

# **Green Public Procurement in the European Union and the Use of Eco-Labels**

State aid & Public procurement in the European Union

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**Abstract:** Since the end of the last century the European Commission has taken initiative regarding the protection of the environment. Furthermore, a clear majority of the Union's citizens perceive the protection of the environment as one of the Union's key priorities. Spending by public authorities plays an important role in the overall economic performance and represents a significant market portion that is currently estimated at 18% of GDP on supplies, works and services. Therefore, Green Public Procurement (GPP) has become more relevant and an important policy instrument in attaining environmental targets. The main focus of this paper will be on the use of eco-labels under the new public procurement directives, which have recently been adopted. The overarching question raised throughout this paper regards the possible changes the adoption of the new public procurement directives might bring towards the use of eco-labels within public procurement. Nevertheless, as long as there is no obligation towards buying green, the process of green procuring remains dependent on the goodwill of the Member States. It remains to be seen whether the new procurement Directive will stimulate GPP and the use of eco-labels.

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## 1. Introduction

The protection of environment has been a key priority of the European Commission for the last few decades. Due to environmental concerns relating to resource efficiency and climate change this priority has become of even more importance. Government public procurement plays an important role in the overall economic performance of the European Union (EU) and represents a significant market portion. Therefore, Green Public Procurement (GPP) has become more relevant and an important policy instrument in attaining environmental targets. The paper is divided into 5 chapters and aims to describe the different aspects of GPP. The main focus will be on the use of eco-labels under the new public procurement directives, which have recently been adopted. The overarching question raised throughout this paper regards the possible changes the adoption of these directives might bring towards the use of eco-labels within public procurement.

The following chapter provides a brief introduction to GPP, the definition thereof, the existing case law of the Court of Justice of the European Union (CJEU) and finally, the '2020 strategy'. The third chapter will focus on different types of eco-labels, their characteristics, objectives and most importantly, the actual specifications. The chapter will explain the difference between international, European and national eco-labels. Furthermore, it will elaborate specifically on the European eco-labels, the EU Ecolabel and private Dutch labels of Max Havelaar and EKO. The fourth chapter dives into the detailed comparison between the new and old public procurement directives, focusing again on the use of eco-labels. The comparison between the new and old regimes will include the use of eco-labels in the technical specifications, award criteria and the performance conditions. The fifth chapter provides a case study of a leading case of the CJEU regarding eco-labels and public procurement, the *Max Havelaar* case. The chapter will examine whether the judgment of the CJEU would have been different under the new procurement Directive and what could be the implications of the judgment in the future. Lastly in the final chapter, there will be an overall assessment of the afore-mentioned and cautious predictions of the future.

## 2. Overview of GPP

This Chapter will provide a brief introduction to GPP through looking at the definition and the existing case law of the CJEU. Finally, the ‘2020 strategy’ will be shortly discussed.

### *2.1. Government as green buyer: What is GPP?*

Since the end of the last century the European Commission has taken initiative regarding the protection of the environment.<sup>1</sup> Furthermore, a clear majority of the Union’s citizens perceive the protection of the environment as one of the Union’s key priorities.<sup>2</sup> Spending by public authorities plays an important role in the overall economic performance and represents a significant market portion that is currently estimated at 18% of GDP on supplies, works and services.<sup>3</sup> Public procurement is an instrument to stimulate the process where governments and regional and local public authorities or other bodies governed by public law purchase products, services or works.<sup>4</sup> Therefore, public procurement has a significant influence on production and consumption.

The Commission highlighted already in 2003 the importance of this policy instrument with regard to social and environmental considerations and introduced the concept of GPP in the EU.<sup>5</sup> In its 2008 Communication, the European Commission defined GPP as "a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life-cycle when compared to goods, services and works with the same primary function that would otherwise be procured". In the same communication the Commission set an indicative target that, by 2010, 50% of all public tendering procedures should be green in the EU, where ‘Green’ means being in compliance with endorsed common core EU GPP criteria for ten priority product or service groups such as construction, transport, cleaning products and services.<sup>6</sup> By 2012, only three Member States had reached this target.<sup>7</sup> However, the EU is going into the right direction by having

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<sup>1</sup> <http://www.ieep.eu/work-areas/governance/environmental-action-programmes/> (last retrieved 28.05.2014).

<sup>2</sup> See Eurobarometer Report “Attitudes of European citizens towards the environment” (March 2008) – 78% of respondents agreed with the statement “The EU should allocate more money to the protection of environment, even if this means that less money is spent on other areas.” The Report also found that Europeans widely support the idea of green procurement in public expenditure: nearly three-quarters think that public authorities should purchase more environmentally friendly products, even if they are more expensive than corresponding products.

<sup>3</sup> COM(2011) 896 final, p. 2.

<sup>4</sup> Art. 1(2) Directive 2014/24/EU.

<sup>5</sup> COM(2008) 400 final.

<sup>6</sup> [http://ec.europa.eu/environment/gpp/studies\\_en.htm](http://ec.europa.eu/environment/gpp/studies_en.htm), (last retrieved 28.05.2014).

<sup>7</sup> See Annex I.

recently adopted three new directives expanding the possibilities to employ environmental considerations.<sup>8</sup> The key motivation driving the GPP scheme is to provide guidance on how to reduce the environmental impact caused by public sector consumption and to use GPP to stimulate innovation in environmental technologies, products and services.<sup>9</sup> Although GPP is a voluntary instrument, Member states have been keen to adopt it. However, the application and thus the impact vary from one member state to the other.<sup>10</sup>

## 2.2. Development of GPP through case law

Since the end of the 1990's, the CJEU has given a handful of relevant judgments dealing with the incorporation of social and environmental criteria in the public procurement procedure. The most relevant judgments will be presented below briefly and the leading case of *Max Havelaar* regarding the use of eco-labels will be thoroughly explained in chapter 5. The reason to start with cases regarding social criteria relates to the fact that in these cases the CJEU concluded for the first time that other criteria *besides* purely economic considerations could be taken into account in the procurement procedure.<sup>11</sup> In addition, as will be provided in chapter 5, the CJEU considered the Max Havelaar eco-label to have more social than environmental characteristics.

### 2.2.1. The *Beentjes* case

*The Beentjes*<sup>12</sup> case deals with a public invitation to tender in the field of construction. The contract required that tenderers had to employ a certain number of long-term unemployed persons. Beentjes submitted the lowest bid, however the contracting authority did not consider Beentjes to be in a position to meet the employment requirement, hence its bid was rejected. The directive in force at the time did not explicitly provide for social considerations to be taken into account. The CJEU found that the obligation to employ long-term unemployed persons was neither a suitability criterion used to assess the tenderer nor an award criterion.<sup>13</sup> However, since Directive 71/305/EEC does 'not laydown a uniform and

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<sup>8</sup> Directive 2014/23/EU, Directive 2014/24/EU, Directive 2014/25/EU.

<sup>9</sup> AEA Group, *Assessment and Comparison of National Green and Sustainable Public Procurement Criteria and Underlying Schemes*, Report to the European Commission, Final Report, ENV.G.2/SER/2009/0059r, p.68.

<sup>10</sup> See AEA Group, *Assessment and Comparison of National Green and Sustainable Public Procurement Criteria and Underlying Schemes, Report to the European Commission*, Final Report, ENV.G.2/SER/2009/0059r, p. v, vi and vii.

<sup>11</sup> Case C-31/87 *Gebroeders Beentjes BV v. Netherlands* [1998] ECR I-4635, para. 37.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, para. 28.

exhaustive body of Community rules'<sup>14</sup>, it does not exclude such a criteria, as long as the criteria employed is not directly or indirectly discriminatory to tenderers from other Member States

### 2.2.2. The *Nord-Pas-de-Palais* case

The case of *Nord-Pas-de-Palais*<sup>15</sup> also dealt with social criteria and the employment of long-term unemployed persons. The contracting authority used this requirement as a criterion for the award of the contract. However, unlike in the *Beentjes* case, the CJEU did not consider the criterion in question to be a special condition relating to the performance of the contract. Nevertheless, by establishing that the criterion had been 'used as a basis for rejecting a tender', it could be regarded as a suitability criterion, however the Court ultimately decided to classify it as an award criterion.<sup>16</sup> In essence, the CJEU referred to its *Beentjes* judgement, underlining that reliance on such a criterion is compatible, as long as the fundamental principles are observed. Criterion with social characteristics has to be consistent with the principle of non-discrimination and must have been clearly indicated in the contract notice.<sup>17</sup>

### 2.2.3. The *Concordia Bus* case

The case of *Concordia Bus Finland*<sup>18</sup> concerns environmental criteria used in public procurement procedure by the municipality of Helsinki. The award criteria included in addition to the overall price for the line operation the quality of the vehicle fleet in terms of nitrogen oxide and noise emissions. The company Concordia Bus Finland had submitted the tender with the lowest price, however, the contract was awarded to a tenderer whose tender had the lowest nitrogen oxide and nose emissions. The CJEU created a test that needs to be applied whenever contracting authority decides to award a contract to economically most advantageous tender taking into account criteria relating to the preservation of the environment. There are four conditions that the criteria need to fulfill:

- It must be linked to the subject matter of the contract;
- It cannot confer an unrestricted freedom of choice on the authority;
- It must be expressly mentioned in the contract documents or the tender notice and;

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<sup>14</sup> Ibid., para. 20.

<sup>15</sup> Case C-225/98 *Commission v. France* [2000] ECR I-7445.

<sup>16</sup> Ibid., para. 52.

<sup>17</sup> Ibid., para. 53.

<sup>18</sup> Case C-513/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v. Helsingin kaupunki and HKL-Bussiliikenne* [2002] ECR I-07213.

