Green Public Procurement:

An EU and Member State Perspective

Abstract

This contribution examines whether and how green criteria can be included in public procurement in the EU, through research based on the case law of the Court of Justice of the European Union. The article sheds some light on these cases and their implications which can be found in the new Public Procurement Directives 2004/17/EC and 2004/18/EC. The article then presents an assessment of specific green public procurement issues, such as green energy and eco-labelling. It concludes that the Court of Justice has made a considerable progress towards inclusion of green criteria, but this paper also identifies a need for further improvement, which can be achieved through two means. First, it can be accomplished by broadening the concept of green public procurement and by introducing the notion of sustainable public procurement. The very recent case C-368/10 *Commission v. Netherlands* shows that this evolution is needed. Finally, the European Member States are asked to introduce Green criteria and to foster green public procurement through National Action Plans.

1. Introduction

Over the past decade the EU institutions as well as the Member States have given increasingly attention to the achievement of environmental policy goals. Hereby the contribution of the public administration to reach these goals via green public procurement can be seen as vital. Public procurement, the process by which governments and regional and local public authorities or other bodies governed by public law purchase products, services and public works, represents large volumes of public spending each year.[1] Given its enormous economic significance, public procurement has the potential to influence the market in terms of production and consumption trends.[2] Traditionally, public procurers have relied mostly on the offered price as the key award criteria. The need to take into account other factors e.g. environmental and wider sustainability concerns have become, however, increasingly apparent in the past decade in order to reach the environmental policy goals set. Including and promoting environment aspects into public procurement procedures (green public procurement-GPP) can influence market behaviour in favour of environmentally friendly, social responsible produced and innovative products. During the past decade the EU Commission attributes considerable importance in the light of the European sustainability strategy and the "EU 2020" strategic goals.[3]

As key document for this development on EU level can be considered the Commission Communication "Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement" from 2001.[4] In this document the Commission clarified how Community law offered various possibilities for public purchasers to include

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[1] Approximately19,9% of the EU Gross Domestic Product. Communication from the Commission Annual Growth Survey 2012, COM (2011) 815 final.

[2] Strategic Use of Public Procurement in Europe, Final Report to the European Commission, MARKT/2010/02/C, EU 2011, page 1.

[3] European Commission, 'The Uptake of Green Public Procurement in the EU 27', p. i, http://ec.europa.eu/environment/gpp/pdf/CEPS-CoE-GPP%20MAIN%20REPORT.pdf (last visited 3 June 2012).

[4] Commission Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, COM (2001) 274 final.

environmental considerations into the public procurement procedures.[5] This document was followed by the 6th Environmental Action Plan.[6] In Article 4 of this Decision the importance of promoting green public procurement policy has been underlined. In the Communication on Integrated Product Policy – Building on Environmental Life-Cycle Thinking published by the Commission in 2003[7] and in the first edition of the Handbook on green public procurement published in 2004[8] the Commission continued with these developments to guiding public purchasers towards green public procurement. Aim of this Handbook is to help public authorities successfully plan and implement GPP. In the same year the new legal framework concerning procurement in form of the Directives 2004/17/EC[9] and 2004/18/EC[10] has been accepted in the Council and published. They explicitly include the possibility for green criteria in the public procurement process.[11] Very important for the development of this new legal regime have been two judgements of the Court of Justice of the European Union from 2002[12] and 2003.[13] In the following years, the Commission published based on the Sustainable Development Strategy in 2006,[14] the Communication on "Public procurement for a better environment"[15] and the Action Plan concerning

[5] See also: European Commission, 'The Uptake of Green Public Procurement in the EU 27', p. i-ii, http://ec.europa.eu/environment/gpp/pdf/CEPS-CoE-GPP%20MAIN%20REPORT.pdf (last visited 3 June 2012).

[6] Decision 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme OJ L 242.

[7] Communication from the Commission to the Council and the European Parliament Integrated Product Policy Building on Environmental Life-Cycle Thinking ,COM (2003) 302 final.

[8] Meanwhile a second edition of the Handbook has been published in 2011.

[9] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, L 134.

[10] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, L 134/114.

