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## **Green Public Procurement**

Analysis of current practices and possible future developments

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Green Public Procurement has been encouraged by the European Union since the end of the 1990's to enhance environment protection. Environmental considerations may now be taken at various stages of the public procurement procedure. Nevertheless, the Green Public Procurement uptake at national level still remains insufficient due to the perception of the expensive price of green products and the lack of awareness of Green Public Procurement. To remedy such issues, public authorities should not only be trained and provided with external experts, but it is necessary to move from a voluntary to a mandatory mechanism.

**Keywords:** Public Procurement; Environmental considerations; Legally binding instruments

## **Abstract**

In this contribution, Green Public Procurement procedures will be closely scrutinized. These procedures, as its name suggests, involve the consideration of environmental aspects when purchasing goods, services and works. Indeed, Directive 2004/18/EC establishes that a public contract can be awarded not only on the basis of the lowest price but also based on the most economically advantageous tender. In the latter case, it has been recognized that even environmental aspects could be included in the tender procedure. Although the benefits of Green Public Procurement are widely recognized and the Commission has put a lot of effort in its promotion, Green Public Procurement remains a voluntary instrument. Inevitably, this undermines the success and potential benefits of the instrument. In this paper, the authors, by analyzing the legal developments of Green Public Procurement and their implementation throughout the Union and its Member States, try to establish whether Green Public Procurement can be seen as a successful process or whether it is just an empty concept. Moreover, the authors attempt to provide potential future developments that could further enhance the use of Green Public Procurement by contracting authorities in their call for public tenders.

## Introduction

Environmental protection has been at the heart of European Union's (EU) actions since 1986 with the entry into force of the Single European Act (SEA). Indeed, already then the European Economic Community (EEC) had to take environmental protection requirements into account in other Community's policies, principally the economic and internal market policies.<sup>1</sup> This obligation was kept in Article 6 of the Treaty establishing the European Community (TEC) following the Treaty of Maastricht.<sup>2</sup> Today it finds its place under Article 11 of the Treaty on the Functioning of the European Union (TFEU).<sup>3</sup> The relevance of this provision has gained particular importance since the end of the 1990s and is of fundamental significance today. This is due to the fact that our current way of producing and consuming natural resources is not without consequences for the environment. Natural resources are decreasing rapidly, not only harming the environment but also hindering further economic growth due to the scarcity of resources.<sup>4</sup> This has the potential effect of threatening the overall quality of life. It is therefore only logical that not only the European institutions but also the Member States increasingly introduce environmental considerations in their different policies.

Through public procurement procedures, public authorities spend every year massive amounts of money to purchase public works, services and products. This makes public procurement an attractive area for the introduction of environmental aspects in the process of the selection and purchasing of those products and services. Eventually this will lead to an increase in use of 'green' products and services resulting in more sustainable production and consumption.

It is therefore not surprising that at EU level many initiatives are taken to stimulate the use of environmental criteria in tender procedures. Through Commission communications and policy papers, the Commission tried to provide

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<sup>1</sup> Article 130r of the Single European Act supplementing the EEC Treaty of 18 November 1987, [1987] OJ L 327.

<sup>2</sup> Article 6 TEC (Consolidated version of the Treaty establishing the European Community of 24 December 2002, [2002], OJ C 325/33).

<sup>3</sup> Article 11 TFEU (Consolidated version of the Treaty on the Functioning of the European Union of 30 March 2010, [2010] OJ C 83/01).

<sup>4</sup> European Commission; *Environment – FAQs*, 2013, available at <[http://ec.europa.eu/environment/gpp/faq\\_en.htm#general1](http://ec.europa.eu/environment/gpp/faq_en.htm#general1)> (last visited 30.05.2013).

guidance on the way Green Public Procurement (GPP) criteria could be included in the different stages of the tender procedure. Initially, the Court of Justice of the European Union (CJEU) was the first to accept environmental criteria to be inserted in the process of awarding public contracts.<sup>5</sup> Based on settled case law<sup>6</sup>, the EU legislator codified the possibility for contracting authorities to rely on environmental aspects for the award of public contracts in the two public procurement directives. Despite this explicit reference in the legislation, the consideration of GPP criteria during the public procurement process still needs to happen on a voluntary basis. In order to strengthen the use of GPP, it is therefore indispensable to further develop the existing legal framework.

The following paper will first elucidate what the GPP criteria are within the EU legal order and why there is a need to adopt such criteria. As a second point, it will set out the legal framework of GPP in the EU. Thirdly, the paper establishes how GPP criteria may be included in public procurement procedures and puts this into perspective with two practical examples. The last part of this paper addresses the hits and flaws of GPP and offers potential solutions to further ameliorate the uptake of GPP criteria.

## **Green Public Procurement in the European Union**

### **1. Definition and ratio of Green Public Procurement**

#### *1.1. A definition of Green Public Procurement*

Over the last couple of years environmental issues have increasingly drawn the attention of the EU legislator. This is no different in the area of public procurement. It has become clear that the current patterns of production and consumption of natural resources damage not only the environment but can lead to health problems and distortion of the economic growth due to decreasing natural resources.<sup>7</sup> In order to face these problems GPP has proven to be a useful

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<sup>5</sup> C-513/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* [2002] ECR I-07213, paras. 59-64.

<sup>6</sup> Ibid; see also to this matter: Case C-448/01 *EVN AG and Wienstrom GmbH v Republik Österreich* [2003] ECR I-14527; and Joined cases C-20/01 and C-28/01 *Commission of the European Communities v Federal Republic of Germany* [2003] ECR I-03609.

<sup>7</sup> European Commission; *Environment – FAQs*, 2013.

tool by encouraging the use of greener products and services by the public authorities.

Firstly, it is important to determine what GPP exactly entails. In its 2008 communication, the 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."<sup>8</sup>

Secondly, the notion *life-cycle* needs some clarification. As it is provided in Article 53(1) Directive 2004/18/EC, it is possible to award a contract based on the most economically advantageous tender (MEAT) or the lowest price. In the former case not only the purchase price will be taken into account to calculate the costs but also the whole life-cycle of supplies, services or works will be important, leading to a tender that in first instance might be more expensive but will be less costly on the long term.<sup>9</sup> Through a tool called life-cycle costing (LCC), main categories such as investment, operation, maintenance and end-of-life disposal expenses are assessed leading to a general evaluation of an asset through its life-cycle. In case the external environmental costs are equally assessed, we have an environmental LCC.

Currently GPP is still a voluntary instrument meaning that it is up to the Member States and public authorities to determine to what extent they implement it.<sup>10</sup> Therefore the application of GPP is not solely limited to contracts falling within the scope of the EU Procurement Directives but can also be applied to contracts below those thresholds.

GPP may be applied by both contracting authorities and contracting entities.<sup>11</sup> The former are bodies governed by public law meeting the needs of general interest, not having an industrial or commercial character and having legal personality that are for the most part financed, administrated or supervised

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<sup>8</sup> COM (2008) 400 final.

<sup>9</sup> European Commission, *Environment – Life-Cycle costing*, 2013, available at <<http://ec.europa.eu/environment/gpp/lcc.htm>> (last visited 30.05.2013).

<sup>10</sup> European Commission; *Environment – FAQs*, 2013.

<sup>11</sup> *Ibid.*



by the state or public authorities.<sup>12</sup> The latter are not necessarily public authorities or bodies governed by public law but are entities providing public services depending fairly on public money, in the so-called ‘special sectors’, i.e. water, energy, transport and postal services.<sup>13</sup>

### *1.2. The need for Green Public Procurement*

Each year public authorities in Europe spend around 2 trillion Euros (equivalent to 19% of the EU’s GDP) making them major consumers. The main part is going to sectors such as transport, food and buildings which are to be considered as sectors with high environmental impacts. According to the study “EIPRO – Environmental Impact of Products”, those products are responsible for 70-80% of environmental impacts of (private) consumption.<sup>14</sup> Since natural resources used in this consumption process are rapidly decreasing, action is needed.

Because of their role in this mass consumption, public authorities have a significant influence on the way goods, services and works are chosen. Consequently, they could use their power to structure this choosing- process in a way that would reduce the environmental impact.<sup>15</sup>

Therefore GPP can be a helpful instrument leading to sustainable consumption and production. An increase in demand of greener products by the public authorities could incentivize the industry to develop environmentally friendly products, services and technologies.<sup>16</sup> This would not only be beneficial to the environment but also to the overall economy since eco-technology has been recognized as a rapidly growing sector allowing the European industry to

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<sup>12</sup> Article 1(9) Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134/114.