- It must comply with the fundamental principles of Community law, in particular the principle of non-discrimination.<sup>19</sup>

#### 2.2.4. The *ENV & Wienstrom* case

In the *ENV & Wienstrom* case<sup>20</sup> the CJEU had to decide whether an award criterion, concerning a weighting 45% of the overall criteria and which required the energy supplied to be produced from renewable sources, was compatible with EU public procurement rules. The Court found that use of renewable sources of energy and its weighting at 45% is in principle compatible with European law.<sup>21</sup> However, the problem with the award criterion in this case was that it related only to the amount of energy produced from renewable sources *in excess* of the expected annual consumption. Therefore, it was not related to the service, which was the subject matter of the contract.<sup>22</sup> The CJEU hence reaffirmed the requirement established in *Concordia Bus* that, in order for the award criterion to be compatible with EU law, there must exist a link between the criterion and the subject-matter of the contract.

### 2.3. Europe 2020

Europe 2020 is the ten-year strategy for growth in the European Union.<sup>23</sup> Besides overcoming the economic and financial crisis, this strategy lays down the conditions for a different growth model, which aims to turn the Union into a smart, sustainable and inclusive economy.<sup>24</sup> Ergo, creating the conditions for a different growth model. To give concrete meaning to this, Europe 2020 sets out five headline targets; climate and energy, employment, education, research and innovation, social inclusion and combating poverty, and education. These headline targets are supported by seven flagship initiatives of which the EU and the Member States mutually take efforts to meet the conditions set out in the strategy. One of these initiatives is the effort to resource efficiency, which supports the shift towards a low-carbon, resource-efficient economy.<sup>25</sup> As a consequence, the Commission proposed for the reform of the procurement directives.<sup>26</sup> The 2020 strategy seeks to the use of environmental

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<sup>19</sup> Ibid., para. 64.

<sup>20</sup> Case 448/01 *ENV AG and Wienstrom GmbH v. Republik Österreich* [2003] ECR I-14558.

<sup>21</sup> Ibid., paras. 34 & 43.

<sup>22</sup> Ibid., para. 66.

<sup>23</sup> COM(2010) 2020 final.

<sup>24</sup> Ibid., p. 5.

<sup>25</sup> Ibid., p. 6.

<sup>26</sup> See paragraph 4.1.



characteristics in public procurement.<sup>27</sup> In 2014, the Commission published a Communication in which it analysed the objectives from the Europe 2020 strategy and the flagships initiatives.<sup>28</sup> There were mixed experiences with the objectives and initiatives set out in the strategy.<sup>29</sup> While, the education, climate and energy intermediate targets were met or came close, the other targets were not met. The failure of certain objectives and initiatives to be successful is partly due to the financial crisis. Other challenges or trends show that the Europe 2020 strategy needs to be reviewed. The Commission did not propose in its Communication any recommendations, but sees the necessity to launch a EU-wide consultation with stakeholders to take the next stages.

### **3. Eco-labels**

#### *3.1. Introduction to eco-labels*

The new Public Procurement Directive allows the use of eco-labels, but what are they and where do they stand for? In this chapter the characteristics of eco-labels will be investigated. First, the emergence and objectives of eco-labels will be discussed before focussing on its objectives and characteristics. There are many labels giving certain information about the product or service, but it is not always clear which criteria they are subject to and who determines them. The following sub-chapter will discuss the different types of eco-labels that are used within the European Union and special attention will be given towards the EU Ecolabel. Thirdly, the private eco-labels of Max Havelaar and EKO will be only shortly discussed, as they will be extensively treated in the fifth chapter. Finally, an analysis of the expected influence of the use of eco-labels under the new public procurement Directive will be made. However, these are only estimations as it is still too early in time to know the real effect of the new measures.

#### Origins of Eco-labelling: Environmental Concern

Since the seventies, a growing global concern for environmental protection by governments, businesses and the general public can be seen. In meanwhile, also commercial enterprises recognize that environmental concerns could be translated into a market advantage for certain products. A new trend, mostly in developed countries, can be seen with regard to a new bottom line for policy makers of public authorities as well as entrepreneurs: besides aiming at

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<sup>27</sup> Kunzlik 2013, p. 176.

<sup>28</sup> COM(2014) 130 final/2.

<sup>29</sup> Ibid., p. 21.

the financial most advantageous option, the environmental and social performance is increasingly taking into account (the so-called 3BL: triple bottom line)<sup>30</sup>. However, buying 'green' is not so evident as it may seem: first, a procurer needs to know which environmental criteria to use or emphasize and, second, how to find and verify products and services actually meeting these criteria. Generally spoken, most procurers do not have typically expertise in this area.<sup>31</sup>

### Eco-labelling and its Objectives

With many products and services making green claims, it can be difficult to know which of them can be trusted. Eco-labels<sup>32</sup> have been introduced in order to guarantee and facilitate the process of procuring more goods, services and works with reduced environmental impact insights. Generally spoken, a label indicates certain information about a product, e.g. its origin or assets, in order to give the consumer enough information to decide if they want to buy and/or being associated with it. The same is true for an eco-label, which guarantees that a product or service is less harmful to the environment than comparable quality products or services on the basis of a number of predetermined criteria. According to the International Organization for Standardization (ISO), the overall goal of labelling is:

[...] through communication of verifiable and accurate information, that is not misleading, on environmental aspects of products and services, to encourage the demand for and supply of those products and services that cause less stress on the environment, thereby stimulating the potential for market-driven continuous environmental improvement.<sup>33</sup>

One speaks often about 'environmentally friendly' or 'green' products, as the aim is to reduce the negative impact of consumption and production on the environment, health, climate and natural resources<sup>34</sup>. Today, there are worldwide 448 eco-labels in 197 countries and 25 industry sectors to be found according to the global directory of eco-labels Ecolabel Index.<sup>35</sup>

To sum up the major benefits of eco-labels:

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<sup>30</sup> Brown, D., Dillard, J., Marshall, R.S., *Triple Bottom Line: A business metaphor for a social construct*, Portland State University, School of Business Administration 2006, <http://www.recercat.net/bitstream/handle/2072/2223/UABDT062.pdf;jsessionid=D2F0EBB5B125337F87E37FCFAD328D11.recercat2?sequence=1> (last retrieved: 21.05.2014).

<sup>31</sup> European Commission, Green Public Procurement and the European Ecolabel – Fact sheet, [http://ec.europa.eu/environment/gpp/pdf/toolkit/module1\\_factsheet\\_gpp\\_policy.pdf](http://ec.europa.eu/environment/gpp/pdf/toolkit/module1_factsheet_gpp_policy.pdf) (last retrieved 21.5.2014).

<sup>32</sup> The first and oldest label is the German label Blue Angel created in 1978, see [http://www.blauer-engel.de/en/blauer\\_engel/](http://www.blauer-engel.de/en/blauer_engel/).

<sup>33</sup> Global Ecolabelling Network (GEN) Information paper: *Introduction to Ecolabelling*, [http://www.globalecolabelling.net/docs/documents/intro\\_to\\_ecolabelling.pdf](http://www.globalecolabelling.net/docs/documents/intro_to_ecolabelling.pdf), p. 1, (last retrieved 21.5.2014).

<sup>34</sup> Recital 5, Regulation 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel [2010] OJ L 27/1.

<sup>35</sup> <http://www.ecolabelindex.com/>, (last retrieved: 21.05.2014).

### Environmental effect by informing consumer choice and raising awareness.

Eco-labeling is an effective way of informing public and private customers about the environmental impacts of selected products, and the choices they can make. They can empower people to choose between products that are harmful to the environment and those that are more compatible with environmental objectives.

### Promoting economic efficiency

Eco-labeling is generally cheaper than regulatory controls. By empowering customers and manufacturers to make environmentally supportive decisions, the need for regulation is kept to a minimum. This is beneficial to both government and industry.

### Social- Health benefits

Eco-labels are helpful to establish high environmental performance standards for products and services that improve the quality of life.

### Encouraging continuous improvement and market development

By choosing eco-labeled products, consumers have a direct impact on supply and demand in the marketplace and leads towards greater environmental awareness. In a dynamic market, eco-labeled products encourage a corporate commitment to continuous environmental improvement and innovation.

### Promoting certification

Eco-labeling provides customers with visible evidence of the product's desirability from an environmental perspective. Certification can be seen as an educational role for customers and at the same time promoting competition among manufacturers.

### Assisting in monitoring

Official eco-labeling programs encourage the monitoring of environmental claims more easily. Competitors and customers are in a better position to judge the validity of a claim, and will have an incentive to do so should a claim appear dubious.<sup>36</sup>

## Characterisation of Eco-labels

Making use of an eco-label is on a voluntary basis and has the advantage that it specifies that the product or service is in some way superior to non-labelled products. However, a specific

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<sup>36</sup> [http://www.iisd.org/business/markets/eco\\_label\\_benefits.aspx](http://www.iisd.org/business/markets/eco_label_benefits.aspx);  
[http://ec.europa.eu/environment/gpp/benefits\\_en.htm](http://ec.europa.eu/environment/gpp/benefits_en.htm).

problem of eco-labelling is assessing equivalent standards. Globally the most widely used typology relies on the series of ISO 14020 standards, which separates environmental labelling schemes into three types:

- Type I is a multi-attribute label developed by a third party;
- Type II is a single-attribute label developed by the producer;
- Type III is an eco-label whose awarding is based on a full life-cycle assessment.<sup>37</sup>

**Table 2. ISO Standards and their main requirements**

| ISO Standard | Type   | Requirements  | Examples of schemes                                     |
|--------------|--|---|---|
| 14024        | Type I – Ecolabels                           | Multi-issues third-party voluntary labels indicating high environmental performance based on set of life-cycle-based criteria and designed and implemented in a transparent manner. | Blue Angel, Nordic Swan, Canadian Environmental Choice. |
| 14021        | Type II – Self-declared Environmental Claims | Private claims, first-party verified, adhering to specific principles (verifiable, accurate information, not misleading).   | Recycled content, Biodegradable.                        |
| 14025        | Type III – Environmental Declarations        | Quantified environmental information, based on life-cycle analysis, using independent verifiable data, primarily used for business-to-business communication.                       | Eco-Leaf; Korean Environmental Declaration of Products. |

Sources: ISO (1999a; 1999b and 1999c); Allison and Carter (2000); GEN (2013); JEMAI (2013); KEITI (2013).