[11] See also: CEPS and the College of Europe and presented to the Commission in February 2012, ' The Uptake of Green Public Procurement in the EU 27', p. 23.

[12] Case C-513/99 *Concordia Bus Finland Oy Ab (formerly Stagecoach Finland) v Helsingin kaupunki and HKL-Bussiliikenne* , [2002] ECR I-7213.

[13] Case C-448/01 *EVN AG and Wienstrom GmbH v. Republic of Austria* [2003] ECR I-14527.

[14] Renewed sustainable development strategy, EU SDS Council of the European Union, 10117/06, Brussels 9. June 2006.

[15] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Public procurement for a better environment, COM (2008) 400 final.

sustainable consumption and production in 2008.[16] According to the Commission in these documents 50% of the EU public tendering procedures should be following the EU GPP criteria by 2010. This approach has been supported also by the Member States in the Council.[17] In the following period the Commission developed common GPP criteria for 19 product and service groups, inviting authorities also in the Member States to include these criteria into their tendering procedures in order to purchase greener products, works and services.[18]

In the following paper we want to discuss more in detail the contribution of the European Court of Justice (CJEU) to these developments by giving a more detail analysis of the relevant case law. Furthermore, we shall elaborate on the legal framework set by the Directives 2004/17 and 2004/18. Furthermore, we will analyse the Commission Green Paper published in 2011 which aims at a more efficient European Public Procurement Market.[19]

[16]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan, COM (2008) 397 final.

[17] See references in the study prepared by CEPS and the College of Europe and presented to the Commission in February 2012, 'The Uptake of Green Public Procurement in the EU 27', page 24.

[18] See for the list of products p. 25 of this report.

[19] Green paper of the Commission on the Modernisation of EU public procurement policy. Towards a more efficient European Public Procurement Market, COM (2011) 15 final.

2. The relevant case law of the European Court of Justice

2.1 The Concordia Bus Case

2.1.1 The Facts of the case

Helsinki's city council tendered several routes for the public bus transport. In the tender they stated that the tender would be awarded to the proposal which was most economically advantageous to the city overall. This would have been done based on three categories: the overall price of operation, the quality of the bus fleet (nitrogen oxide emissions and noise levels below certain limits), and the operator's quality and environment management.

Among others *HKL-Bussiliikenne and Concordia* (at that time called Swebus Finland Oy Ab) handed in proposals. In the end, the contract was awarded to HKL. Concordia wanted to fight this decision, based on the fact that the factors, especially the quality of the bus fleet, were discriminatory as only HKL could supply those kinds of busses.

It further submitted that, in the overall assessment of the tenders, no account could be taken of ecological factors which are not directly linked to the subject-matter of the tender.

2.1.2 The opinion of the Advocate General[20]

Concerning the question whether with a public contract tender only the economic nature should be taken into account, as was brought forward by Concordia, AG Mischo agreed with the city of Helsinki that the criteria relating to nitrogen oxide emissions and noise levels fall within the ambit of Article 36(1)(a) of Directive 92/50. This because they are part of categories of 'quality' and 'technical merit'.[21] Furthermore, it was the AG's opinion that criteria which exist for the public benefit may be included in the criteria for the award of public contracts, like was

[20] Advocate General Mischo in Case C-513/99, *Concordia Bus Finland*, of 13 December 2001.
[21] AG in Case C-513/99, *Concordia Bus Finland*, para. 76-77.

also similar in the earlier cases *Beentjes*[22] and *Commission v. France,*[23]where it concerned mitigation of unemployment.[24]

Based on these two cases the use of such criteria is limited to the fact they must be consistent with all the fundamental principles of Community law (now Union law) and must be applied in conformity with the procedural rules as is laid down in the relevant Directives.[25]

The AG believed, however, that, contrary to what the Court stated in *Evans Medical and Macfarlan Smith*[26], such criteria may also be included in a tender without it being to prove that it gives an economic benefit, direct or indirectly.[27]

The Austrian and Swedish Governments and the Commission stated that the criteria should, though, be linked to the subject-matter of the contract.[28] The AG disagreed with this referring to the before mentioned cases *Beentjes* and *Commission v. France* as the use of unemployed people for a works contract could also not be seen as being directly linked to the contract.[29]

The Commission stated that the criterion has to be objective and apply to all the tenders.[30] Contrary to aesthetic characteristics of a tender, the AG argued, the criteria concerning the nitrogen oxide emissions and the noise levels are measurable and therefore would fulfil these criteria.