<sup>13</sup> Recital 1 Preamble to Directive 2004/17/EC of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal service sectors, OJ L 134/1.

<sup>14</sup> A. Tukker et al. (eds.), *Environmental Impact of Products (EIPRO) – Analysis of the life-cycle environmental impacts related to the final consumption of the EU-25*, Institute for Prospective Technological Studies (DG JRC/IPTS, European Commission), 2006.

<sup>15</sup> European Commission, *Environment – Buying Green Handbook*, 2013, available at <<http://ec.europa.eu/environment/gpp/pdf/handbook.pdf>> (last visited 30.05.2013).

<sup>16</sup> COM (2008) 400 final.

play an important role herein. GPP could thus minimize the damage caused to the environment while maintaining an economic equilibrium at the same time.<sup>17</sup>

Moreover, there is also a financial aspect. If one takes the full LCC of a contract into consideration and not just focuses on the purchasing price it will show that GPP can lead to financial savings for public authorities. This will eventually make it easier for the national authorities to comply with the environmental challenges and duties and through that show their commitment to environmental protection. More generally the use of GPP will lead to awareness on environmental issues (also towards private parties) and in the long term GPP will improve health and the overall quality of live.<sup>18</sup>

## **2. How was it introduced?**

### *2.1. The emergence of public procurement in the EU*

Directives 92/50/EEC, 93/36/EEC, 93/37/EEC and Directive 97/52/EC, amending the three former ones, were the first attempt to codify public procurement to guarantee transparent procurement tenders, ensuring free competition and the principle of non-discrimination.<sup>19</sup> Those directives did not contain any provisions promoting GPP and contracting authorities often picked the tender for which they had to pay the least.

In 1996 and 1998, the Commission started to give a certain importance to the environment in public tenders. Indeed, in its 1996 Green Paper, *Public Procurement in the European Union: Exploring the Way Forward* and its 1998 White Paper, *Public Procurement in the European Union*, it provided an incentive to consider a variety of environmental protections, through a broader interpretation of the directives.<sup>20</sup>

Due to the scarcity of natural resources, the Commission highlighted the importance of sustainable production and consumption in a 2001 Communication. This Communication assisted Member States in making a better

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<sup>17</sup> European Commission; *Environment – FAQs*, 2013.

<sup>18</sup> European Commission; *Green Public Procurement*, 2010, available at <<http://ec.europa.eu/environment/gpp/pdf/brochure.pdf>> (last visited 30.05.2013).

<sup>19</sup> de Leonardis, 'Green Public Procurement: From Recommendation to Obligation', *International Journal of Public Administration* 34, 2011, p. 111.

<sup>20</sup> COM 96 (583) final; COM 98 (143) final.

use of public procurement to favour environmentally-friendly products and services.<sup>21</sup> In the following years, the CJEU was seized several times to decide on the legitimacy of the use of environmental criteria in public procurement procedures.

## 2.2. Consideration of environmental requirements acknowledged by the CJEU

### 2.2.1. Concordia Bus Finland (2002)

The CJEU was the first to make the consideration of environmental conditions possible for contracting authorities or entities. Indeed, in the 2002 *Concordia Bus Finland* case<sup>22</sup>, the CJEU was seized for a preliminary ruling to determine whether environmental criteria could be taken into consideration at the award stage of a contract and if extra points could be awarded to them.

The case concerned the award of a public contract for operating the urban bus network.<sup>23</sup> The contract had to be attributed according to the MEAT with three specific award criteria: (i) the overall price, (ii) the quality of the bus fleet, and (iii) the operator's quality and environment management. As regards the weighing, each criterion stood respectively for 86 points, 10 points and additional points.<sup>24</sup> The City of Helsinki received eight tenders from which HKL was the most economically advantageous one.<sup>25</sup> Concordia Bus Finland, an unsuccessful tenderer, challenged this decision to the Finnish Competition Council on the ground that the City of Helsinki discriminated against it by awarding additional points to HKL having buses with nitrogen oxide emissions and noise levels below certain limits.<sup>26</sup> The Council rejected the application stating that the City of Helsinki gave preference to low-pollution buses and that there was no procedural shortcoming.<sup>27</sup> In appeal, the national court deemed necessary to analyze whether the EU public procurement directives authorized

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<sup>21</sup> COM (2001) 274 final.

<sup>22</sup> C-513/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* [2002] ECR I-07213.

<sup>23</sup> C-513/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* [2002] ECR I-07213, para. 20.

<sup>24</sup> *Ibid*, paras. 21-22.

<sup>25</sup> *Ibid*, para. 25.

<sup>26</sup> C-513/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* [2002] ECR I-07213, para. 27.

<sup>27</sup> *Ibid*, para. 29.

the inclusion of environmental criteria in their award procedure. Therefore, it decided to seize the CJEU for a preliminary ruling under Article 267 TFEU.<sup>28</sup>

The CJEU held that contracting authorities are allowed to take various criteria into account at the award stage. Moreover, these do not necessarily have to be of a purely economic nature. The CJEU drew a parallel with the Treaties pointing out to former Article 6 TEC (now Article 11 TFEU) which requires the integration of environmental requirements into the definition and implementation of Community policies and activities.<sup>29</sup> The CJEU thus confirmed the possibility to include environmental conditions into the award procedure and made it subject to four conditions: (i) they should be linked to the subject matter of the contract; (ii) they should not give unrestricted freedom of choice on the contracting authority, meaning any environmental requirements must be specific and objectively quantifiable; (iii) they should be expressly mentioned in the contract documents or in the tender notice; and (iv) they have to comply with the general EU Treaty principles.<sup>30</sup> There are two main principles in the field of public procurement. These are the principle of equal treatment, i.e. non-discrimination on the basis of nationality and its corollary, the principle of transparency.<sup>31</sup> For the latter, the CJEU has constantly held that the obligation of equal treatment is inherent to the principle of equal treatment.<sup>32</sup> These two principles are now codified in Article 2 Directive 2004/18/EC.

### 2.2.2. Federal Republic of Germany and Wienstrom (2003)

The ruling in *Concordia Bus Finland* was similarly reaffirmed in *Wienstrom*<sup>33</sup> and *Commission v Federal Republic of Germany*.<sup>34</sup>

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<sup>28</sup> C-513/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* [2002] ECR I-07213, paras. 32-34.

<sup>29</sup> *Ibid*, paras. 53-57.

<sup>30</sup> *Ibid*, paras. 59-64.

<sup>31</sup> Article 18 TFEU, but also in the specific provisions on free movement, i.e. Articles 45, 56 and 63 TFEU.

<sup>32</sup> Case C-92/00 *HI* [2002] ECR I-5553, para. 45; Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, para. 91; and Case C-496/99 P *Commission of the European Communities v CAS Succhi di Frutta SpA* [2004] ECR I-03801, para. 109.

<sup>33</sup> Case C-448/01 *EVN AG and Wienstrom GmbH v Republik Österreich* [2003] ECR I-14527.

<sup>34</sup> Joined cases C-20/01 and C-28/01 *Commission of the European Communities v Federal Republic of Germany* [2003] ECR I-03609, para. 60.

a) Wienstrom

In *Wienstrom*, an Austrian contracting authority invited economic operators to submit tenders for the award of a public contract for the supply of electricity according to the MEAT. The two award criteria were net price per kWh, with a weighting of 55%, and energy produced from renewable energy sources of at least 22.5 gigawatt hours (GWh) per annum, with a weighting of 45%. For the latter, the contracting authority would only take into account the energy supplied in excess of 22.5 GWh per annum.<sup>35</sup> *Wienstrom* considered the provision in the tender invitation unlawful, specifically pointing to the lack of means to verify whether electricity is produced from renewable energy sources and the decision to make the availability of electricity from renewable energy sources in excess of 22.5 GWh per annum an award criterion. As a result, the Austrian national court decided to stay the proceedings and refer questions for preliminary ruling.<sup>36</sup>

The CJEU re-affirmed the *Concordia Bus Finland* judgment holding that it is acceptable to make use of ecological award criteria and give them a large weighing, even if the criterion in question does not provide an immediate economic benefit for the contracting authority.<sup>37</sup> It added that in order for the criterion to be acceptable, it should be expressly linked to the subject-matter of the contract and should be capable of verification. This means that the bidders must provide the necessary certificates enabling the contracting authority to verify whether they fulfill the specific criteria.<sup>38</sup> The Court further drew the attention on the importance of the award criteria to be linked to the subject matter of the contract. It declared unacceptable the use of an award criterion, which is based on the total amount of electricity from renewable sources provided in excess of the amount required under the contract. Such a criterion is not linked to the subject matter of the contract and constitutes an unjustified discrimination against the bidders who fulfill the requirements.<sup>39</sup>

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<sup>35</sup> Case C-448/01 *EVN AG and Wienstrom GmbH v Republik Österreich* [2003] ECR I-14527, paras. 15, 17-18.