Source: OECD<sup>38</sup>

Eco-labels fall under the Type I ISO 14024 family and can be awarded by a public body or a private party, such as NGOs, industry groups, or a combination of stakeholders.

### 3.2. Eco-label within the European Union

The European Commission distinguishes this type of labelling into three groups of eco-labels:

- i. Public multi-criteria eco-labels: Different sets of criteria are established for each product or service group covered by the scheme and pass/fail criteria set the standard for the label in question;
- ii. Public single issue labels: labels relating to one particular environmental issue, for

<sup>37</sup> [http://www.iisd.org/business/markets/eco\\_label\\_iso14020.aspx](http://www.iisd.org/business/markets/eco_label_iso14020.aspx)

<sup>38</sup> Gruère, G., *A Characterization of environmental Labelling and Information Schemes*, OECD Environment Working Paper No. 62, available at [www.oecd.org/env/workingpapers.htm](http://www.oecd.org/env/workingpapers.htm), p. 15, (last retrieved: 21.05.2014).

example energy use or emission levels (e.g. EU organic label or Energy Star label<sup>39</sup>);  
iii. Private labels.<sup>40</sup>

Within the European Union, the competent bodies award both the national public labels and the EU Ecolabel. To give two examples as illustration; the competent body in Germany, the *Deutsches Institut für Gütesicherung und Kennzeichnung e. V* (RAL)<sup>41</sup>, is entitled to award the EU Ecolabel and the German label ‘Blauer Engel’. The competent body in the Netherlands, the *Stichting Milieukeur* (SMK)<sup>42</sup>, has the competence to award the labels ‘Milieukeur’, ‘Groen Label Kas’, ‘Maatlat Duurzame Veehouderij & Aquacultuur’ as well as the European eco-label. Except of the EU Ecolabel, the sets of criteria for national labels are established by the national government themselves and therefore criteria might differ per country. As a side note, these national labels, whether awarded by a public or private body, should be recognized by other Member States as they are covered by the principle of mutual recognition established by the *Cassis de Dijon*<sup>43</sup> and its interpretation of article 34 TFEU.<sup>44</sup>

In addition, the criteria of private labels for accessibility and guarantee of quality differ. To find out the criteria of private labels (e.g. FSC (Forest Stewardship Council)<sup>45</sup>, IFOAM<sup>46</sup>, Bra Miljöval<sup>47</sup> or Max Havelaar<sup>48</sup>) information can be found on their own website or on data collections sites such as the Ecolabel Index<sup>49</sup> or Global Ecolabelling Network<sup>50</sup>. Whether these labelling schemes may or may not conform to the guidelines on appropriate environmental labels for public procurement depends on their accessibility and the way they are adopted.<sup>51</sup>

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<sup>39</sup> A specific label that helps to identify equipment that meets certain standards regarding energy efficiency based on an agreement between the Government of the United States of America and the European Union, see Regulation 106/2008/EC.

<sup>40</sup> European Commission, Green Public Procurement and the European Ecolabel – Fact sheet.

<sup>41</sup> <http://www.ral-umwelt.de/ral-umwelt-ueber-uns.html>.

<sup>42</sup> <http://www.smk.nl/1/home.html>.

<sup>43</sup> Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaktung für Branntwein* [1979] ECR 649.

<sup>44</sup> Chalmers, D., Davies, G., Monti, G., *European Union Law*, p. 770.

<sup>45</sup> <http://www.fsc.org/>, (last retrieved: 21.05.2014).

<sup>46</sup> <http://www.ifoam.org/>, (last retrieved: 21.05.2014).

<sup>47</sup> <http://www.naturskyddsforeningen.se/bmv/english.cfm/>, (last retrieved: 21.05.2014).

<sup>48</sup> <http://www.maxhavelaar.nl/>, (last retrieved: 21.05.2014).

<sup>49</sup> <http://www.ecolabelindex.com/>.

<sup>50</sup> EU Ecolabel can be used by all EU Member State plus Iceland, Norway, Switzerland and Turkey, see <http://ec.europa.eu/environment/ecolabel/>, (last retrieved 26.05.2014).

<sup>51</sup> European Commission, Green Public Procurement and the European Ecolabel – Fact sheet.

## EU Ecolabel<sup>52</sup>

In order to create more transparency and an eco-label that can be trusted within the entire European Union, the European Commission launched in 1992<sup>53</sup> the EU Ecolabel<sup>54</sup>, which scheme is stipulated by Regulation 66/2010/EU. The EU Ecolabel is part of the sustainable consumption and production policy of the Community, which aims at reducing the negative impact of consumption and production on the environment, health, climate and natural resources. The scheme is intended to promote those products that have a high level of environmental performance through the use of the EU Ecolabel.<sup>55</sup> The label is voluntary, based on multiple criteria, where a third party awards the use of the label to indicate overall environmental preferability within a particular product category based on life cycle assessment.<sup>56</sup> The criteria to obtain an EU Ecolabel ‘shall be based on the environmental performance of products’ which shall be determined on a scientific basis considering the whole life cycle of products.<sup>57</sup>

The requirements for the award of the EU Ecolabel are based on European consensus on the scientific reliability of the criteria and they relate to both technical performances as environmental characteristics of the product.<sup>58</sup> The EU Ecolabel is awarded by the competent body<sup>59</sup>, which is a body designated by each Member State within government ministries or outside.<sup>60</sup> Nevertheless, some critical voices state that the basis on which the EU Ecolabel has been awarded is unclear towards the outside world, which might have the consequence that the quality of the label will be undermined. Another critical point is that the criteria for obtaining the label are too weak as a company can obtain an EU Ecolabel for certain products but not using the same production standards for all their products while reaping the public relations benefits of association with the EU Ecolabel.<sup>61</sup>

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<sup>52</sup> <http://ec.europa.eu/environment/ecolabel/>, (last retrieved 26.05.2014).

<sup>53</sup> Council Regulation No 880/92/EEC of 23 March 1992 on a Community eco-label award scheme.

<sup>54</sup> <http://ec.europa.eu/environment/ecolabel/facts-and-figures.html>.

<sup>55</sup> Recital 5, European Parliament and Council Regulation 66/2010 of 25 November 2009 on the EU Ecolabel [2010] OJ L 27/1.

<sup>56</sup> <http://ec.europa.eu/environment/ecolabel/faq.html#top-ten>.

<sup>57</sup> Article 6 of Regulation 66/2010/EU.

<sup>58</sup> Article 6(3)(a-g) of Regulation 66/2010/EU.

<sup>59</sup> See for an overview of the competent bodies <http://ec.europa.eu/environment/ecolabel/competent-bodies.html#nl>, (last retrieved 26.05.2014).

<sup>60</sup> Article 4 of Regulation 66/2010/EU.

<sup>61</sup> NGO FERN created by the World Rainforest Movement sets out its views on the pros and cons of the EU scheme regarding pulp used for paper production, see *The EU Ecolabel and Asia Pulp and Paper*, [http://www.fern.org/sites/fern.org/files/NGO\\_statement\\_APP.pdf](http://www.fern.org/sites/fern.org/files/NGO_statement_APP.pdf) (last retrieved: 21.05.2014).

## Accessibility of the EU Ecolabel

In principle, all products or services supplied for distribution, consumption or use in the European Economic Area (EEA) market<sup>62</sup> and included in one of the established non-food and non-medical product groups<sup>63</sup> are eligible for the EU Ecolabel. Companies can apply for the EU Ecolabel if the product or service is made in one of the countries of the EEA or, when the product is made outside its territory, if the product or service is placed on the market within the EEA.<sup>64</sup> Once a company and its products or services are entitled to apply, it needs to pay the application fee and when accepted the annual fees. The EU Ecolabel is designed to be as low cost as possible for businesses interested in the scheme. The Commission gives an indication of the amount of fees<sup>65</sup> and to make the label accessible to *all* sizes of businesses: there are reduced fees available for Small and Medium Enterprises (SMEs), micro-enterprises and companies from developing countries. Furthermore, there is 30% reduction foreseen in the application fee for companies registered under EMAS<sup>66</sup> or 15% for companies certified under ISO 1400<sup>67</sup> (the reductions are not cumulative).<sup>68</sup> In addition, the applicant needs to pay all fees for (laboratory) tests and checks performed by third parties or inspections that are needed to proof the conformity with the EU Ecolabel criteria. For example, a SME in the Netherlands with an annual turnover of less than €666.000 of EU Ecolabel products pays €600 application fee and an annual fee of €1.500. The least paid is a micro-enterprise<sup>69</sup> that has an annual turnover of less than €467.000 pays €600 application fee and an annual fee of €350.<sup>70</sup> In comparison with the fees to be paid for the oldest national eco-label, the German Blue Angel, the EU Ecolabel is more expansive especially regarding the application fees. The

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<sup>62</sup> European Union plus Iceland, Lichtenstein and Norway.

<sup>63</sup> See for these groups <http://ec.europa.eu/environment/ecolabel/products-groups-and-criteria.html>, (last retrieved 26.05.2014).

