Awarding of Public Contracts and Women's Interests

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In the furthering of real professional chances for women an important starting point is the allocation and award of public contracts. By this means, the state can manage influence to bear upon the strategic decisions of entrepreneurs in the private economy to the benefit of female employees. In respect to the individual assertion of the constitutional rights of equal opportunity in employment and of equal treatment the employer is sentenced to pay damages. Contrary the award of public contracts linked to certifiable equal opportunities measures within the tendering companies is suited to oblige them to reconsider the situation of female employees in their organisation by means of positive financial stimulation. Relating to equal opportunities at work frameworks, guidelines, directives and special recommendations exist under EC law. Since the Treaty of Amsterdam the EC decided to strive towards the eradication of inequality between men and women in all its activities. This principle of mainstreaming is not yet subsumed with the detailed regulation of the award of contracts under European law. In legal practice of several EC member states the consideration of social aims in the award of public contracts is established. In Austria this discussion was precipitated as a result of a women's referendum in 1997. Now it is possible to review and consider equal opportunity measures in companies tendering for public contracts beneath the treshholdvalue that is determined by the EC contracts award directive. A clearly defined legal regulation was brought to a stop by the Austrian conservative party, although the law relating to the award of contracts already recognised contract clauses with - for example - ecological goals. The former minister for women's affairs was able to push through guidelines for the award of contracts at least for the five Austrian ministries under the control of social democrats. The guidelines have remained valid after the last elections and the following change of government. The guidelines have especially two points of leverage:

- Organisations, firms tendering for contracts have to give a declaration that they will observe the constitutional right to equal treatment. Legally valid court verdicts in respect to slighting the right of equal treatment have to be made public under threat of fines for breach of contract.
- Tenderers for contracts have to declare their currently valid measures towards equal opportunities within their organisation, firm, and they are under threat of fines for breach of contract in case of false declarations.

Through comparing the prices / costs, the cheapest offer is determined whereby the declarations of equal opportunity measures are rated according to a system of scores in accordance to which price bonusses are subtracted from the original offers. Experience already shows that entrepreneurs use the opportunity to publicise their equal opportunity measures, consider the situation of female employees within their organisation firm, and take equal opportunities measures into consideration in their administrative planning. As a result of decentralised responsibilities the award of public contracts is

organised differently in the different corporate bodies. Therefore it is difficult to determine the number of contracts awarded in connection with equal opportunity measures. However, experience shows that particularly the organisations, firms offering the best price / performance ratio in their tenders also declare their equal opportunity measures which then are not brought to bear in the bonus system. The case of a tenderer getting a contract as a result of the bonus achieved through the equal opportunity measures remains an isolated example. The number of female employees who actually benefit from equal opportunity measures within these organisations, firms cannot be exactly determined since such information is not required to be declared. Anna Sporrer comes to the conclusion, only if a clear competitive advantage from equal opportunity measures will have been established there will be a far-reaching effect upon the inclination of organisations and companies to pursue equal opportunity aims.

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A Statement of the German Point of View

For more than ten years the German Association of Women Lawyers has drawn the attention of the legislative to the necessity of making headway in equal opportunities within the private economy through a combination of the award of public contracts with equal opportunity measures and also with measures for furthering family policy. In contrast to the public service, in private economy financial incentives are the instrument of choice and of last resort. Developments in the United States of America show that changes in reality in organisations in regard to equal opportunities can only become palbable and mensurable by these means. External incentive systems lead to the creation of internal systems of incentives in which men may have to be rewarded for furthering women's interests, or be punished for omitting efforts. The figures showing the increasing proportion of women in us-management document the success of these strategies. In order to determine the influence upon companies of conditions of contract allocation combined with equal opportunities policy in the award of public contracts, it is necessary to refer to article 9 AGBG (Gesetz zur Regelung des Rechts der Allgemeinen Geschaftsbedingungen), the German law which regulates the general terms and conditions of trade. According to this law, the contract partner may not be made to suffer undue extra cost and risks of possible costs due to the conditions of allocation. Above and beyond this regulation there are no further reasons against the establishment of conditions of contract allocation, condition of trade allocation which are combined with equal opportunities policy, just as there are legal scruples against contract allocation conditions combined with ecological aims. At the EC level a directive to equal opportunities within the framework of public contract allocation would be desirable. Until this happens, the project of making the allocation of public contracts dependent of certifiable equal opportunity measures can cite the Beentjes-verdict of the European Court. In this decision the European Court found that the inclusion of social criteria in the conditions of contract allocation concurs with E.U. law. This newly established principle leads to further principles. Social criteria have to fulfill the following norms:

- be independent of any assessment of the capability of a tenderer to carry out the contract,
- be concurrent with the principles of EC law in each individual case,

- intend to fulfill aims in the territory of the state which is offering the public contract.