<sup>36</sup> *Ibid*, paras. 23 and 27.

<sup>37</sup> *Ibid*, paras. 32-33, 39-42.

<sup>38</sup> *Ibid*, paras. 48-53.

<sup>39</sup> *Ibid*, paras. 66-69.

b) Commission v Federal Republic of Germany

*Commission v Federal Republic of Germany* is quite different from the two aforementioned cases. It concerns an infringement proceeding launched by the Commission on the ground that two contracting authorities had failed to comply with EU law and to apply Directive 92/50/EEC.<sup>40</sup> Special attention will be given to C-28/01 due to its special relevance to the environment. In C-28/01, the contracting authority relied on Article 11(3) (b) Directive 92/50/EEC (now Article 31(1) (b) Directive 2004/18/EC) to justify the procedure without the publication of a contract notice. The contracting authority included as an essential award criterion the proximity of the incineration facilities to the City of Braunschweig in order to avoid transport over longer distances and therefore to ensure the protection of the environment.<sup>41</sup> The CJEU reiterated its ruling in *Concordia Bus Finland* holding that a contracting authority may take account of criteria relating to environmental protection at the various stages of a procedure for the award of public contracts. The protection of the environment may thus be a technical reason to consider whether the contract at issue may be awarded to a specific supplier.<sup>42</sup> The CJEU nevertheless reiterated that the derogation enshrined in Article 11(3) Directive 92/50/EEC was to be interpreted strictly and that the party relying on such exceptional circumstances bore the burden of proof.<sup>43</sup> Due to the fact that the German government did not provide any evidence to prove that the procedure was non-discriminatory and that the proximity of the waste disposal facilities was absolutely necessary, the CJEU rejected the argument that environmental protection constituted a technical reason to claim that the contract could be awarded to only one particular supplier.<sup>44</sup>

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<sup>40</sup> Joined cases C-20/01 and C-28/01 *Commission of the European Communities v Federal Republic of Germany* [2003] ECR I-03609, paras. 7, 9-11, 12-13, 17-18.

<sup>41</sup> Joined cases C-20/01 and C-28/01 *Commission of the European Communities v Federal Republic of Germany* [2003] ECR I-03609, para. 18.

<sup>42</sup> *Ibid*, paras. 60-61.

<sup>43</sup> *Ibid*, para. 58.

<sup>44</sup> *Ibid*, paras. 64-66.

### *2.3. Codification of the Court's case-law*

In 2004, the Council together with the European Parliament adopted two Directives on public procurement amending the previous Directives: Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC coordinating the procedures for the award of public works contracts, public supply contracts and public service contracts.

In contrast with the earlier EU Directives governing procurement and in line with the CJEU case-law, the 2004 Directives contain specific reference to the possibility of including environmental considerations in the contract award process. First, the preamble of Directive 2004/18/EC explicitly sets out the objective of contributing to “the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts”.<sup>45</sup> Both directives make it clear that contracting authorities or contracting entities may apply award criteria based on environmental characteristics linked to the subject matter of the contract.<sup>46</sup> The directives also provide for the inclusion of environmental conditions in technical specifications<sup>47</sup>, the use of eco-labels<sup>48</sup>, the setting of social and environmental conditions for the performance of contracts<sup>49</sup>, the obligation for bidders to demonstrate they have met the environmental obligations<sup>50</sup> and the duty for bidders to prove they can perform the contract in line with the environmental measures.<sup>51</sup> Hence, the Directives offer a number of opportunities for GPP to be implemented, throughout the contract selection and award process.

### *2.4. Further Union's targets and National Action Plans (NPAs)*

In 2008, the Commission repeated its desire to reduce the environmental impact caused by public sector consumption and indicated how to use GPP in order to stimulate innovation in environmental technologies, products and services. In

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<sup>45</sup> Recital 5 to Preamble of Directive 2004/18/EC.

<sup>46</sup> Article 53(1) Directive 2004/18/EC and Article 55(1) (a) Directive 2004/17.

<sup>47</sup> Article 23(3) (b) Directive 2004/18/EC; Article 34(6) Directive 2004/17.

<sup>48</sup> Article 23(6) Directive 2004/18/EC; Article 34(6) Directive 2004/17.

<sup>49</sup> Article 26 Directive 2004/18; Article 38 Directive 2004/17.

<sup>50</sup> Article 27 Directive 2004/18; Article 39 Directive 2004/17.

<sup>51</sup> Article 48(2) (f) and 50 Directive 2004/18; Article 54(6) Directive 2004/17.

addition, it set an indicative target that, by 2010, 50% of all public tendering procedures should be ‘green’. By ‘green’, it should be understood that the procedures endorse core EU GPP criteria.<sup>52</sup>

The EU has also set up a strategy, the ‘EU 2020 Strategy’ that aims at smart, sustainable and inclusive growth. One of the core targets is indeed climate change and energy sustainability. By 2020, the Union plans to diminish its greenhouse gas emissions by 20-30%, to obtain 20% of its energy through renewable energy and to increase by 20% its energy efficiency. The use of environmental criteria in public procurement contracts is therefore a key tool to achieve those objectives.<sup>53</sup>

Next to the EU legal framework, the Commission has also encouraged the Member States to sketch out NAPs to enhance GPP.<sup>54</sup> Similarly, to the 2020 Strategy, the NAPs enclose an evaluation of how the situation is at present and the targets to be achieved in the future. These are voluntary programs, but they raise the awareness about GPP and permit Member States to use it when deemed appropriate.<sup>55</sup>

### **3. GPP in practice**

#### *3.1. GPP criteria*

##### 3.1.1. What are GPP criteria?

The common GPP criteria mentioned in the 2008 Commission communication are those that “can be incorporated into a public procurement procedure for goods, services or works in order to reduce the environmental impact of the purchase”.<sup>56</sup> Their purpose is to identify the main environmental impacts of each of the products, works and services covered and to propose clear, verifiable and

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<sup>52</sup> COM (2008) 400 final.

<sup>53</sup> European Commission; *Europe 2020*, 2013, available at <[http://ec.europa.eu/europe2020/index\\_en.htm](http://ec.europa.eu/europe2020/index_en.htm)> (last visited 30.05.2013).

<sup>54</sup> COM (2003) 302 final.

<sup>55</sup> European Commission; *National Action Plans*, 2013, available at <[http://ec.europa.eu/environment/gpp/action\\_plan\\_en.htm](http://ec.europa.eu/environment/gpp/action_plan_en.htm)>, (last visited 30.05.2013).

Currently, 22 Member States adopted such a national action plan: Austria, Belgium, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, UK. On the other hand, Bulgaria, Estonia, Greece, Hungary, Romania have not set up a NAP yet.

<sup>56</sup> European Commission; *Environment – FAQs*, 2013.



ambitious criteria to address these in the procurement process. Considering the growing interest in green procurement procedures and the strengthening of the internal market, it has been recognized that common GPP criteria could be useful in order to avoid any distortion of the market. Moreover, companies who are active in more than one Member State welcome such common GPP criteria, making it easier for them to manage their procurement procedures in a more coherent way. There are two levels of common GPP criteria, namely the core and the comprehensive.

(i) Core – “suitable for use by any contracting authority across the EU, which addresses key environmental impacts and are designed to be used with minimum additional verification efforts or cost increases”.<sup>57</sup>

(ii) Comprehensive – “aimed at contracting authorities who wish to purchase the best environmental products available on the market. These criteria may require additional verification efforts or a slight increase in cost compared to other products with the same functionality”.<sup>58</sup>

The common GPP criteria should be easy to use, based on the most significant environmental impacts of the products, works and services, and easily verifiable. Moreover, they should in any case comply with EU procurement legislation.<sup>59</sup> The adoption of these non-binding GPP criteria happens on a voluntary basis by the Member States. Indeed, in practice a number of Member States have implemented common GPP criteria in their national action plans or, at least, have adopted similar criteria.<sup>60</sup> Some sectors have been identified as more suitable for the application of GPP criteria in the tendering procedure. For those priority sectors (19), specific common GPP criteria have been developed.<sup>61</sup>

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<sup>57</sup> European Commission; *Environment – FAQs*, 2013.

