity. It has provided clear boundaries within which the Court can develop further case law. The new legislation enables us to rely less on ambiguous case law in this area, and more on legislation.

For every stage of the procurement process the new directives indicate explicitly possibilities and limitations. It starts with the **technical specifications**, with provisions requiring to take into account accessibility criteria for people with disabilities or explaining how environmental requirements can be fit into these specifications, including the usage of labels.

Regarding these labels, such as eco labels, energy efficiency labels or social labels, the package clearly prohibits contracting authorities setting requirements for the labels as such. They however are allowed to use the labels, where appropriate, as "inspiration" for drawing up the technical specification. This means they can use elements from these labels that comply with the provisions on technical specifications.

Contracting authorities can indicate consequently in the contract notice or the tender documents that the label that was the source of the requirement can serve as adequate means to proof compliance. However, tenderers who wish to prove equivalence but do not have the relevant label are open to provide proof by other appropriate means as well.

With regard to **selection criteria** the package demonstrates:

- how the violation of environmental and social laws can justify the exclusion of enterprises from the procurement procedure

or

- how specific circumstances can justify the requirement of additional means of proof in order to assess the tenderers technical capacity to perform environmental management measures required for the contract.

The **award criteria** have received quite some interest in the adoption of the legislative package. The attention did not concern the admissibility of social and environmental elements in the award criteria as this has already been acknowledged for quite some time on the basis of the case law of the Court.

For example, a contracting authority that wishes to purchase buses for its city transport is allowed to set criteria regarding the fuel consumption or the NOx emission levels. Also the contracting authority can decide to award additional points to a bidder offering buses which provide better access for elderly or handicapped people.

The focus of attention concerned rather the limits of these possibilities. The preambles of the directives offer detailed guidelines for the determination of these limits. They state the four principal conditions for the establishment of award criteria developed by the Court of Justice in the Concordia Bus case.

According to these conditions, the award criteria:

- have to be linked to the subject matter of the contract,
- must not confer unrestricted freedom to the contracting authority,
- have to be expressly mentioned and
- must comply with the principles of EU law.

Although not each and every criterion needs to have a direct economical impact, the award criteria taken as a whole must make it effectively possible to determine the most economically advantageous tender for the contracting authority.

Before concluding, I will not try to escape the question asked yesterday by Mr. Meyer, who raised the issue of "production methods". According to the preambles of the Directives (Recital 29) it is allowed to "lay down the environmental characteristics, such as a given production method" in the technical specification of a given contract. Mr Meyer was wondering to what extent contracting authorities are free to rely on this principle to determine what to buy.

According to article 23 (3) (b) of the new classical directive, all technical specifications that are not formulated by reference to standards have to be "sufficiently precise to allow tenderers to determine the subject matter of the contract". As production processes can be qualified as technical specifications this applies to them as well. This means in practice that they principally cannot concern any environmental consideration that is not linked to the subject matter of the contract.

I have come to the conclusion of my presentation.

I recognise that it is not an easy subject and sometimes to handle the theoretical issues in a concrete case can raise doubts.

The Commission is always available to provide guidance. It has already started, as mentioned yesterday by Mr Carsin, by issuing a Handbook on green procurement, an useful tool which offers concrete information to practitioners. It is available on our web site.

But please, do always bear in mind the following points, when asking questions to the Commission (and in particular to me during this session):

- the legislative package is not a regulatory instrument of the Commission. It is rather a legal text adopted by the European legislator, namely the Council and the Parliament, and

- the ultimate responsibility to interpret it, like every other legislative text, lies with the Court of Justice, not with us. We can always offer our views, our opinion, but last word is for the Court.

Many thanks for your attention.