<sup>64</sup> <http://ec.europa.eu/environment/ecolabel/how-to-apply-for-eu-ecolabel.html>, (last retrieved 26.05.2014).

<sup>65</sup> Nevertheless, the fees slightly differ per Member State due to the differences of costs of running the scheme and due to the kind of product or type of application, see <http://ec.europa.eu/environment/ecolabel/how-to-apply-for-eu-ecolabel.html>, (last retrieved 26.05.2014).

<sup>66</sup> Eco-Management and Audit Scheme is a voluntary environmental management instrument that enables organizations to assess, manage and continuously improve their environmental performance. It was developed in 1993 by the European Commission, see [http://ec.europa.eu/environment/emas/index\\_en.htm](http://ec.europa.eu/environment/emas/index_en.htm), (last retrieved 26.05.2014).

<sup>67</sup> Indicates a family of standards related to environmental management that pertains the process of how a product is produced in order to help organizations to comply with environmentally oriented requirements, see <http://www.iso.org/iso/iso14000>, (last retrieved 26.05.2014).

<sup>68</sup> For example in the Netherlands, a large enterprise with an annual turnover of €1.5 million of EU Ecolabel products pays an application fee<sup>68</sup> of €2.000 and in 2014 annual contribution of 0.15% x €1.5 million = €2.250, [http://www.europeseocolabel.nl/Public/EU\\_Ecolabel\\_Bestanden/Tariefstructuur\\_EU\\_Ecolabel\\_NL2014\\_ENGV2.pdf](http://www.europeseocolabel.nl/Public/EU_Ecolabel_Bestanden/Tariefstructuur_EU_Ecolabel_NL2014_ENGV2.pdf).

<sup>69</sup> A company with less than 10 employees.

<sup>70</sup> [http://www.europeseocolabel.nl/Public/EU\\_Ecolabel\\_Bestanden/Tariefstructuur\\_EU\\_Ecolabel\\_NL2014\\_ENGV2.pdf](http://www.europeseocolabel.nl/Public/EU_Ecolabel_Bestanden/Tariefstructuur_EU_Ecolabel_NL2014_ENGV2.pdf), (last retrieved 26.05.2014).

Blue Angel has an application fee of only €250 and an annual fee of minimal €270 up to €6.000, depending on the annual sales.<sup>71</sup> However, comparison with the private awarded label Max Havelaar within the Netherlands, the EU Ecolabel is more advantageous for smaller companies as application fee costs €525<sup>72</sup> and the minimum annual fee per year is €1430 for licensees that manufacture or process their products up to €3470.<sup>73</sup>

| Type of organization | Cat | Indicator            | Total fee charged |
|----------------------|-----|----------------------|-------------------|
| 1st grade            |     | Members <sup>1</sup> |                   |
|                      | A   | < 50                 | € 1,430.00        |
|                      | B   | 50 – 100             | € 2,040.00        |
|                      | C   | 101 – 250            | € 2,250.00        |
|                      | D   | 251 – 500            | € 2,450.00        |
|                      | E   | 501 – 1000           | € 3,060.00        |
|                      | F   | > 1000               | € 3,470.00        |

Source: Fairtrade labeling organization Flocert<sup>74</sup>

### 3.3. The private labels Max Havelaar & EKO

The Max Havelaar label is used in several countries and promotes a process of production with certain conditions under which the supplier acquired the products from the manufacturer.<sup>75</sup> Max Havelaar products guarantee fair trade origin products purchased at a price and under conditions more favorable than those determined by market forces from organizations made up of small-scale producers in developing countries. The Fairtrade Labelling Organisation (FLO) carries out the audit and certification based on four criteria: the price must cover all the costs; it must contain a premium compared to the market price; production must be subject to pre-financing and the importer must have long-term trading relationships with the producers.<sup>76</sup> The Max Havelaar label indicates the quality of the production process from the site of the people that are involved. The Dutch EKO label emphasises the other site of the production process as it is granted to products that exist at least of 95% of ingredients from organic agricultural production. Therefore it indicates only

<sup>71</sup> [http://www.blauer-engel.de/en/company/costs/costs\\_schedule\\_of\\_fees.php](http://www.blauer-engel.de/en/company/costs/costs_schedule_of_fees.php), (last retrieved 26.05.2014).

<sup>72</sup> Flocert, *Fee System Small Producer Organization*, version 25 of 22.05.2014, p. 4, <http://www.flo-cert.net/wp-content/uploads/2014/03/PC-FeeSysSPO-ED-25-en.pdf>, (last retrieved 26.05.2014).

<sup>73</sup> The majority of members of the organization are Small Producers and legally formed organizations which are able to contribute to the social and economic development of its members and its communities and is democratically controlled by its direct members, Flocert, p. 3.

<sup>74</sup> Flocert, *Fee System Small Producer Organization*, version 25 of 22.05.2014, <http://www.flo-cert.net/wp-content/uploads/2014/03/PC-FeeSysSPO-ED-25-en.pdf>, p. 5.

<sup>75</sup> Case C-368/10 *Commission v. Netherlands*, para. 74.

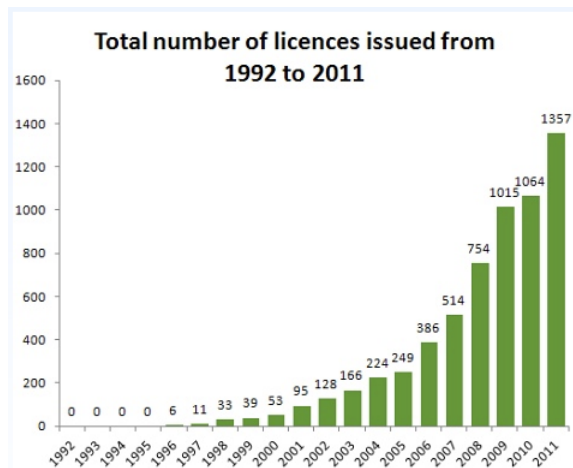
<sup>76</sup> *Ibid.*, paras. 36 and 37.



the quality of the product itself but nothing about the human circumstances participating in the production process.<sup>77</sup> In chapter 5, the *Max Havelaar* case will be analysed in detail.

### 3.4. GPP and eco-labels

The number of licenses for EU Ecolabel has increased significantly in the last decade and it is



Source: European Commission

very likely that the new procurement Directive will stimulate the use of eco-labels even more. However, there is no ‘what to buy’ obligation that favour environmental friendly products as the use of European standards, e.g. by using the EU Ecolabel, is only a recommendation and national authorities are allowed<sup>78</sup> to continue to use national variants of eco-labels.

As long as there is no obligation to use European standards, different labelling schemes will continue to exist because national labels are better known within their Member State. Moreover, if a company wants to sell its product bearing the most well known label in each Member State, it needs to comply with many standards.

One of the objectives of the new public procurement Directive is to facilitate the access of SMEs by encouraging contracting authorities to divide large contracts into lots.<sup>79</sup> However, the permission to make use of eco-labels for the public procurement process might discourage SMEs who do not have (yet) such a label to participate. The application for an eco-label is a big step as it takes time to gather all required proofs and brings (annual) costs. This investment comes on top of the preparation for the tender procedure and they will only be remunerated if the SME wins the tender and therefore a risky investment. Furthermore, when a contracting authority requires a specific label it is for an economic operator difficult to find ‘labels that confirm that the works, supplies or services meet equivalent label requirements’<sup>80</sup> as eco-labels are not ‘equal’ because they all have different sets of criteria with their own emphasises. Moreover, what if a company does fulfil all requirements, but

<sup>77</sup> Case C-368/10 *Commission v. Netherlands* [2012], Judgment 10 May 2012, para. 34.

<sup>78</sup> Article 11 of Regulation 66/2010.

<sup>79</sup> Recital 78, see also 2, 59 and 66 of Directive 2014/24/EU.

<sup>80</sup> Article 43 of Directive 2014/24/EU.

does not have a label? Without explaining explicitly the requirements, it remains unclear what is actually wanted which is not desirable regarding the principle of transparency.

#### **4. Applying the GPP criteria with the use of eco-labels**

In the following paragraph the rules on the use of eco-labels in the GPP criteria will be examined. With the recently adopted new EU procurement Directive, the Commission partly aims at increasing the role of environmental considerations in procurement procedures. Under the new Directive, the contracting authorities can use eco-labels more directly. In addition, environmental factors can play a significant role in the whole production process. To really understand the impact of the new Directive on the use of eco-labels, it's essential to make the comparison between the situation before and after the reform. Therefore, the new procurement directives, 2014/24/EU and 2014/25/EU will first be looked at in general. Second, the technical specifications in the old and new directives will be compared. Does the new Directive make the use of public procurement better, with respect to these technical specifications? And finally, the same comparison will be made between the old and new directives with respect to the award criteria and contract performance conditions.

##### *4.1. New EU procurement directives*

In December 2011, the Commission made the proposal to revise and modernize the existing public procurement directives.<sup>81</sup> Directive 2014/24/EU repealed Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.<sup>82</sup> And Directive 2014/25/EU replaced Directive 2004/17/EC on procurement by entities operating in the water, energy, transport and postal services sectors.<sup>83</sup> These new procurement directives, together with Directive 2014/23/EU on concessions, should provide for a simplification and flexibilisation of the former procedural regime.<sup>84</sup> The European Parliament voted in favour of the proposal on 15 January 2014.<sup>85</sup> The directives were adopted by the Council on 11 February 2014.<sup>86</sup> Notwithstanding the adopted new

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<sup>81</sup> COM(2011) 896 final.

<sup>82</sup> Directive 2014/24/EU.

<sup>83</sup> Directive 2014/25/EU.