<sup>58</sup> *Ibid.*

<sup>59</sup> European Commission, *Environment – GPP Criteria*, 2013, available at <[http://ec.europa.eu/environment/gpp/gpp\\_criteria\\_process.htm](http://ec.europa.eu/environment/gpp/gpp_criteria_process.htm)> (last visited 30.05.2013).

<sup>60</sup> European Commission; *Environment – FAQs*, 2013.

<sup>61</sup> Copying and graphic paper, cleaning products and services, Office IT equipment, Construction, Transport, Furniture, Electricity, Food and catering services, textiles, gardening products and services, windows, thermal insulation, hard-floor coverings, wall panels, combined heat and power, road construction and traffic signs, street lighting and traffic signals, mobile phones and indoor lighting.

### 3.1.2. How are common GPP criteria developed?

The procedure for the development of common GPP criteria largely follows the structure of the EU Ecolabel criteria setting-procedure. Based on an annual GPP work plan, the Commission's Joint Research Centre's Institute for Prospective Technological Studies (JRC-IPTS) leads the development process.<sup>62</sup> During the process, documents such as the preliminary report, a draft of the technical report or of the criteria, will be made available on the Commission's website allowing stakeholders to submit their comments.<sup>63</sup> There will be a response to those comments and they will be taken into consideration during the ongoing procedure. Next to this external consultation the informal GPP Advisory group (GPP AG) will be consulted regarding the proposal for EU GPP criteria.<sup>64</sup> Finally, once the criteria comply with all requirements and reflect the views of all interested parties involved in the development procedure, the Commission will adopt the EU GPP criteria and the technical reports. They can be found in form of a staff working document on the website of the Commission. Nevertheless, it is possible for a Member State or another stakeholder to be in charge of the development process. This can evidently only be done successfully if they have enough expertise in the matter. Moreover, it is important that they take a neutral and objective approach in order to obtain the Commission's approval in the end.<sup>65</sup>

### *3.2 The use of GPP criteria in the tender procedure*

To achieve the aim of GPP, GPP criteria will be introduced in the call for tenders. It is thus a misconception that GPP is a separate and uniform procedure of public procurement. Therefore, it is important to keep in mind that the basic principles and the provisions of national and/or EU legislation are still applicable. This means that in any case the public authority must get the best

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<sup>62</sup> European Commission, *Environment – GPP Criteria*, 2013.

<sup>63</sup> Technical reports provide information such as the scientific explanations of the criteria and the estimation of the expected environmental impacts of the criteria as a whole.

<sup>64</sup> The EU GPP AG acts as a consultative body to the Commission for the development of EU GPP criteria. One representative per Member State and five representatives of other stakeholders form this EU GPP AG.

<sup>65</sup> European Commission, *Environment – GPP Criteria*, 2013.

value for taxpayers money for everything they procure and they must act fairly taking the principles of the internal market into consideration. Consequently they will have to act in respect with the principle of non-discrimination, equal treatment, transparency and proportionality.<sup>66</sup>

As aforementioned, there is not such a thing as one uniform green procurement procedure. Green consideration can be taken into account in several stages of the procurement procedure and each case will be different depending on the needs and goals that are put forward. Hereunder it will briefly be demonstrated how the GPP criteria can be used in the different stages of the tender.

### 3.2.1 Subject matter

Firstly, the contracting authorities will need to define the subject matter of the contract. Since they enjoy substantial freedom to do so, they can include environmental considerations provided that this will not lead to a distortion of the market. This might also be an opportunity to inform the tenderers and more generally the market of GPP objectives.<sup>67</sup>

### 3.2.2 Technical specifications in terms of performance or functional requirement

After identifying the subject matter, the contracting authorities will set out technical specifications in the tender documents. In order to comply with the transparency principle, it is important for the tenderers to be aware of the requirements against which they will be evaluated. Those requirements have to be related to the characteristics of the work, supply or service that will be purchased. Many of the GPP criteria and environmental requirements such as technical standards and specifications regarding the use of materials and production methods can already be introduced at this stage by the contracting authority.<sup>68</sup> Technical specifications can also be defined by the use of eco-labels but only if they are appropriate to define the characteristics of the product or

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<sup>66</sup> European Commission, *Environment – Buying Green Handbook*, 2013.

<sup>67</sup> European Commission, *Environment – Buying Green Handbook*, 2013.

<sup>68</sup> Technical environmental requirements in: Article 23(3) (b) Directive 2004/18/EC and Article 34(3) (b) Directive 2004/17/EC; and material and production methods in: Annex VI of Directive 2004/18 and Annex XXI of Directive 2004/17/EC.

service, that the requirements for the eco-label are based on scientific information, that they are adopted in a procedure in which all stakeholders may participate and that they are accessible to all interested parties.<sup>69</sup>

### 3.2.3 Selection of suppliers and service providers

In order to assess the ability of a tenderer to perform a contract, selection criteria are used. These criteria concern the personal suitability to pursue the professional activity, the economic and financial standing and their technical ability.<sup>70</sup> When conducting such an assessment, contracting authorities may take environmental aspects into consideration.

Firstly, contractors can be excluded in case of grave professional misconduct or when convicted of an offence concerning professional conduct.<sup>71</sup> This can be the case if environmental legislation has been breached. The criteria for exclusion are to be considered as relatively strict in the sense that it would probably only be possible in cases that clearly show that the environmental aspects have been a particularly important part of the previous contract and the breach has been substantial.<sup>72</sup>

Furthermore, the contractor's previous experiences or other environmental technical competences can be requested if the contract has a specific environmental dimension.<sup>73</sup> The presence of an environmental management system, aiming at the improvement of the overall environmental performance, is recognized as a selection criterion. Article 50 of the Directive 2004/18/EC accepts the EU's eco-management and audit scheme (EMAS) and environmental management standards certified by bodies conforming to EU law or the relevant European or International standards concerning certification (in

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<sup>69</sup> Article 23(6) Directive 2004/18/EC; Article 34(6) Directive 2004/17/EC.

<sup>70</sup> Article 46, 47 and 48 Directive 2004/18/EC.

<sup>71</sup> Article 45(2) (c) and (d) of Directive 2004/18/EC.

<sup>72</sup> A. Palmujoki et al (eds), 'Green Public Procurement: Analysis on the Use of Environmental Criteria in Contracts'. *Review of European Community and International Environmental Law* 19 (2), 2010, p. 256 and COM (2001) 274 final.

<sup>73</sup> For example: requirements regarding the necessary technical equipment for environmental protection or the professional qualifications, education and experience of the personnel to deal with the environmental elements of the contract. *See: European Commission, Environment – Buying Green Handbook*, 2013.

practice this normally means ISO 14001) as proof, although other evidence of equivalent environmental management measures should be accepted too.<sup>74</sup>

It is important to mention that an environmental management system can also be used as an award criterion, thus considered relevant to how the contract will be performed. However, if it is included as one of the selection criteria it cannot be repeated at the award stage.<sup>75</sup> This distinction is not always clear as we can see in the recent *Evropaiki Dynamiki v European Environment Agency case* (2010). The assessment of environmental management measures and criteria in general has proven to be delicate. Especially the scope of ‘equivalent evidence’ is quite problematic. In its judgment, the General Court (GC) tries to provide some insight into the approach that should be taken by the contracting authorities. In this case one of the *award criteria* was based on the existence of a general environmental policy of the company. The claimant argued that the assessment by the contracting authority was flawed since they awarded the contract to the sole company in possession of a third party certification. The GC confirmed in its judgment that the contracting authority disposes of a certain discretion when assessing the evidence submitted and that third party certification is to be considered a strong evidence of a company’s environmental standards even though it cannot be required as such.<sup>76</sup>

#### 3.2.4 Awarding the contract

Once the selection phase has successfully ended, the contracting authority will evaluate and compare the various tenders. According to Article 53 (1) Directive 2004/18/EC, the contract can be awarded based on the lowest price or on the MEAT. For the latter, other criteria next to the purchasing price will be taken into account. The contracting authority must specify the relative weighting it gives to each of the criteria chosen to determine the MEAT.<sup>77</sup> Weighting can be expressed by providing for a range with an appropriate maximum spread. The

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<sup>74</sup> See also A. Palmujoki et al (eds.), 2010, p. 254.