The catalogue of conditions of contract allocation, which has been suggested by the German Women Lawyers Association, fulfills these norms as precondition. The measures suggested extend from legally binding targeting of promotion and employment in areas where women are underrepresented, take in quoted training places and include family-compatible working hours, internal and external child-care or the avoidance of an overproportional reduction of women employees by cases of redundancy. It is recommended that the measures should be chosen and implemented by the companies own discretion and according to the size of the company. A minimum contract volume of DM 10000, less than 5000 Euros, is proposed in the interest not only of efficiency but also to include small and middle-sized companies. A limitation of the legal obligations of the contracting companies by high-volume contracts would be counterproductive. A "minimal solution" could be taken into consideration in which a national regulation confines the obligatory certification of equal opportunity policies to inland companies. Such a regulation would be concurrent with EC law, as the European Court verdict from February 28th in 1991 confirms. The court found that an obligation only of inland Brewers to conform to mediaeval standards was permissible on the grounds that EC law solely protects the freedom of trade between the member states and not within their inland market. The German Association of Women Lawyers favours the "maximum solution" upon EC level by means of the conclusion of a directive in which the securing of equal opportunities as a permissible criterion for the allocation of public contracts will be expressly established. All the more so since the Commission, in it`s evaluation of the Beentjes verdicts and its memorandum of March 11th, 1998, to the question of public contracts, has conceded that it does not represent a problem when the allocation of public contracts is combined with the obligation to employ a certain percent figure of women, or to exclude candidates tendering for public contracts who violate against sex equality laws. Using these channels, it should be possible to oblige the organisations and institutions of the public service who offer contracts to tender, to realise aims of social policy and sex equality within the formal terms for the conclusion and award of public contracts.

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Christa Tobler uses the term "women's clauses" to describe the conditions of contract in which - within the framework of the allocation of public contracts - certain measures towards equal opportunity of employment are defined as a precondition for the conclusion of public contracts. In order to check if EC law permits such clauses it is necessary to take two legal principles into consideration. Of immediate relevance is the Treaty of the European Union itself. Although the Treaty does not expressly mention public procurement, all of the instruments and regulations, which prevent distortion of free competition within the common market, can be consulted in order to check the permissibility of terms of contract - for instance the prohibition of restrictions in free movement. Of primary relevance however are the regulations of equal treatment of women and men, especially the newly-created article 141 (4) of the Treaty. The article has not yet been cited in any verdict of the European Court. The question remains