<sup>84</sup> Press release from the Council 6337/14 PRESSE 64,

[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/intm/140975.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/140975.pdf) (last retrieved: 25.05.2014), p. 1.

<sup>85</sup> See supra note 82.

<sup>86</sup> Ibid.

procurement directives, the former procurement directives will continue to play an important role until 2016, due to the time Member States have to transpose the rules.<sup>87</sup>

One of the Commission's key priorities was to put other policies, such as the environment, to better use with regards to public contracts. Therefore, one of two objectives of the proposal was to improve the use of public procurement in support of common societal goals.<sup>88</sup> Such societal goals include environmental protection and countering climate change. The need for the better use of public procurement in the green areas was confirmed in 2011 after a consultation of stakeholders.<sup>89</sup> The consultation was an initiative of the Commission. The stakeholders supported the proposal to reform; as they acknowledged that economic operators and public procurers were combating with new challenges, which were not sufficiently covered by the former procurement directives. The proposal should give contracting authorities the instruments needed to achieve the Europe 2020 strategic goals (which include the better use of public procurement in support of common societal goals).<sup>90</sup>

The influence of public procurement on the internal market together with these new rules would help to foster innovation, combat climate change and preserve the environment while improving social conditions, public health and employment.<sup>91</sup> To this, contracting authorities may require specific labels certifying environmental characteristics, provided that they accept also equivalent labels.<sup>92</sup> However, other specific labels are also possible, such as specific labels certifying social characteristics. The Commission expressly doesn't limit the type of labels that may be required by the contracting authority. Labels can refer to European, national or international eco-labels, but equally to a label with social characteristics that proof that the product is free of child-labour. There are however certain requirements that definitely limits the competent of contracting authorities to require a specific label. These requirements will be discussed in the following sections. A noticeable fact is the lack of a definition of a label in the old directives. In the new Directive there is a definition given. 'Label' means any document, certificate or attestation confirming that the works, products, services, processes or procedures in question meet certain requirements.<sup>93</sup> And 'label requirements' means the requirements to be met by the works, products, services, processes or procedures in question

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<sup>87</sup> Art. 90(1) of Directive 2014/24/EU.

<sup>88</sup> COM(2011) 896 final, p. 2.

<sup>89</sup> *Ibid.*, p. 3.

<sup>90</sup> *Ibid.*, p. 9.

<sup>91</sup> See *supra* note 88.

<sup>92</sup> *Ibid.*, p. 10.

<sup>93</sup> Art. 1(2)(23) of Directive 2014/24/EU.

in order to obtain the label concerned.<sup>94</sup> The definition of label is regulated in the first Articles of the Directive, which shows the support of common societal goals, such as the protection of the environment and combating climate change.

#### 4.2. *Technical specifications*

Under the former procurement directives, eco-labels and GPP criteria could only be used as useful information sources. The eco-labels were used in two different ways for setting up the technical specifications;<sup>95</sup> first, to help to set up the environmental characteristics of the supplies or services and second, to be used as a means of proof of compliance.<sup>96</sup> While using the eco-label as means of proof, the product or services bearing the eco-label are presumed to comply with the specifications. The detailed specifications of an eco-label implied that contracting authorities were allowed to set up 'higher-than-harmonised standards'.<sup>97</sup> The detailed specifications that are defined in eco-labels, such as the European Eco-label, (multi-)national eco-labels or any other eco-label could be used by the contracting authorities, however they are not obliged to.<sup>98</sup> Any other appropriate means of proof needed to be accepted by the contracting authority (under the former procurement directives). The types of evidence, relating the claims to comply with the technical specifications, needed to be mentioned in advance by the contracting authorities.<sup>99</sup> One could think of several ways how to comply with this obligation, such as an indicative list. It should be mentioned, that carrying an eco-label were deemed to be a simple prove of compliance. Four conditions under Article 23(6) of the Directive needed to be met before the detailed specifications as defined by eco-labels could be used. The specifications needed to be appropriate to define the characteristics of the services or supplies. This meant that these specifications needed to be linked to the subject-matter.<sup>100</sup> Furthermore, the eco-label requirements needed to be drawn up on the basis of scientific information, adopted in a procedure in which third parties can participate and accessible to all interested parties.<sup>101</sup>

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<sup>94</sup> Art. 1(2)(24) of Directive 2014/24/EU.

<sup>95</sup> European Commission, *Buying Green! A Handbook on Green Public Procurement*, Luxembourg: Publications Office of the European Union 2011, p. 30.

<sup>96</sup> Art. 23(6) of Directive 2004/18/EC/

<sup>97</sup> Kunzlik 2013, p. 198.

<sup>98</sup> Recital 29 of the preamble of Directive 2004/18/EU.

<sup>99</sup> *Ibid.*, p. 32.

<sup>100</sup> European Commission, *Buying Green! a Handbook on Green Public Procurement*, Luxembourg: Publications Office of the European Union 2011, p. 31.

<sup>101</sup> See *supra* note 93.

#### 4.2.1. Technical specifications under the new procurement Directive

Under the new procurement Directive the use of eco-labels is not solely specified to technical specifications. Even more, the contracting authority should now be able to refer to particular labels in the technical specifications.<sup>102</sup> While eco-labels are not mentioned under the Article the preamble of the Directive specifically refers to the use of eco-labels. These labels include the European Eco-label, national and multinational eco-labels or any other labels as long as they are linked to the subject-matter.<sup>103</sup> The link to the subject-matter of the contract can for example be the presentation of the product. While the possibility for contracting authorities to require specific eco-labels exists, the conditions needs to be met before such a requirement is allowed under the Directive. These requirements include the objectively criteria (set up in a procedure in which third parties can participate), accessibility and availability. It should be mentioned that the parties involved in the procedure setting up the objectively verifiable criteria can be public bodies as well. Additionally, while protecting the environment, combating climate change and promoting innovation are all objectives of the proposal, innovation seems to play a more important role.<sup>104</sup> Therefore innovation shouldn't be limited by the use of labels.<sup>105</sup>

These conditions are codified in Article 43 of the Directive. There are some significant differences between the new and old directives. Under the old Directive it was not allowed to require products or services to carry a particular eco-label.<sup>106</sup> Under the new procurement Directive the contracting authority can, under conditions, require a specific label as means of proof that the works, services or supplies correspond to the required characteristics.<sup>107</sup> Another difference between the directives is the requirement for the eco-label to be based on scientific information. Under the new Directive this condition has been replaced by the requirement that the labels are based on objectively verifiable and non-discriminatory criteria.<sup>108</sup> A new condition laid down by the new Directive is the condition that the label requirements are set up by independent bodies.<sup>109</sup> It is not allowed for the economic operator under the Directive to have a decisive influence on the set up of

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<sup>102</sup> Art. 43(1) of Directive 2014/24/EU.

<sup>103</sup> Recital 75 of the preamble of Directive 2014/24/EU.

<sup>104</sup> See supra note 86.

<sup>105</sup> See supra note 99.

<sup>106</sup> European Commission, *Buying Green! A Handbook on Green Public Procurement*, Luxembourg: Publications Office of the European Union 2011, p. 13.

<sup>107</sup> Art. 43 of Directive 2014/24/EU.

<sup>108</sup> Art. 43(1)(b) of Directive 2014/24/EU.

<sup>109</sup> Art. 43(1)(e) of Directive 2014/24/EU.

requirements. Furthermore, there should be made a clear distinction to full and partially use of a specific label. Where it is allowed under the former to require such a specific label without indication of the label requirements, this is not the case with the latter. Notwithstanding, the eco-label should, as mentioned, define the characteristics of the works, supplies or services that are the subject-matter of the contract, which means that the amount of possible required eco-labels are limited.

In addition, equivalent labels shall be accepted by the contracting authority if it confirms that the works, services and supplies meet the requirement. The only specifically mentioned exception under Article 43 of the new procurement Directive is the case where the economic operator had no possibility obtaining such an equivalent label or the required label within the time limits. The ‘no possibility’ of the economic operator should be proven by the operator and the reason for the absence should not be attributable to him. Then, the economic operator is allowed to proof by any means (this includes a technical dossier from the manufacturer). Where the condition of ‘linked to the subject-matter’ has not been fulfilled contracting authorities shall not require the label as such but may define the technical specification by reference to those of the detailed specifications of that label, or, when needed, fragments thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.<sup>110</sup> It should be mentioned that despite of the absence of the obligation for the contracting authority to mention the possibility of a equivalence label or the exemptions mentioned above in the technical specifications (or in the contract performance conditions and the award criteria) in Article 43 of the new procurement Directive, this would not indicate this absence is allowed. Contracting authorities are obliged to comply with the principles of procurement.<sup>111</sup> In particular the principle of transparency should play an important role when requiring a specific label. Ergo, in accordance with the principle of transparency, contracting authorities shall be obliged to mention the exceptions mentioned above.

#### *4.3. Award criteria and contract performance conditions*

Under the former procurement Directive the eco-labels were specified to technical specifications. However, it was possible for the contracting authorities to use eco-labels with

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<sup>110</sup> Art. 43(2) of Directive 2014/24/EU.