<sup>75</sup> European Commission, *Environment – Buying Green Handbook*, 2013.

<sup>76</sup> Case T-331/06 *Evropaiki Dynamiki v European Environment Agency* [2010] ECR II-136, paras. 120-123.

<sup>77</sup> Article 53 (2) Directive 2004/18/EC.

contract will finally be awarded to the tender closely corresponding to the requested criteria.<sup>78</sup>

The Directive provides a non-exhaustive list of examples of individual award criteria.<sup>79</sup> This allows environmental criteria to be included as additional award criteria under the MEAT. As mentioned before, the CJEU ruled that factors that are not purely economic, like environmental award criteria, can still influence the tender as long as the four conditions put forward in *Concordia Bus Finland* are fulfilled.<sup>80</sup> So far common environmental criteria have been established in the European Commission's Training Toolkit on GPP for certain key sectors, which have been identified as most suitable for implementing GPP.<sup>81</sup>

The cost of a tender is usually a decisive factor in the award stage of the procurement procedure. This cost element entails more than just the purchase price. To give a more complete image of the cost that will be incurred during its lifetime LCC is used as a tool to provide a general evaluation of that asset.<sup>82</sup> Environmental costs can be included in the LCC. By taking for example disposal costs, savings on maintenance or on the use of energy into consideration, it will often lead to greener and cheaper products and services.<sup>83</sup>

#### 3.2.4 Contract performance clauses

Finally, environmental considerations can be included at the performance stage through the use of contract clauses. Article 26 Directive 2004/18/EC provides the contracting authorities the possibility to lay down, in particular, social and environmental considerations relating to the performance of the contract if they were made known to the tenderers in the contract notice or in the specifications. This allows the contracting authority to require that the execution of the contract

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<sup>78</sup> A. Palmujoki et al (eds.), 2010, p. 253.

<sup>79</sup> Article 53 Directive 2004/18/EC.

<sup>80</sup> C-513/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* [2002] ECR I-07213, paras. 59-64.

<sup>81</sup> European Commission; *How Green is your Public Procurement? Training toolkit on GPP*, 2009, available at < [http://ec.europa.eu/environment/gpp/toolkit\\_en.htm](http://ec.europa.eu/environment/gpp/toolkit_en.htm) > (last visited 30.05.2013). See also A. Palmujoki et al (eds.), 2010, p. 254.

<sup>82</sup> European Commission, *Environment – Life-Cycle costing*, 2013.

<sup>83</sup> European Commission, *Environment – Buying Green Handbook*, 2013.

happens in a way that minimizes the environmental impact, for instance by specifying the way goods are to be supplied or how the environmental management system of the supplier should be established.<sup>84</sup> The contract clause should not be phrased in such a way that certain bidders are directly excluded from getting the contract. Moreover it must follow the principle of proportionality, i.e. sanctions for a possible environmental breach cannot be disproportionate compared to the overall size of the contract.<sup>85</sup> In no way the use of these clauses may lead to an amendment of the contract as tendered or as disguised technical specifications, award or selection criteria.

This section demonstrates clearly that there are various ways to make the public procurement procedure green at different stages. How GPP works in practice will be illustrated by two practical examples.

### *3.3. Practical examples*

#### 3.3.1. Green procurement in Badalona's schools in Spain

In 2009, the city council of Badalona started a project to encourage GPP in public schools. Together with six schools they wanted to develop practice guidelines for the green procurement of certain categories of products. First, it should be highlighted that a school may be considered as a contracting authority within the meaning of Article 1(9) Directive 2004/18/EC. Indeed, it is a body governed by public law, i.e. it meets the general interest (no industrial or commercial interest), it has legal personality and it is financed by the state (the teacher's salaries are also financed by the state). Second, these schools, acting in their capacity of contracting authorities, have established the following GPP criteria that they take into account when contracting with different stakeholders<sup>86</sup>:

- (i) 100% recycled and totally chlorine free for plain/copy paper; certified as sustainably harvested virgin fibres (e.g. FSC certified) for coloured paper.

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<sup>84</sup>A. Palmujoki et al (eds.), 2010, p.254.

<sup>85</sup> *Ibid.*

<sup>86</sup> European Commission, *Green Public Procurement: a collection of good practices*, 2012, p.3, available at <[http://ec.europa.eu/environment/gpp/pdf/GPP\\_Good\\_Practices\\_Brochure.pdf](http://ec.europa.eu/environment/gpp/pdf/GPP_Good_Practices_Brochure.pdf)> (last visited 30.05.2013).

- (ii) Recycled toner and inkjet cartridges; energy efficient equipment based on Energy Star criteria.
- (iii) Purchase food produced through organic agriculture; adapt menus (less meat and more seasonal food).
- (iv) Purchase environmentally friendly cleaning products.
- (v) Include environmental criteria for contracting maintenance services (e.g. materials using less water and energy).

This project and consequently the establishment of GPP criteria had a positive impact on the environment. It resulted in savings totaling 9,574 liters of water and 2,048 kWh in energy through their purchase of 100% recycled paper. Moreover, avoiding products containing certain substances or ingredients helped to reduce bioaccumulation and air pollution.<sup>87</sup>

### 3.3.2 Sustainable uniforms for the French Navy

Since the Ministry of Defence is responsible for the clothing of around 240.000 staff of the French Navy, Army and Air Force, it can be considered as a major purchaser in the clothing sector. Being aware of its position, the Ministry wanted to promote sustainable development through the introduction of green procurement criteria along the clothing production line.<sup>88</sup> From an environmental point of view, the use of toxics and hazardous substances in the production process for textiles is especially problematic. If certain of those substances are used in an unfortunate way this might lead to a decrease in the air, soil and water quality and more generally the health of consumers.

In 2010 a notice to set up a single operator framework agreement was published, dividing the framework into two lots for the supply of between 36 000 and 150 000 cotton knit jerseys over a period of three years. The technical specifications regarding the first lot, which concerned the supply of industry standard blue cotton jersey, determined that no hazardous substances would be used in the production process or would be present in the final product in amounts above the specific thresholds set by the Ministry of defense.

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<sup>87</sup> European Commission, *Green Public Procurement: a collection of good practices*, 2012, p.4.

<sup>88</sup> *Ibid*, p. 17. A notice was published in the Official Journal in April 2010 to establish a single-operator framework agreement.



Specifications were also provided for the second lot, regarding the supply of organic blue cotton jersey, requiring that:

- (i) cotton must be produced by an organic method of agriculture which conforms with Council Regulation No. 834/2007 of 28.6.2007;
- (ii) hazardous substances must not be used in the production process or present in the final product;
- (iii) the range of pH should be between 4.5 and 7.5.

Next to the technical specifications, the award criteria as well included sustainable criteria. In previous tender procedures technical quality was given a weighting of 60% and the price a weighting of 40%, which as a result of the homogeneity in quality of offers was often decisive. In the new tender, however, a weighting of 20% was introduced in the award scheme for sustainability considerations.<sup>89</sup> The result in this case was that the basis for competition amongst suppliers shifted. Finally, 28 suppliers requested the tender documents and each of the two lots received two bids.<sup>90</sup> This success shows that it is perfectly possible to introduce environmental and social requirements in a tender procedure to purchase clothing and it can be used as an example for other types of tenders.

#### **4. Is GPP successful?**

##### *4.1. How far is GPP achieved in the respective Member States?*

In 2011, the Commission directed a study with the aim of measuring if its target from 2008 had been reached, i.e. that 50% of all public tendering procedures in the EU should be green by 2010. This was the first survey covering all 27 Member States and it made several findings.<sup>91</sup>

First, on the last contract signed in the period of 2009-2010<sup>92</sup>, only 26% of the contracts were green; therefore still being far away from the Commission's goal. Member States have nevertheless come a long way and it should not be

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<sup>89</sup> The new award scheme is as following: technical quality (45%), price (35%) and sustainable development (20%).

<sup>90</sup> European Commission, *Green Public Procurement: a collection of good practices*, 2012, p. 18.

<sup>91</sup> 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.