On the fact that only one tenderer, HKL, was able to provide the busses which fulfilled all the criteria set by the city, the AG believed that there was no discrimination between tenderers. As it follows from settled case-law, the AG stated, the principle of equal treatment requires that comparable situations are not treated differently and that different situations are not treated similarly. As HKL could offer the fleet which was requested and Concordia could not, the AG believed they were not in the same situation.

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[22] Case C-31/87 *Gebroeders Beentjes* [1988] ECR 4635; see further Bovis, C.H., *EU Public Procurement Law*, Edward Elgar Publishing, Inc., Massachusetts 2007, p. 276-277.
[23] Case C-225/98 *Commission* v *France* [2000] ECR I-7445.
[24] AG in Case C-513/99, *Concordia Bus Finland,* para. 91-94.
[25] Ibid., para. 96-97.
[26] Case C-324/93 *Evans Medical and Macfarlan Smith* [1995] ECR I-563.
[27] AG in Case C-513/99 *Evans Medical and Macfarlan Smith,* para. 101.
[28] Ibid., para.108.
[29] Ibid., para. 110-112.
[30] Ibid., para. 113.

2.1.3 The judgment of the Court

The Court decided that a contracting authority is allowed to take criteria relating to the environment into account, as long as they are 'linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination'.[31]

Concerning the fact that factually only HKL could supply the gas powered busses the Court concluded that in the factual context, the fact that based on the criteria adopted to identify the economically most advantageous tender could only be satisfied by a limited number of undertakings was not as such a breach of the principles of equal treatment.[32]

2.2 The EVN and Wienstrom case

2.2.1 The facts of the case

The Republic of Austria invited tenders for the supply of electricity for the administrative offices in the Land of Carinthia. The tender would be awarded to the economically most advantageous tender, but including criteria that the tenderer had to state a price in ATS per kilowatt hour. Furthermore, the supplier had to supply the offices with energy produced from renewable energy sources. For this end the supplier had to submit the maximum it could supply from these sources which had to surpass the expected 22.5 gigawatt hours per annum to be used. The price was given a weighting of 55% and the 'electricity from renewable sources' was given a weighting of 45%, whereas only those suppliers who could exceed the 22.5 gigawatt hours per annum would be considered. There was, however, no proof needed of the amounts submitted.

[31] Case C-513/99 *Evans Medical and Macfarlan Smith*, para. 64.
[32] Ibid., para. 85.

2.2.2 The opinion of the Advocate General[33]

AG Mischo was of the opinion that a contracting authority is allowed to make a tender subject to conditions for the protection of the environment as was stated in *Concordia Bus Finland* and in *PreussenElektra*[34].[35] The contracting authority should, however, not include conditions where it has not the possibility to verify the submissions given.[36] This would have as an effect that the award criteria in the assessment of the tenders would not be objectively and uniformly applied to all the tenders.[37]

Furthermore, the question arose whether the criteria of being able to supply most renewable energy was actually connected to the subject-matter of the contract. The defendant had argued that the reason of this inclusion was in order to make sure that there would be a sufficient supply if the demand would rise. In *Evans Medical and Macfarlan Smith* the Court had stated that 'reliability of supplies is one of the criteria which may be taken into account (…) in order to determine the most economically advantageous tender'.[38] However, the AG believed, that in the way it was used in the tender *in casu* it was excessive, as it discriminated indirectly against smaller suppliers who could fulfil the 22.5 gigawatt hours per annum.[39]

On the question whether a 45% award criterion for a consideration which is not open to monetary evaluation was allowed, the AG responded that it was stated in *Evans Medical and Macfarlan Smith* the Court had stated that 'in selecting the most economically advantageous tender, contracting authorities may choose the criteria which they intend to apply, but their choice must related only to criteria designed to identify the most economically advantageous tender'. The AG, therefore, saw no reason why, if the contracting authority is free to choose the award criteria it should not be able to choose the weighting between them.