<sup>111</sup> Art. 18(1) of Directive 2014/24/EU.

regards to the underlying environmental criteria in the award criteria (see chapter 2.2.3).<sup>112</sup> These criteria, which refer to the environmental characteristics, could be used to determine the award criteria. Contracting authorities could therefore use minimum requirements underlying the eco-labels in the specifications and then awarded economic operators additionally at the award criteria for the remaining requirements underlying these eco-labels.<sup>113</sup> As it was also true with the technical specifications, contracting authorities could not require a specific eco-label in the award criteria. In the former procurement Directive the award criteria stage was regulated in Article 53.<sup>114</sup> With regards to the use of eco-labels, the contracting authority should have based the award on the economically advantageous and the criteria needed to link to the subject-matter.<sup>115</sup> As mentioned in chapter 5, the CJEU ruled in *Max Havelaar* that the award criteria might be not only economic but also qualitative, such as environmental characteristics.<sup>116</sup> In addition, the relative weighting of the criteria should be specified in the contract notice.<sup>117</sup>

#### The new procurement Directive

As it was mentioned in paragraph 1.2, the use of eco-labels is not solely specified to technical specifications under the new procurement Directive. Unlike under the former procurement directive, the contracting authorities now have the option to require a specific eco-label as means of proof in the award criteria.<sup>118</sup> This means that contracting authorities are able to require a specific label as means of proof that the works, services or supplies correspond to the required characteristics in the award criteria and contract performance conditions. Obviously, the conditions mentioned in the previous paragraph have to be fulfilled. Also here, the economic operator cannot be excluded if it uses an equivalent label as means of proof or when it had no possibility, similar as with the technical specifications. In addition, the qualitative basis of criteria has now been codified in the new procurement Directive.<sup>119</sup> With regards to the performance conditions, the same requirements laid down in Article 43 are applicable. This means that the contracting authority may require a specific eco-label in the final contract during the period of contract.

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<sup>112</sup> European Commission, *Buying Green! A Handbook on Green Public Procurement*, Luxembourg: Publications Office of the European Union 2011, p. 41.

<sup>113</sup> See supra note 106.

<sup>114</sup> Art. 53 of Directive 2004/18/EC.

<sup>115</sup> Art. 53(1)(a) of Directive 2004/18/EC.

<sup>116</sup> Case C-368/10 *Max Havelaar*, para. 85.

<sup>117</sup> Art. 53(2) of Directive 2004/18/EC.

<sup>118</sup> Art. 43(1) of Directive 2014/24/EU.

<sup>119</sup> Art. 67(2) of Directive 2014/24/EU.

While already mentioned, under the former procurement directives it was not allowed to require products or services to carry a particular eco-label. This has changed in the new Directive. However, following rulings of the Court in the *EVN and Wienstrom* judgment the award criteria still needs to comply with all the fundamental principles of Community law.<sup>120</sup> Therefore, the shift from prohibition to possible requirement brought a question with regards to the principle of equal-treatment. If the contracting authority chooses to require an eco-label as one of the award criteria, would this not distort the equal possibilities for economic operators to get contracted? Because, where in the old Directive the economic operator was not required to have an eco-label but could prove that the supply, work or service complied with the requirements, in the new Directive these non-label using economic operators have a disadvantage. Even though these economic operators would comply with the requirements from the eco-label and are therefore complying with one of the common societal goals, they still would be treated differently than those operators with eco-labels. As been mentioned above, ‘labels’ entails a broad scope, but it does not seem to be proportional to demand from the economic operator to use an eco-label on his product when it already fulfils all its requirements. It will be likely that contracting authorities which require a specific label shall accept any other means of proof that confirm that the works, supplies or services meet equivalent requirements. This is also true in the technical specifications.

##### **5. Case study: *Max Havelaar* Case**

In May 2012, the CJEU rendered an intriguing judgment interpreting the limits of GPP and more specifically, the employment of environmental criteria in various stages of procurement procedure. *Max Havelaar*<sup>121</sup> is a leading judgment regarding the use of eco-labels as a tool for incorporation of environmental and social criteria into public contracts issued by contracting authorities. The noble idea of province of Noord-Holland of the Netherlands to engage in public procurement based on environmentally friendly and fair trade criteria was nevertheless poorly executed and thus enabled the CJEU to declare the procedure as invalid. Following the adoption of the new procurement Directive in 2014 and new set of rules governing eco-labels within public procurement, the implications of the judgment remain subtle, and one could even argue, misleading.

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<sup>120</sup> Case C-448/01 *EVN and Wienstrom*, para. 33.

<sup>121</sup> Case C-368/10 *Max Havelaar*.



The case study will cover the following aspects of the *Max Havelaar* case; firstly, it will explain the relevant facts of the case and the Commission proceedings; secondly, a legal analysis will be provided focusing on the different stages of the procurement procedure in which the province of Noord-Holland sought to insert the eco-labels of Max Havelaar and EKO as environmental and social criteria; thirdly and finally, the consequences of adopting the Directive 2014/24/EU will be reflected upon the judgment and whether it would have possibly changed the outcome of the case.

### *5.1. The Facts & Background of the Case*

#### The Contract Notice

The province of Noord Holland issued a public contract notice in the framework of public procurement Directive 2004/18/EC in the *Official Journal of the European Union* in 2008. The contract concerned the supply, installation and management of automatic coffee machines on hire basis from the beginning of 2009 for three years with the possibility of extension by one year, and the estimated value of the contract was €760,000. The contracting authority emphasized in the contract notice section II, point 1.5. that an ‘important aspect is the desire of the province of North Holland to increase the use of organic and fair trade products in automatic coffee machines.’<sup>122</sup>

In section III, point 1 the conditions regarding the contract were explained and information concerning deposit, guaranties and main terms of financing and payment were provided. Point 1.4 referred to ‘Other particular conditions to which the performance of the contract is subject’ and to that the contracting authority had simply state the word ‘no’.<sup>123</sup> The contract was to be awarded to economically most advantageous tender in terms of the criteria stated in the specifications, as provided in section IV, point 2.1 of the contract notice.

#### Specifications: Call for Tenders

The Noord-Holland issued specifications named ‘Call for tenders’ consisting of various chapters introducing the award criteria and technical specifications. In part 1.3. of the specifications under the heading ‘Context of the contract’ the contracting authority specified that ‘[t]he tenders shall be evaluated both on the basis of qualitative and environmental

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<sup>122</sup> Case C-368/10 *Max Havelaar*, para. 15.

<sup>123</sup> *Ibid.*, para. 16.

criteria and on the basis of price.’<sup>124</sup> The contracting authority wished to engage the tenderers into Q&A type of procedure regarding the contract. The answers would be given in the form of an information notice, defined in point. 2.3. of the specifications as:

Document containing the replies to the questions posed by interested parties in addition to possible amendments to the specifications or to other contract documents, forming part of the specifications and taking precedence over the other parts thereof including the annexes.<sup>125</sup>

The next important part of the specifications was in part 4.4. called the ‘Suitability conditions/minimum conditions’, which dealt with turnover, professional risk indemnity insurance, the tenderer’s experience, quality conditions and the evaluation of customer satisfaction. In section 4 of part 4.4., headed under ‘Quality conditions’, the notice stated:

In the context of sustainable purchasing and socially responsible business the Province of North Holland requires that the supplier fulfil the criteria concerning *sustainable purchasing* and *socially responsible business*. In what way do you fulfil the criteria concerning sustainable purchasing and socially responsible business? It is also necessary to state in what way the supplier contributes to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production [...].<sup>126</sup>

The requirement of sustainability of purchases and socially responsible business was also stated as a ‘knock-out’ criterion, meaning that a tenderer not fulfilling the criteria would be exempted from the competition. In addition, the specifications included an Annex, from which points 31 and 35 are of relevance:

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

35: If possible, the ingredients should comply with the EKO and/or Max Havelaar labels. ... [Maximum] 15 [points. Assessment:] preferred[.]’<sup>127</sup>

After questions raised by tenderers, the information notice refined that the requirement under point 31 encompasses also other eco-labels, insofar as the criteria are equivalent or identical, and the ingredients<sup>128</sup> under point 35 may bear a label based on the same criteria as the aforementioned eco-labels.

### Commission’s Pleas

The Commission notified the Netherlands in May 2009 that the specifications issued within the contract notice infringed Directive 2004/18 due to three main reasons;

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<sup>124</sup> Ibid., para. 19.

<sup>125</sup> Ibid., para. 23.

<sup>126</sup> Ibid., para. 26. Emphasis added.

<sup>127</sup> Ibid., para. 29.

<sup>128</sup> The ingredients were those used for preparation of drinks besides coffee and tea, such as milk, sugar and cocoa.

- 1) By imposing the Max Havelaar and EKO eco-labels as *technical specifications*, the Netherlands violated Articles 23(6) and 23(8);
- 2) Subjecting the tenderers to comply with *the criteria of sustainable purchasing and socially responsible business*, the Netherlands violates Articles 44(2), 48 and 2;
- 3) By imposing the Max Havelaar and EKO eco-labels as *award criteria*, the Netherlands violated Articles 53.

The next sub-chapter containing the legal analysis will examine the Commission's pleas and explain the main arguments of the parties in addition to the Court's conclusions. The chapter will follow the order of reasoning of the Court, thus first focusing on technical specifications, then on award criteria and lastly on selection criteria.

### 5.2. *Legal Analysis*

The main problem in this case is *how* the contracting authority used the two quite different eco-labels in the procurement procedure. The use of eco-labels, as will be demonstrated below, was not as such prohibited under the auspices of the Directive 2004/18/EC, however it was the lack of transparency and preciseness of the contract notice that ultimately lead the Court to rule against the Netherlands. In addition, the Court made a clear distinction between eco-labels referring to environmental characteristics inherent in the product itself, and between eco-labels referring to social characteristics defining trade rules governing the management of the product.

One interesting overarching theme that can be witnessed from the arguments of the Netherlands is the reliance on a test of 'reasonably well-informed tenderers exercising ordinary care' in the context of the content and requirements of the eco-labels.<sup>129</sup> The answer of the Court and the Advocate General Kokott to these arguments is quite different; the Court's opinion is that the interpretation of the specifications must be determined by adopting the perspective of potential tenderers because the aim of is to guarantee access to public contracts.<sup>130</sup> The contracting authority has the right to rely on the fact that the tenderers should be informed and reasonable aware, however that reliance cannot result in violation of the well-defined obligations placed upon the contracting authority by Directive 2004/18/EC when it comes to expressly mentioning the detailed environmental characteristics of an eco-

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<sup>129</sup> See Case C-368/10 *Max Havelaar*, paras. 60 and 83.