<sup>92</sup> Last contract signed for a given product group in 2009-2010.

forgotten that 55% of the last contracts signed contained at least one core GPP criteria. It is thus an increase of 26% compared to the whole period of 2009-2010. Moreover, 38% of the total value procured included some form of GPP criteria.<sup>93</sup>

Second, the study shows that GPP varies significantly within the EU.<sup>94</sup> As can be seen from the map in Annex I, there are four top performers, i.e. Belgium, Denmark, the Netherlands and Sweden, where green criteria are applied in 40 to 60% of the cases. These are followed by a group of countries having a level of uptake between 20 to 40%.<sup>95</sup> Portugal, Ireland, Poland, the Czech Republic, Finland, Slovenia, Hungary, Romania, Bulgaria, Greece, Latvia and Estonia, however, have a level of EU GPP uptake below 20%. These results should, nonetheless, be taken with caution as the respective countries did not participate equally in the survey.<sup>96</sup> Furthermore, the Member States who are doing best have usually a better awareness of GPP and already had a system of green criteria in their public procurement procedures.<sup>97</sup>

Third, green criteria are used in a greater quantity for certain sectors compared to others.<sup>98</sup> As illustrated by the scheme in Annex II, the transport sector meets the 50% target set at the EU level. Conversely, the furniture, textiles, food and catering services, and construction sector significantly lag behind with a level of uptake below 20%.<sup>99</sup>

#### *4.2. Reasons for such results*

The above study demonstrates that the Commission's 2010-target has only been reached by half. Many discrepancies remain between Member States. Some of them do not even consider green requirements at all. As illustrated above, Portugal, Greece and Hungary are, for example, among the worst performers. Various reasons can explain this lack of implementation within the Union.

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<sup>93</sup> A. Renda et al. (eds.), 2012, p. 7.

<sup>94</sup> See Annex I for a complete overview of the GPP uptake in the various Member States.

<sup>95</sup> Spain, Italy, France, the United Kingdom, Germany, Austria, Slovenia, Slovakia, Lithuania.

<sup>96</sup> A. Renda et al. (eds.), 2012, pp. 8-9.

<sup>97</sup> *Ibid*, pp. 8-9.

<sup>98</sup> See Annex II for a complete overview of the GPP uptake per sector.

<sup>99</sup> A. Renda et al. (eds.), 2012, pp. 10-12.

#### 4.2.1. Green products cost more

The 2011-study shows that purchasing costs are still the predominant criterion for awarding contracts. 64% of the respondents mainly used the lowest price as the decisive criterion, while only a minority uses predominantly LCC evaluation methods.<sup>100</sup>

National contracting authorities thus remain persuaded that green products cost more. This argument must be rejected. Indeed, it results from a Commission's study on the costs and benefits of GPP in the EU that the purchasing price of green products does not exceed excessively the price of non-green products. In its study, the Commission focused on the price of green (100% recycle and eco-certified copying paper) and non-green paper and observed that the price of green paper was similar to non-green paper and even 23% cheaper in Germany.<sup>101</sup>

More importantly when assessing the costs of a product on basis of its life-cycle, green products are usually cheaper although the purchase price is higher.<sup>102</sup> Today, consumers still perceive green products as being more expensive. In order to achieve sustainable production and consumption, a real change in the consumer's mind needs to occur. In a 2008 study on the impacts of GPP, the cost of the product, but also its operational and disposal costs were taken into account. As a result, GPP leads to cost reductions. The survey also revealed that in seven EU countries, the Netherlands, the United Kingdom, Germany, Austria, Finland, Sweden and Denmark, the average financial impact of GPP in 2006/2007 was approximately -1.2%.<sup>103</sup>

Although, Member States are sometimes reluctant to adopt green requirements due to the fact that green products cost more, the costs should be balanced with the GPP's benefits. Indeed, GPP encompasses various benefits and

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<sup>100</sup> A. Renda et al. (eds.), 2012, p. 15.

<sup>101</sup> Öko-Institut & ICLEI; *Study on Costs/Benefits of Green Public Procurement in Europe*, 2007, available at <[http://ec.europa.eu/environment/gpp/pdf/eu\\_recommendations\\_1.pdf](http://ec.europa.eu/environment/gpp/pdf/eu_recommendations_1.pdf)> (last visited 30.05.2013).

<sup>102</sup> PWC Sustainability; *Collection of statistical information on Green Public Procurement in the EU: Report on data collection results*, 2009, available at <[http://ec.europa.eu/environment/gpp/pdf/statistical\\_information.pdf](http://ec.europa.eu/environment/gpp/pdf/statistical_information.pdf)> (last visited 30.05.2013).

<sup>103</sup> PWC Sustainability; *Collection of statistical information on Green Public Procurement in the EU: Report on data collection results*, 2009.

not only from an economic point of view. From a political point of view, the use of GPP raises the awareness of citizens and demonstrates commitments towards environmental protection. From an environmental point of view, GPP has the effect of reducing the negative impacts on the environment such as reducing greenhouse gas emissions, diminishing pollution, encouraging energy efficiency use and sustainable production. From a social and health point of view, GPP also improves the quality of life of European citizens. Lastly, the use of GPP also has a strong economic advantage. Indeed, it operates as an incentive for enterprises to innovate and promote new environmental technologies.<sup>104</sup>

To conclude, the assumption that GPP is more costly for public authorities must be refuted for two reasons. First, green products are usually not more expensive than non-green products and that is even truer when assessing the LCC of green-products. Second, GPP's benefits largely outweigh their costs.

#### 4.2.2. Lack of awareness of GPP

The 2011-study also demonstrates that Member States and more particularly public authorities find it difficult to include green criteria in their public procurement contracts. The average level of perceived difficulty among all respondents is 3.06 on a scale of 1 to 5.<sup>105</sup>

The greatest barrier to GPP is the lack of awareness and lack of expertise to use them. Yet, awareness of GPP is a key tool for its implementation. Indeed, the more public authorities are informed about GPP, the more likely they will take them into account in their call for public tenders.<sup>106</sup> Awareness of GPP is decisive for the choice to adopt GPP, but also to include such environmental criteria in the award stage.<sup>107</sup>

In an Italian survey, it emerged that for public authorities the main problems in adopting GPP were: (i) the lack of information about the real

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<sup>104</sup> European Commission – GPP 2010; and European Commission; *Environment – Benefits of GPP*, 2013, available at <[http://ec.europa.eu/environment/gpp/benefits\\_en.htm](http://ec.europa.eu/environment/gpp/benefits_en.htm)> (last visited 30.05.2013).

<sup>105</sup> A. Renda et al. (eds.), 2012, p. 17.

<sup>106</sup> *Science for Environment Policy* [Weekly news alert 309]. European Commission DG Environment New Alert Service, 2012.

<sup>107</sup> Testa et al (eds.), 'What factors influence the uptake of GPP (green public procurement) practices? New evidence from an Italian survey', *Ecological Economics* 82, 2012, p. 93.

environmental impacts of the products (27%); (ii) difficulty in finding suppliers (27%); (iii) difficulty in the preparation of call for tenders and purchasing (23%) and (iv) the lack of guidelines by higher-order authorities (20%).<sup>108</sup>

The Commission has tried to raise awareness for GPP in its 2008 toolkit. The toolkit, as its name indicates, is a tool for public authorities to enhance training programs on GPP and to stimulate their use. The toolkit consists of three different modules: (i) a strategic module to raise the political support for GPP, (ii) a legal module to clarify legal issues and (iii) an operational module for purchasing officers. The first module instructs national contracting authorities how to progressively include GPP in their tender procedure according to a step-by-step mechanism. The latter would appear as a management cycle of “Plan, Do, Check, Act”.<sup>109</sup> The second module establishes a legal framework for GPP, as examined above, which consists mainly of the public procurement directives and the jurisprudence of the CJEU. The third module is more concrete and maybe the most important for national contracting authorities. Indeed, it sets out practical examples of environmental criteria and the context in which they can be used, i.e. the module illustrates which criteria suit better a certain product or service.<sup>110</sup>

In order to implement GPP, contracting authorities also need to train their personnel. This is explicitly provided by the Energy Efficiency Directive in Article 17 which provides that public administration needs to be trained on technical aspects (i.e. environmental criteria for a product category and their application), legal aspects (i.e. how to define the contents and express them in the call for tender) and economic aspects (i.e. how to evaluate the “environmental value” of the offer and integrate it in the monetization of the price). The training to develop *ad hoc* competences and skills in GPP is an essential instrument for the implementation of environmental requirements. However, lack of training is still very present in the European Union.<sup>111</sup> This holds even truer for small public

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<sup>108</sup> Testa et al (eds.), 2012, p. 91.