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[33] Advocate General Mischo in Case C-448/01 *EVN AG and Wienstrom GmbH v. Republic of Austria*, of 27 February 2003.
[34] Case C-379/98 *PreussenElektra* [2001] ECR I-2099.
[35] AG in Case C-448/01 *EVN AG and Wienstrom GmbH v. Republic of Austria*, para. 34-37.
[36] Ibid., para. 39-41.
[37] Ibid., para. 42-44.
[38] Ibid., para. 56-62.
[39] Ibid., para. 70-72.

2.2.3 The judgment of the Court

Concerning the question whether it was allowed to put conditions in a tender that only energy from renewable energy sources were to be used the Court followed its line set in *Concordia Bus Finland*. It ruled that when a 'contracting authority decides to award a contract to the tenderer who submits the most economically advantageous tender it may take into consideration ecological criteria, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination'.[40]

Regarding the question whether such a criteria may have a weighting of 45% the Court followed the line of AG stating that the contracting authorities are free to choose the award criteria, but also the weighting of these criteria.[41] Therefore, the 45% weighting was not an obstacle to the overall evaluation[42] as also no evidence could be presented that requirements of Community law (now Union law) had been infringed.[43]

The Court believed, however, that while as such ecological criteria are allowed to be used in a tender, it is an infringement of the principle of equal treatment due to lack of transparency and objectivity of the tender procedure to use a criterion which the contracting authority cannot verify.[44]

On the fact that the award criterion concerned the total supply of the amount of electricity created by renewable energy sources in excess of the expected annual consumption of the contracting authority, the Court stated that this was not linked to subject-matter of the contract. Therefore, this was also not allowed.[45]

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[40] Case C-448/01 *EVN AG and Wienstrom GmbH v. Republic of Austria*,, para. 33.
[41] Ibid., para. 39.
[42] Ibid., para. 42.
[43] Ibid., para. 43.
[44] Ibid., para. 46-51.
[45] Ibid., para. 67-69.

2.3 Commission v. Netherlands

2.3.1 The facts of the case

The province of 'Noord-Holland' put out a tender for automatic coffee-machines in combination with a supply contract for these machines. For the coffee and thee which are to be supplied, it required that these products should have the EKO label and the Max Havelaar label or, as was stated in a later notice, similar labels. The EKO label is awarded to products made up of at least 95% organic ingredients. Products bearing the Max Havelaar label have been purchased at a fair price and under fair terms of trade from organisations made up of small groups of farmers in developing countries.[46]

The Commission believed that several aspects of this tender were in breach of i.e. Article 23 of Directive 2004/18.

2.3.2 The opinion of the Advocate General[47]

The Commission had made clear that it did not believe that the buying of organic and fair-trade products was contrary to EU law. The problem was the references in the tender to the EKO and Max Havelaar labels.[48]

According to AG Kokott in principle it is not forbidden to use eco-labels as a point of reference in the technical specifications. The Commission believed this was in breach with the principle of transparency. However, according to the AG, this principle only obliges equal access for tenderers.[49] As a reasonably well-informed tenderer should 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 this principle was not breached.[50]

Problematic was, however, that the EKO label had been put under the heading 'requirements'. Whereas this heading was defined as meaning mandatory minimum conditions which had to be satisfied to prevent exclusion from the

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[46] AG in Case C-368/10 *Commission v. Netherlands*, para. 27; see Max Havelaar, www.fairtraide.net (last visited 3 June 2012).
[47] Advocate General Kokott in Case C-368/10 *Commission v. Netherlands*, of 15 December 2011.
[48] Ibid., para. 40.
[49] Ibid., para. 55.
[50] Ibid., para. 54-56.

tender.[51] Therefore, tenderers, which were mostly from other Member States, thought that the EKO label was obligatory. They might, however, have had similar labelled products or could have fulfilled the conditions of such labels. This was therefore breach of the principle of non-discrimination.[52]