<sup>130</sup> *Ibid.*, para. 52.

label. In other words, the legitimate expectations of the contracting parties flow both ways. The Advocate General took the opposite view in paragraphs 56-57 of the opinion:

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 *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. Furthermore, the *administrative burden* involved in laying down the requirements on contracting authorities cannot be overlooked.<sup>131</sup>

Nevertheless, the opinion of the Advocate General seems to be closer to the requirements of the new Directive 2014/24/EU, since under the new regime it is allowed to make a reference to eco-labels without specifying its particular characteristics.<sup>132</sup>

### 5.2.1. The Use of Eco-labels in Technical Specification

The first part of the Court's reasoning deals with the alleged violation of rules relating to technical specifications. This part was divided into two sub-questions, namely whether the use of eco-label EKO as a technical specification was compatible with Article 23(6) and whether the use of eco-label Max Havelaar again as technical specification infringed Article 23(8). The reason behind considering these two eco-labels under different provisions relates to their particular characteristics. As provided in chapter 3.3, EKO inherently refers to the ingredients composing the product whereas Max Havelaar deals with particular fair trade rules. However, before digging deeper into reasoning whether or not the particular use of eco-labels employed by the Netherlands was incompatible with the Directive, it first needs to be established that eco-labels can form part of technical specifications at all. The Court was clear on this point; only EKO would fall under definition of technical specification, however Max Havelaar would not. This might create some confusion, since in the award criteria both of the labels were again accepted.<sup>133</sup> The Court looked into Annex IV, paragraph 1(b) of Directive 2004/18/EC, where technical specification was defined as relating exclusively to the characteristics of the product itself, hence leaving out any criteria referring to trade conditions.

#### EKO as technical specification

Directive 2004/18/EC provides in Article 23 under the heading 'Technical specifications' that the contracting authorities may include environmental characteristics as part of functional or

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<sup>131</sup> AG Kokott opinion in Case C-368/10, delivered on 15 December 2011. Emphasis added.

<sup>132</sup> See more on this topic in Chapter 4 and the requirements under Article 43 of Directive 201/241

<sup>133</sup> See more on this in Chapter 5.2.3. <http://europeanlawblog.eu/?p=510> (last retrieved 25.05.2014).

performance requirements<sup>134</sup>, and that they ‘may use the detailed specifications or [...] parts thereof, as defined by European or (multi-) national eco-labels, or by and any other eco-labels’<sup>135</sup>, hence establishing that the contracting authorities are allowed to employ the eco-labels only indirectly. In addition, the contracting authority must approve any other means of proof of compliance with the requirements constituting the eco-label.<sup>136</sup>

The CJEU interpreted these obligations strictly. It took the view that mere reference to the eco-labels as part of technical specifications is incompatible with Article 23. The Court supported its argument that Article 23 cannot have an extensive interpretation by relying on the last sentence of recital 29 stating that ‘[t]he technical specifications should be clearly indicated, so that all tenderers know what the requirements established by the contracting authority cover.’<sup>137</sup> Another major problem in the contract notice’s specifications of Noord-Holland was that points 31 and 35 of Annex referred solely to EKO and Max Havelaar labels. It was only at a later point in the information notice that the contracting authority specified the acceptance of equivalent or identical criteria. The Court saw this as a failure to provide transparent and precise enough information to tenderers within the contract notice. The failure to provide for detailed specifications could not be compensated by providing information by publication after the contract notice, since the tenderer usually makes the decision to participate in the procurement procedure based on the actual contract notice.<sup>138</sup> The Court cited Advocate General’s opinion paragraph 71 that providing additional information by information notice ‘cannot change, even by means of corrections, the meaning of the essential contractual conditions’.<sup>139</sup>

To conclude, the province of Noord-Holland would have been authorized to use EKO eco-label as a technical specification, as long as the detailed specifications of the label would have been expressly indicated<sup>140</sup> and secondly, that the contracting authority would have provided in the contract notice that equivalent labels or other means of proof would have been accepted.

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<sup>134</sup> Article 23(3)(b) of Directive 2004/18.

<sup>135</sup> Article 23(6) of Directive 2004/18.

<sup>136</sup> *Ibid.*

<sup>137</sup> Recital 29 of Directive 2004/18.

<sup>138</sup> Case C-368/10 *Max Havelaar*, paras. 55 and 69.

<sup>139</sup> *Ibid.*, para. 55.

<sup>140</sup> There are also other requirements related to the use of eco-labels, see chapter 4 to that end/

## Max Havelaar as technical specification

As already provided above, the Court took the view that the eco-label of Max Havelaar would not fall under the definition of technical specification and hence it was incorrect to examine the Commission's plea in the light of Article 23(6). Instead, the Court concluded it would be correct to see the requirement of products bearing Max Havelaar eco-label under Article 26, which refers to conditions relating to performance of the contract.<sup>141</sup> It was thought that fair trade rules are actually related more to social conditions. However, due to pre-litigation rules, the CJEU saw itself restricted by the Commission's original pleas and held that part of the case inadmissible.

### 5.2.2. The Use of Eco-labels as Award Criteria

After pondering upon the issue of technical specifications, the Court moved onto the award criteria and the use of eco-labels therein. The Commission claimed that by imposing the requirement of EKO and Max Havelaar as award criteria, Article 53 of Directive 2004/18 was infringed due to two reasons; the eco-labels in question did not relate to the subject-matter of the contract and secondly, the principles of equal access, non-discrimination and transparency were violated, especially because these eco-labels were Dutch and more easily accessible to economic operators in the Netherlands.

Article 53(1) provides that when the contracting authority is awarding the contract to economically most advantageous tender, they may use 'various criteria linked to the subject-matter of the public contract in question, for example [...] environmental characteristics'.<sup>142</sup> The Court pointed out, that the wording 'for example' means that the list is not exhaustive and besides economic criteria the contracting authority may resort to qualitative criteria as well. This rule was established earlier in the famous *Concordia Bus* case, where the limits of environmental criteria were well defined.<sup>143</sup> Moreover, it is not necessary that the criteria actually form a part of 'material substance' of a product in order to qualify as award criteria.<sup>144</sup> In addition to environmental criteria, social considerations can constitute award criteria as well. This preliminary mark is of importance, since the Court categorized the eco-label of Max Havelaar with social characteristics rather than purely related to environmental issues.

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<sup>141</sup> Under the new Directive 2014/24/EU the equivalent Article is 70.

<sup>142</sup> Article 53(1)(a) of Directive 2004/18/EC.

<sup>143</sup> See Chapter 2.2.3 for further analysis.

<sup>144</sup> Case C-368/10 *Max Havelaar*, para. 91.

Advocate General Kokott used the contract notice as means of justifying the link between the subject-matter of the contract and the two eco-labels. Firstly, she pointed out in paragraph 109 that the fact that EKO could be used as technical specifications already proves that there is a sufficient degree of linkage between the subject-matter of the contract and the award criteria. As to Max Havelaar eco-label, Kokott argued that since it could constitute conditions relating to the contract under Article 26 of the Directive 2004/18/EC, it again shows the linkage. The Court started its argumentation from looking into the characteristics of the eco-labels. After that it established the subject-matter of the contract, which was the supply of coffee, tea and ingredients to make other drinks. Hence the Court found no difficulty in establishing that both of the labels as award criteria do have a link to the subject-matter of the contract and Commission's plea was not accepted.

The second part of the consideration of award criteria concerned the requirement of using the two particular eco-labels in order to gain points in the award phase. The Court noted that the fact that Noord-Holland had failed to provide for a list underlying the criteria of the eco-labels, it had not created such award criteria 'as to allow all reasonably well-informed tenderers exercising ordinary care to know the exact scope thereof and thus to interpret them in the same way'.<sup>145</sup> More precisely, the principle of equal treatment was violated and therefore, the Court did find a violation of Article 53(1) of Directive 2004/18/EC.

### 5.2.3. The Use of Qualitative Criteria in the Selection Phase

The last issue of the case deals with qualitative criteria, namely that provided in section 4 of part 4.4 of the contract notice specifications used to select or dismiss tenderers. The requirement of 'sustainability of purchases and socially responsible business' was argued by province of Noord-Holland to constitute contract performance conditions under Article 26, because these requirements related to the contract and not the tenderers' personal capacity. The Commission disagreed on this point and took the view that the requirements concerned the general policies of the tenderers and hence were categorized as technical and professional ability under Article 48 of Directive 2004/18/EC.

The Court followed Commission's reasoning on this point since the contracting authority itself had titled the relevant part of the specifications as 'Suitability requirements/minimum levels'. Furthermore, the contracting authority has defined the

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<sup>145</sup> Case C-368/10 *Max Havelaar*, para. 88.

‘suitability requirements’ as to grounds for exclusion or minimum levels to be satisfied by the tenderer so that his tender could be taken into consideration.<sup>146</sup> This definition gives a clear indication that it was not the tender itself that was being scrutinized, but the tenderer himself. Once again, the Court took the tenderers point of view and assumed that a potential tenderer could see these requirements as pointing only to a minimum level of professional capacity within the meaning of Articles 44(2) and 48 of Directive 2004/18/EC.