<sup>109</sup> European Commission – DG Environment; *GPP Training Toolkit – Module 1: Managing GPP implementation*, 2008, available at [http://ec.europa.eu/environment/gpp/pdf/toolkit/module1\\_managing\\_gpp\\_implementation.pdf](http://ec.europa.eu/environment/gpp/pdf/toolkit/module1_managing_gpp_implementation.pdf). (last visited 30.05.2013).

<sup>110</sup> European Commission – Environment; *GPP Training Toolkit*, 2008. Retrieved via: [http://ec.europa.eu/environment/gpp/toolkit\\_en.htm](http://ec.europa.eu/environment/gpp/toolkit_en.htm), last visited on 30 May 2013.

<sup>111</sup> Testa et al (eds), 2012, p. 94.

contracting authorities as they face higher obstacles in developing GPP initiatives. Indeed, they usually do not have the financial resources to train their personnel to deal full time with GPP. Support from external experts is thus necessary.<sup>112</sup> The required experts would encompass procurers, lawyers and environmentalists with knowledge of the public procurements directives and GPP.<sup>113</sup>

#### 4.3. From recommendation to obligation

##### 4.3.1. Harmonization

Under Article 4(2) (e) TFEU, environment is a shared competence of the Union. Article 192 TFEU, in conjunction with Article 191 TFEU, explicitly authorizes the Council and the Parliament to adopt measures, in accordance with the ordinary legislative procedure, to preserve, protect and improve the quality of the environment and to use natural resources in a rational way. GPP is one of the methods to ensure the achievement of those objectives at EU level.<sup>114</sup>

So far, GPP has mainly taken the form of non-binding instruments such as invitations or recommendations. To be more efficient, it is necessary to establish legally binding measures to compel public entities to adopt green criteria in their public tenders.<sup>115</sup> Indeed, according to a calculation, if it would be mandatory for public entities to supply green electricity, the production of 60 million tons of CO<sup>2</sup> would be avoided. This corresponds to a reduction of 18% of greenhouse gases which is the target launched by Kyoto for the European Union. In addition, it is provided that if public entities would be compelled to purchase green sanitary equipments, water consumption would diminish by 200 million tons.<sup>116</sup> Another example is that if public authorities would be obliged to purchase energy-efficient computers, the release of 830 thousands tones of CO<sup>2</sup>

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<sup>112</sup> *Ibid*, p. 94.

<sup>113</sup> Mapping out good practices for promoting green public procurement 2013. Paris: OECD meeting of Leading Practitioners on Public Procurement (GOV/PGC/ETH(2013)3), p. 10, available at [http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/ETH\(2013\)3&docLanguage=En](http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/ETH(2013)3&docLanguage=En) (last visited 30.05.2013).

<sup>114</sup> de Leonardis, 'Green Public Procurement: From Recommendation to Obligation', *International Journal of Public Administration* 34, 2011, p. 110.

<sup>115</sup> de Leonardis 2011, p. 113.

<sup>116</sup> *Ibid*, p. 110.

would be saved.<sup>117</sup> This demonstrates that more needs to be done in the area of GPP and by ‘more’ the authors suggest mandatory and enforceable measures.

The EU took a step in the right direction with two legislative instruments adopted in 2009 and 2012 respectively. First, Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles (the Clean Vehicles Directive) applies to contracting authorities and entities within the meaning of the public procurement directives if the thresholds set out by these directives are met and to operators with the discharge of public service within the meaning of Regulation 1370/2007.<sup>118</sup> The directive requires them to consider environmental impacts when concluding contracts for the supply of transport vehicles. Contracting authorities should stimulate “the market for clean and energy- efficient vehicles and improving the contribution of the transport sector to the environment, climate and energy policies of the Community”.<sup>119</sup> The competent authorities referred to in the directive have two options to meet this requirement: (i) setting technical specifications for energy and environmental performance, or (ii) including energy and environmental impacts as award criteria.<sup>120</sup>

Second, Directive 2012/27/EU on energy efficiency (the Energy Efficiency Directive) is not adopted on the basis of Article 192 TFEU, but on the basis of Article 194(2) TFEU on energy. The Energy Efficiency Directive establishes minimum standards for the Member States to meet the Union’s 2020 20 % headline target on energy efficiency.<sup>121</sup> Under the directive, when the thresholds under Article 7 of Directive 2004/18/EC are met, public bodies, i.e. ‘contracting authorities’ as defined in Directive 2004/18/EC<sup>122</sup>, are required to

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<sup>117</sup> A. Ocho and C. Erdmenger, Study contract to survey the state of play of green public procurement in the EU, Final report 2003, ICLEI European Secretariat, Eco-Procurement Programme.

<sup>118</sup> Article 3 Directive 2009/33/EC of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles, OJ L 120; Regulation (EC) No 1370/2007 of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315/1.

<sup>119</sup> Article 1 Directive 2009/33/EC.

<sup>120</sup> Article 5(3) Directive 2009/33/EC.

<sup>121</sup> Article 1 Directive 2009/33/EC.

<sup>122</sup> Article 1(8) Directive 2009/33/EC.

purchase products, services and buildings with high energy-efficiency performance.<sup>123</sup>

These two directives already show that GPP in the EU is making a decisive turn. Nevertheless, more needs to be done to require Member States' public bodies to take environment-friendly conditions into account in their call for public tenders. Although the establishment of directives is a positive step forward, an effective monitoring mechanism at EU level is necessary to verify whether Member States comply with their obligations and whether they implemented the directives correctly.

#### 4.3.2. Coordination between the EU and Member States to monitor the exercise of GPP criteria

The adoption of mandatory GPP criteria would render possible to better monitor and coordinate the adoption of GPP criteria in the respective Member States. Indeed, the CJEU will have jurisdiction, under Article 267 TFEU, to give an autonomous and uniform interpretation of the criteria throughout the Union. Such synchronization of green requirements in public procurement procedures is greatly beneficial for the functioning of the internal market and EU-wide competition. It also permits economic operators to know what to expect. This is particularly favourable for economic operators active in more than one Member State and Small and Medium Enterprises (SMEs) who lack the capacity to adjust to different public procurement procedures.<sup>124</sup>

Additionally to interpretations, the CJEU will also have jurisdiction, according to Articles 258 and 259 TFEU, to hear claims from the Commission or Member States due to the failure of another Member State to fulfill its obligations under European Union law. In those circumstances, the EU will have an easier grasp on the use of GPP criteria by the Member States. Moreover, the CJEU will have the possibility to take the necessary measures to sanction Member States who have not or have wrongly implemented the directives setting

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<sup>123</sup> Article 6(1) Directive 2009/33/EC.

<sup>124</sup> Questions and Answers on the Communication on Green Public Procurement (GPP): MEMO/08/514. Europa: Communiqué de presse Rapid, 2008, available at <[http://europa.eu/rapid/press-release MEMO-08-514\\_en.htm](http://europa.eu/rapid/press-release_MEMO-08-514_en.htm)> (last visited 30.05.2013).



out the GPP criteria. Hence, the adoption of additional legally binding instruments in the field of GPP may serve as a yardstick for further enhancing the use of autonomous and uniform environmental requirements.