Distinct to the EKO label, the Max Havelaar label is not a technical specification, as it does not concern the production of the product, but the purchasing policy in accordance with fair-trade. This was thus a social consideration rather than a technical one. Therefore, it could not be dealt with as being a possible breach of Article 23, but rather of Article 26 of Directive 2004/18/EC.[53]

The AG agreed with the Commission that a contracting authority may not exercise unlimited influence over the future contractor's purchasing policy. Such a fair-trade criterium should therefore be only directly linked to the supply contract. Therefore, a requirement that the tenderer has only fair-trade products would be problematic, however, it would be possible to link it directly to the products to be supplied.[54]

The AG disagreed also for this label with the Commission concerning the transparency for the same reasons as for the EKO label, being that a reasonable well-informed tenderer would be familiar with this label or its equivalents. Furthermore, the reference to such a label would minimize the administration costs for both the contracting authority and the tenderer.[55] This is especially true due to the many different definitions of fair-trade which exist.[56]

Like the EKO label also the Max Havelaar label was part of the requirements. Therefore, also for this label the same confusion arose especially with foreign undertakings that no other fair-trade labels then the Max Havelaar label were accepted. Therefore, also the way how this label was used breached the principle of non-discrimination.[57]

[51] Ibid., para. 63 and 110.
[52] Ibid., para. 64-65 and 122.
[53] Ibid., para. 76-80 and 110.
[54] Ibid., para. 88.
[55] Ibid., para. 89-90.
[56] Ibid. , para. 91.
[57] Ibid., para. 93-94.

Therefore, due to the way it was used these labels became in breach of the principle of non-discrimination, however, this would not prevent a contracting authority from also taking into consideration environmental and social factors in determining the economically most advantageous tender. This has, however, limits. The contracting authority has not an unrestricted freedom of choice.[58] "*The criteria which it takes as a basis must be linked to the subject-matter of the contract. They must be capable of establishing the tender which offers best value for money. Furthermore, they must be objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition".*[59]

2.3.3 The judgment of the Court

According to the Court contracting authorities are to treat economic operators equally and non-discriminatorily and are to act in a transparent way according to Article 2 of Directive 2004/18/EC. These principles are vitally important when dealing with the technical specifications, due to the possibility to discriminate through the choice of the specifications or their formulation.[60]

The contracting authorities may opt for detailed specifications of an eco-label, but not the eco-label as such. In contradiction to this, however, the contracting authorities may indicate that the products, which bear the eco-label, of which the detailed specifications are used, are presumed to comply with the specifications.[61] However, also any other appropriate means of proof, being for example as a technical dossier of the manufacturer or a test report from a recognised body, have to be accepted.[62]

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[58] This the AG based upon Case C-31/87 *Gebroeders Beentjes*, para. 26; Case C-19/00 *SIAC Construction Ltd v County Council of the County of Mayo* , para. 37; Case C-513/99 *Concordia Bus Finland*, para. 61 and 64; and Case C-331/04 *ATI EAC e Viaggi di Maio and Others* ('ATI EAC') [2005] ECR I-10109, para. 21.
[59] AG in Case C-368/10, paras 103-104.
[60] Case C-368/10 *Commission v. Netherlands*, judgement of 10 May 2012, nyr para. 62.
[61] Ibid., para. 64.
[62] Ibid., para. 65.

Therefore, as the contracting party required a specific eco-label rather than the detailed specification required for that eco-label it breached the principle of non-discrimination.[63]

The Court agreed with the AG that fair-trade label does not give a product related character, but rather the purchasing policy of the undertaking. Therefore, there could be no breach of Article 23 of Directive 2004/18/EC and was this part of the case inadmissible.[64]

However, the Court accepted, following the AG, that contracting authorities 'are also authorised to choose the award criteria based on considerations of a social nature, which may concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other person'.[65]

This had to be still linked to the subject-matter as is stated in recital 46 in the preamble of Directive 2004/18 where it states in the third paragraph, that 'the determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured', the 'most economically advantageous tender' being '[that] which … offers the best value for money'.[66]