The Commission submitted three arguments to support its claim the requirements were incompatible with the Directive; firstly, the afore-mentioned requirements established an assessment of tenderer’s technical abilities contrary to Article 44(2) and 48 of Directive 2004/18/EC; secondly, there was lack of sufficient link between the subject-matter of the contract and the requirements and; lastly, the requirements lacked clarity to the extent that Article 2 of the Directive would be violated.

#### Violation of Articles 44 & 48

Article 44(2) provides that the ‘contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48’. Article 48 is titled ‘Technical and/or professional ability’ and has a long and exhaustive list of different requirements the contracting authority may use when choosing the tenderers to participate in the procurement procedure. The Court concluded that none of the factors in Article 48 related to ‘sustainability of purchases and socially responsible business’ and found the requirements to be in breach of the Directive. The Advocate General Kokott took the opposite view. It first held that the criteria at hand does not fall at all under Article 44 or 48, thus following the Netherland’s arguments. Secondly, the Advocate General argued, that even if the criteria would fall under Article 44 or 48, it would not be incompatible with them since Article 48(2)(c) refers to ‘description of [...] measures used by the supplier or service provider for ensuring quality’. In other words she gave that provision a very broad construction, however the Court never accepted this line of argumentation.

What is interesting to see is that the new Directive 2014/24/EU makes a clear reference to this particular issue under recital 97;

The condition of a link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy [...]. Contracting authorities should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place.

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<sup>146</sup> Ibid., para. 103.



It is clear that in order there to be a link between the subject-matter of the contract and the requirements in questions, the latter mentioned cannot be too broad and in any case cannot go beyond the scope of the contract. Hence by requesting the tenderers to indicate how they comply with those criteria and how they ‘contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production’<sup>147</sup>, the contracting authority were essentially asking economic operators to comply with requirements that did not have a link with the actual contract. This argument is in line with the CJEU’s previous judgment in *ENV & Wienstrom*, where asking the tenderers to produce green energy beyond the amount what was actually needed in the contract was not allowed.

### Principle of transparency in Article 2

Article 2 of Directive 2004/18 establishes principles that need to be followed when awarding the contract.<sup>148</sup> It refers to principles of equality, non-discrimination and transparency. The Court took the very familiar positioning of looking into the criteria of ‘sustainability of purchases and socially responsible business’ from the subjective perspective of the tenderer, concluding that the principle of transparency demands the criteria to be ‘clear, precise and unequivocal’ as to enable all tenderers to interpret them in the same manner.<sup>149</sup> Moreover, the principle also requires that the contracting authority must know which tenderers actually do fulfill the criteria. Due to the vagueness of the criteria established by the province of Noord-Holland, neither the tenderers, nor the contracting authority itself were regarded as being in the position to know what was actually required from the tenderers in order to fulfill the requirement. Therefore, the Court concluded that Article 2 was violated and the criteria were incompatible with the principle of transparency.

### 5.3. Judgment’s implication from the perspective of the new Directive

As already pointed out in the beginning of this chapter, the judgment of the *Max Havelaar* case has a limited impact due to the adoption of the new Directive. Directive 2014/24/EU changed the rules regarding the use of eco-labels in the GPP, lowering the administrative burden of the contracting authorities by not requiring them to specify the detailed

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<sup>147</sup> Ibid., para. 108.

<sup>148</sup> This type of Article has been replaced in the new Directive 2014/24 by a more general Article 18, which established the principles of procurement as a whole

<sup>149</sup> Case C-368/10 *Max Havelaar*, para. 109.

specifications of eco-labels.<sup>150</sup> In other words, the parts of the judgment dealing with technical specifications and award criteria are not relevant anymore after the new Directive has been implemented into national legislations.<sup>151</sup> Meanwhile, Member States are between following the old regime of Directive 2004/18 and implementing the new rules of eco-labels, which naturally can cause some controversy and confusion. One interesting issue that can be raised is the different interpretation and categorization of different parts of the contracting authority's specifications between the parties, the Court and the Advocate General in this case. In a procedure such as that at hand consisting of very detailed and technical rules, the contracting authorities must give special attention to how and in which part of the procedure to use the eco-labels successfully as part of the GPP, without breaching the rules of the directives.

Another issue raised is why did the Court follow the procedure of the old Directive 2004/18/EC in *Max Havelaar*, since the negotiations regarding the new Directive 2014/24/EU were already well on their way and it was well-known that the rules concerning eco-labels would change.<sup>152</sup> One argument could be that the Court did not want to step in the shoes of the legislator by interpreting the Directive 2004/18 differently from its pure textual meaning. Although the Court must have been aware that the rules regarding eco-labels were about to change, it decided to wait for the Directive 2014/24/EU to actually enter into force. However, it seems that Advocate General Kokott was more eager to apply the new rules, as pointed out in chapter 5.2. Nevertheless, it remains arguable if the Court would have actually given a different outcome to the case, if it had followed the new public procurement regime. One of the main problems in this case was the fact that Noord-Holland did not write out the detailed specifications of the eco-labels in the technical specifications or the award criteria, and this rule is precisely the provision that has been changed under the new Directive. It remains to be seen how the CJEU will interpret Article 43 of Directive 2014/24/EU in its jurisprudence and how strictly it will apply the freedom to use the eco-labels without indicating in writing the label requirements. Nevertheless, the test created in *Concordia Bus* case will continue to apply, and in that way directly manoeuvre the behaviour of contracting authorities in the use of eco-labels as part of procurement procedure.

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<sup>150</sup> There are other requirements regarding the use of eco-labels within the Directive 2014/24, see chapter 4.

<sup>151</sup> Article 90 of Directive 2014/24 sets the deadline for transposition, which is due 18 April 2016.

<sup>152</sup> Article 41 of COM(2011) 896 final.

## 6. Conclusion

The new procurement Directive indeed allows procurers to make better use of public procurement in support of common societal goals, such as protection of the environment and combating climate change. Due to the use of eco-labels in public procurement, contracting authorities can set out the environmental requirements to be met by products, services and works in a broader scope of the procurement procedure. Nevertheless, the use of eco-labels will be limited to the amount of labels that are appropriate to define the characteristics and cannot be used during the selection criteria, which relates to the tenderer himself, and not the tender. It remains to be seen whether the new procurement Directive will stimulate GPP and the use of eco-labels. As long as there is no obligation towards buying green, the process of green procuring remains dependent on the goodwill of the Member States.

Furthermore, the case law of the CJEU is very scarce in the field of environmental criteria used in public procurement, and the leading case of *Max Havelaar* concerning the use of eco-labels as part of the procedure does not bring sufficient clarity to contracting authorities. This is due to the adoption of the new Directive 2014/24/EU, which ultimately will change the way in which eco-labels can be used, hopefully as to lower the administrative burden of contracting authorities. Eco-labels are an easy and informative way of engaging in GPP, as long as the rules remain clear, precise and transparent to all participating parties without discrimination. However, it is questionable if the use of eco-labels is not contrary to the objective of the new Directive to facilitate the participation of SMEs in public procurement, as the application for an eco-label is a big step financially and administratively to take. It will be interesting to follow how the Commission and the CJEU will apply and interpret the new public procurement directives in relation to eco-labels.

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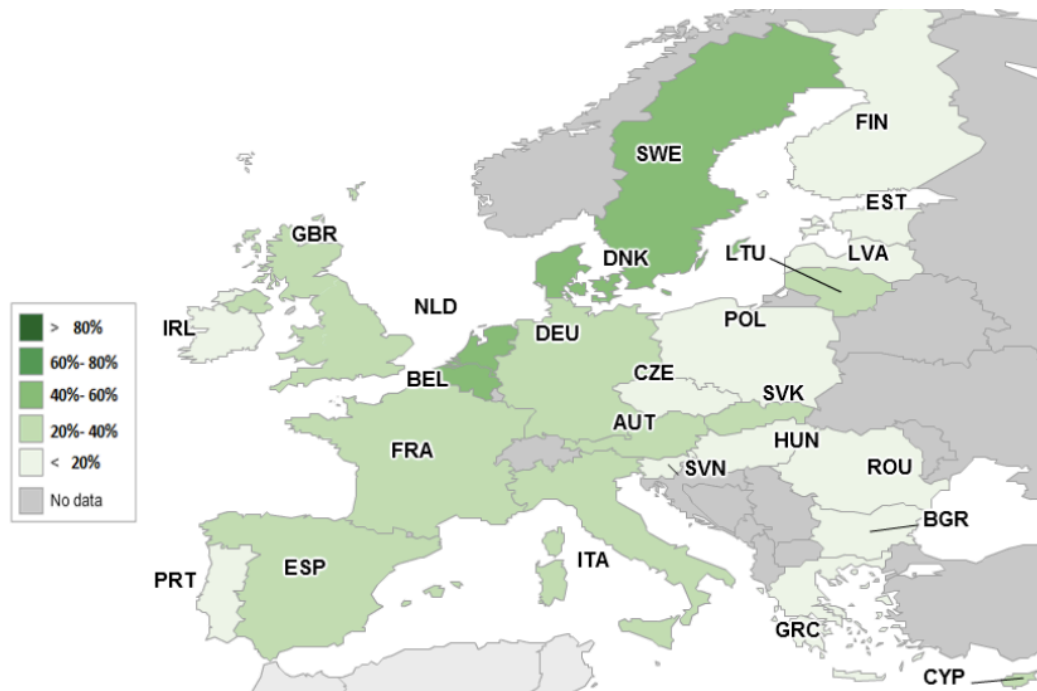
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## ANNEX I

GPP is a voluntary instrument and the increase of GPP is still depending on the goodwill of the Member States. The overall level of EU GPP is a very fragmented picture:



Source: Andrea Renda et al. (eds), *The Uptake of Green Public Procurement in the EU 27*, Centre for European Policy Studies and College of Europe, 2012, p. 41.