### **Conclusion**

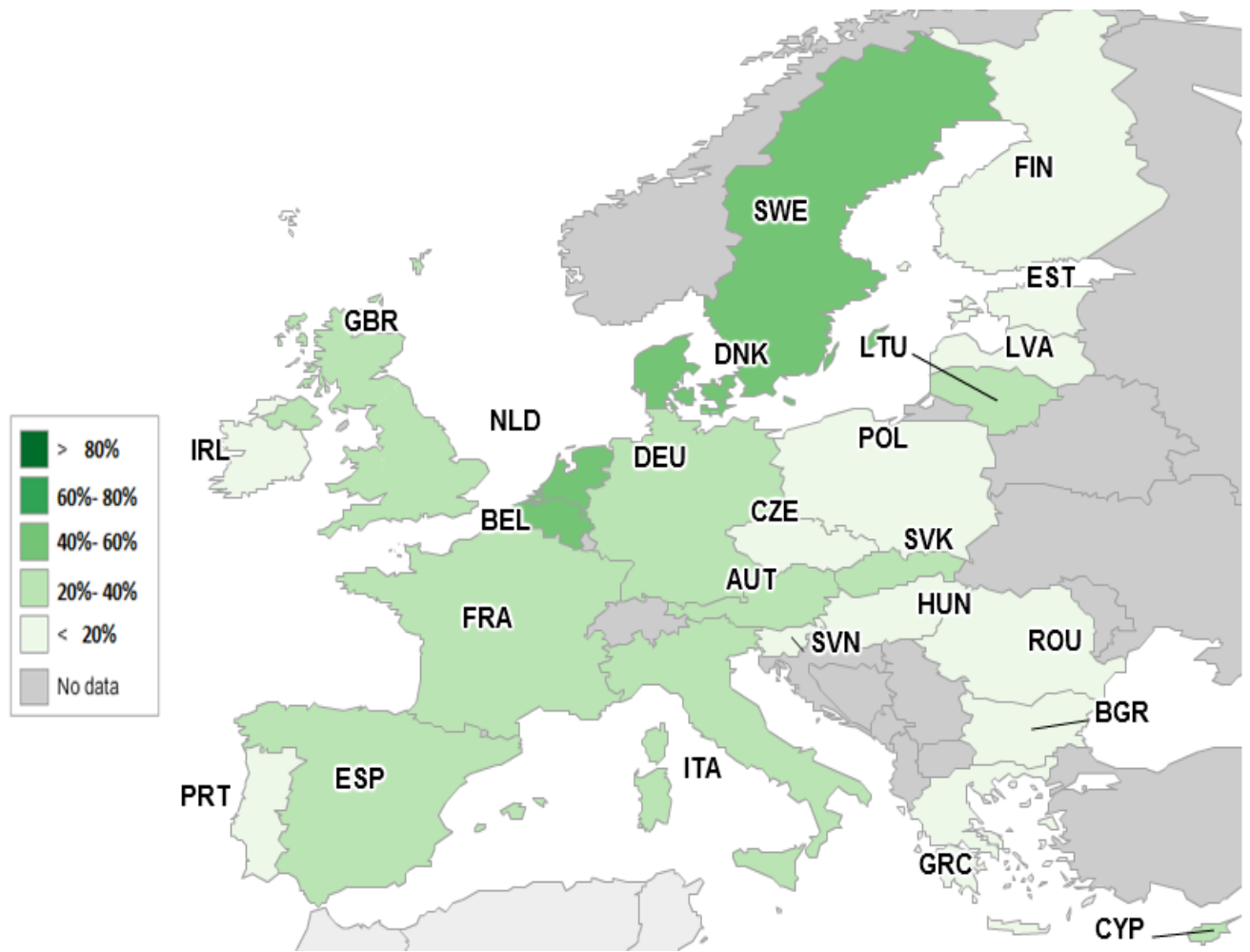
Environmental protection is a core element of the Treaties and GPP is considered as a key tool to contribute to that policy's objective. This can be demonstrated by the active role played by the Commission in drafting green papers and communications to further enhance the integration of environmental criteria in public procedures for the purchase of goods or services.

In *Concordia Bus Finland*, the CJEU held for the very first time that GPP criteria could be taken into account by public authorities in their call for tenders provided four conditions are met. Since then the CJEU has confirmed its ruling in various other cases and the Council together with the Parliament have adopted Directive 2004/18/EC which explicitly grants the possibility to consider environmental requirements in calls for public tenders. The authors have demonstrated that such environmental requirements may be embraced at various stages in the procedure: (i) by setting out technical specifications in term of performance or functional requirements in the tender documents, (ii) as a selection criterion, (iii) as an award criterion within the scope of the MEAT, and (iv) at the performance stage through the use of contract clauses. The practical examples of the Badalona school in Spain and the uniforms for the French Navy demonstrate how environmental considerations can be included in public contracts and the benefits they generate.

A 2011-study, carried out by the Centre for European Policy Studies and the College of Europe, has demonstrated that the implementation of GPP criteria within EU Member States is still insufficient. This is due to the fact that Member States still perceive green products as more expensive, thus favourizing tenders having the lowest price. In addition, national contracting authorities still lack the knowledge and training to implement GPP criteria within their own domestic legal

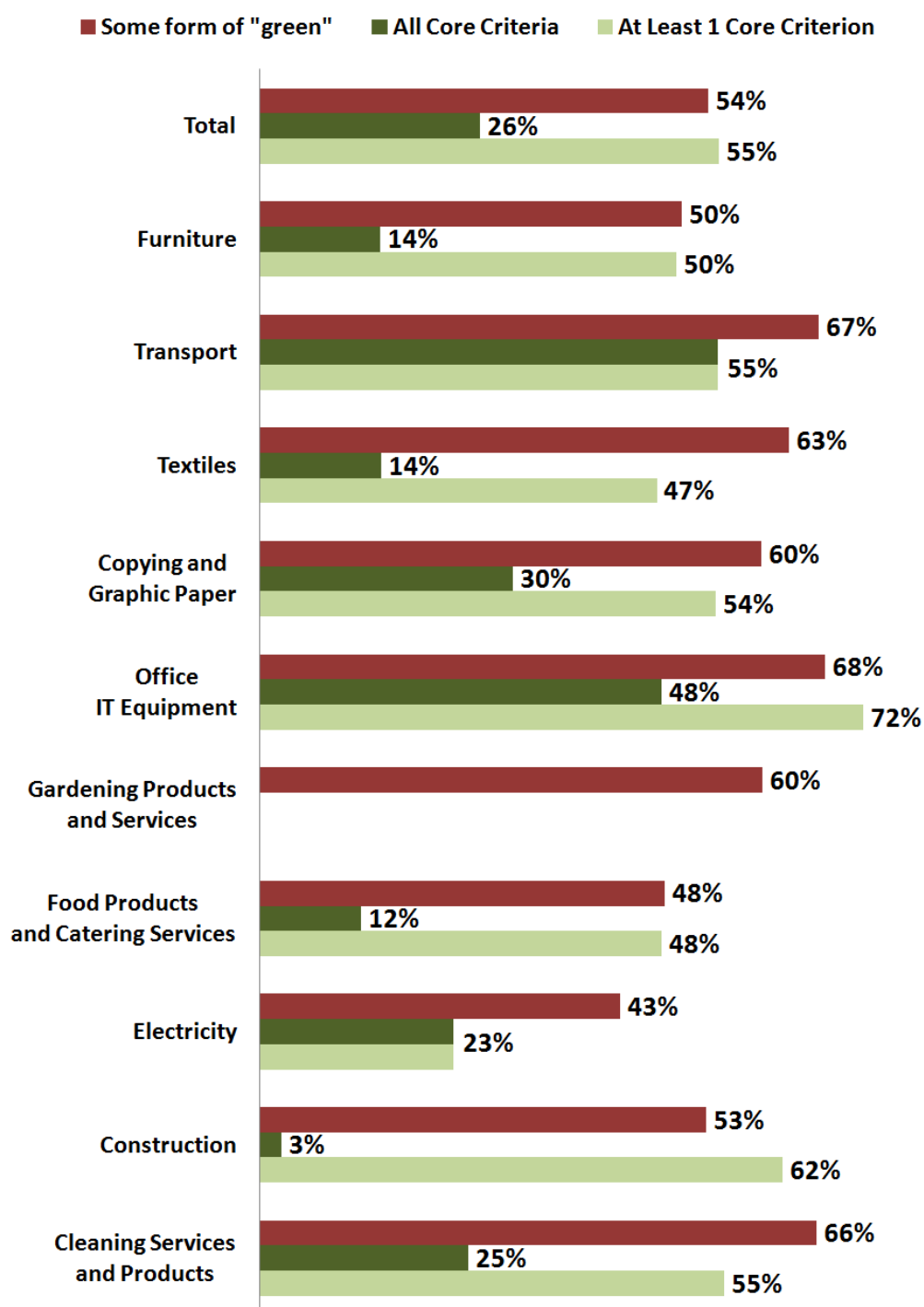
order. In order to reduce the harmful consequences of the mass production and consumption on the environment to a minimum, it is necessary to move from a voluntary to a mandatory mechanism by creating legally binding instruments. The Clean Vehicle Directive and the Energy Efficiency Directive are already two steps in the right direction, but this is not enough. More sectors need to be covered. A compulsory GPP scheme would also permit a better monitoring by EU institutions and more specifically the CJEU. Conclusively, the adoption of legally binding measures may serve as a benchmark to enhance the use of autonomous and uniform environmental requirements; and consequently foster the well functioning of the internal market and of competition. Only then will it be possible for the Commission to reach its 50%-target and even outreach it. The authors are, nevertheless, persuaded that due to the current financial crisis, environmental considerations are being put at the back burner and it is perhaps not the best time to arrive at a successful GPP process.

## ANNEX I



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. ix.

## ANNEX II



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

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