open if the European Court will interpret article 141 (4) in the same way as it did in the Kalanke, and Marshall decisions relating to article 4 (2). In these cases the court ruled that an automatic and unqualified preference of women within the framework of a quota agreement was not permissible without a specific clause of access enabling special circumstances to be considered under which a male candidate could be drawn into consideration. The eventual interpretation and possible restriction of scope of article 141 (4) of European Treaty by the European Court, will be relevant for the implementation of women's clauses in public contracts. Additionally, there are a number of directives, which are in force at the EC level, which especially refer to the coordination of award of public contracts. All the directives have a restricted sphere of implementation. The restrictions are related to the kind of contract, to the public bodies, which draw up the contract, and to the financial volume of the contract. Insofar as a contract does not lay in one of these particular spheres of implementation, then the regulations of the European Treaty are valid. The European Court has repeatedly confirmed that every examination of the legality of a contractual or legal regulation has to be effected either in comparison with the relevant directive or with the European Treaty. Since it is not to be excluded that a decision is made with reference to both, directives and Treaty, it would seem to be expeditous to remember both sources of law. The directives for coordination of the process of the allocation and award of public contracts do not contain in themselves any regulations for equal opportunities. The coordination directives distinguish between the obligation to announce calls for tender in the publications of the EC, and the criteria for the suitability of tenderers and for the award of contracts. By closer examination of the jurisdiction referring to the directives, it would seem that the system of criteria for contract allocation and award is conclusively regulated. Taking the directive for building contracts as an example, by the criteria for selection of contractors and for award of contract in practice only those contractors could be taken in consideration who fulfill the conditions of suitability in terms of their technical ability to fulfill the contract, and those who fulfill the conditions of economic efficiency or offer the lowest price in their tender for the contract. In reality however, the directive allows in fact some room for maneuver, since - although the established criteria are clearly stated - the evaluation scores, which the administration uses to judge the economic and financial performance of the tendering con-tractors, are not closely codified or specified. Nor are the criteria for the definition of the lowest price conclusively and exhaustively established within the directive. Although none of the directive criteria for selection and award of contractors and contracts are based upon social considerations, this does not mean that such considerations are excluded. This is made clear for instance in a ruling concerning the award of public building contracts which permits the exclusion of tendering firms in which serious management mistakes have been proved. The possibility of including social aspects in contracts is not expressly excluded in the directives. The question arises if social clauses are possible including women's clauses, beyond the already mentioned restricted framework. Until now the question remains unanswered. In the Beentjes case the European Court found a social condition within the contract as being fundamentally lawful. In this case, a procentual employment of long-term unemployed was made a requirement to the conclusion of a contract. The court confirmed that the relevant directive referring to selection of contractors and award of contracts formed a closed system. The court, however, held the contract condition in question neither for a condition of contractor selection nor for a condition of contract award. Instead the court repeated its already known point of view that the directive has no exhaustive legal authority in

relation to conditions of contract, which are more extensive in scope than the regulations of the directive. The result of this non-exhaustive character in practice is that an agreed condition of contract is still compatible with EC law - if the condition does not concord with any of the categories named within the directive, and if the condition neither directly nor indirectly leads to a discriminatory effect upon contract tenderers of other member states. This court decision has led to much confusion. It appears not to be compatible with the jurisdiction of the European Court in relation to the closed systems of the contractor selection and contract award criteria. Several authors have interpreted the Beentjes verdict to the effect that the European Court has established a "third category" or chosen a "third way". The repercussions of the Beentjes verdict have been qualified through subsequent decisions of the court - without resolving the question of principle: how and under what circumstances additional conditions of contract can be seen as being legal. With the European Court decision, the Commission against Italy in 1992, the court found a condition of contract to be not legitimate which favoured mergers to several contractors who, on the one hand, had combined their resources at very short notice, and, on the other hand, carried out their main activities in the region in which the building contract was to be carried out. With the decision of the European Court, the Commission against Italy in 1994, the court rejected a condition of contract for provision of a lottery computer system, since only groups, companies, and consortiums were allowed to tender bids whose main capital stock was in public hand. However both decisions deal with conditions in reference to the contract parties. This corresponds to the selection category of the directive. Therefore these decisions of the European Court do not gainsay the basic permissibility of a "third category". Such a "third category" would contain contract conditions, which have neither to do with selection criteria nor with conclusion, allocation nor award criteria. In the European Court decision, the Commission against Spain in 1993, the court refused to recognise the legality of a condition of contract under which the parties were obliged to dis-close their balances. This is also to be understood as a decision about the impermissibility of a condition of contract in reference only to the contract parties. It does not touch upon the basic permissibility of conditions of contract of any "third category". Such conditions are not excluded when they are distinguished from the criteria of selection of contractors and criteria for the award of contracts. As such they can be determined from administrations drawing up con-tracts for example as an ecological or social condition for the conclusion of contracts. In a statement, the EC Commission has expressly encouraged the member states to use the allocation of public contracts to fulfill social aims. Moreover, the Commission has intimated the intention to establish principles for the implementation of social goals by the allocation of public contracts. The opinion of the commission is not binding for the European Court, nevertheless the Com-mission befits the role of a watch-dog of the EC - especially in connection with violations of EC contract laws. In the past the European Court has taken the views of the Commission into consideration, and it cannot be said in principle that the "soft law" of the Commission has no influence in the interpretation of "hard law". The Amsterdam Treaty, the regulation of article 3 (2) gives the Commission new incentive, since here it is established that the EC shall have the goal to abolish of sex inequality and that it should promote equality between men and women. Here we are dealing with an imperative and not an option. The principle of the effective market will shift - a bit - into the background. Whoever wishes to maintain the effective market as the main goal can only do so at the price of ignoring anti-discrimination and sex equality laws.