Furthermore, as is stated in the first and fourth paragraphs of that recital, 'compliance with the principles of equality, non-discrimination and transparency requires that the award criteria are objective, ensuring that tenders are compared and assessed objectively and thus in conditions of effective competition'. This would thus mean that criteria which would give an unrestricted freedom of choice to the contracting authority would be prohibited.[67] These same principles also apply to all potential tenderers as that the contracting authority has to make sure that the formulation of the award criteria are being such 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'. [68]

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[63] Ibid., para. 70.
[64] Ibid., para. 73-79.
[65] Ibid., para. 85.
[66] Ibid., para. 86. See for this also the AG para. 104.
[67] Ibid., para. 87. See also *Concordia Bus Finland*, para. 61.
[68] Ibid., para. 88. See also *Wienstrom*, paras 56-58.

Applying these principles to the labels *in casu* the Court decided that both labels were linked to the subject-matter of the products.[69] However, the Court continued, only the description of the label does not compensate for the lack of precision regarding the criteria underlying the labels concerned. Therefore, without having listed the criteria underlying those labels and without having allowed proof that a product satisfies those underlying criteria by all appropriate means, the province of Noord-Holland violated EU law.[70]

[69] Ibid., para. 89-92.
[70] Case C-368/10, para. 96-97.

2.4 Selection phase

Under the new Directive exclusion from a tender is mandatory pursuant to Article 45 of Directive 2004/18/EC or in conjunction with Article 54(4) of Regulation Directive 2004/17/EC respectively if the candidate has been convicted for participation in a criminal organisation, corruption, fraud or money laundering. In addition, a candidate may be excluded for a conviction if grave professional misconduct is proven (Article 45(2) of Directive 2004/18/EC). Non-compliance with environmental law may breach criminal law provisions of a Member States. Currently, there is no "European criminal law".[71] But recital 43 in the preamble of Directive 2004/18 states:

> 'If national law contains provisions to this effect, non-compliance with environmental legislation or legislation on unlawful agreements in public contracts which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.'

The Commission regards serious and repeated breaches as sufficient to invoke 'grave professional misconduct'.[72] Williams stresses the fact that it is often not enough to exclude a candidate from the tender but also other companies if it or he uses them as a 'veil' but is essentially controlling them.[73]

It is certainly allowed to include technical specifications that use environmental criteria (see Article 34(b) of Directive 2004/17/EC and Article 23(3)(b) of Directive 2004/18/EC). It is however interesting to see how eco-labels can be used as technical specifications. This will be addressed below.

The personal ability may also be checked, in particular, an 'indication of the environmental management measures that the economic operator will be able

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[71] S. Williams, *Coordinating public procurement to support EU objectives – a first step? The case of exclusions for serious criminal offences*, in: S. Arrowsmith and P. Kunzlik (ed.), *Social and Environmental Policies – New Directives and New Directions*, Cambridge University Press, Cambridge 2009, p. 481.

[72] European Commission, *Buying Green! A Handbook on Green Public Procurement*, 2nd ed., Publications Office of the European Union, Luxemburg 2011, p. 34.

[73] S. Williams , in: S. Arrowsmith and P. Kunzlik (ed.), *Social and Environmental Policies – New Directives and New Directions*, p. 492-493.

to apply when performing the contract' can be a prerequisite (Article 48(2)(f) of Directive 2004/18/EC). The contracting authority should prefer the Eco Management and Audit Scheme (EMAS)[74] (Article 50 thereof respectively Article 51(3) of Directive 2004/17/EC). The Utilities Directive also explicitly stipulates that 'other evidence of equivalent environmental management' should be accepted (Article 52(3)(2) thereof). In the alternative, environmental criteria can be included in a contract clause (Article 26 of Directive 2004/18 (Contract clauses)).

2.5 Award phase

In the *Concordia Bus Finland* case the Court restated the well-known formula of public procurement conditions. First, a public authority or in the case of the Utilities Directive also private undertakings have to take into account the general principles of EU law. The general principles are the principle of mutual recognition, the free movement provisions including non-discrimination and equal treatment, the principle of proportionality and the principle of transparency. Second, the criteria have to be mentioned in the contract documents or in the tender notice. Third, the Court made it clear that the chosen criteria 'should not give unrestricted freedom of choice' to the contracting authority. Finally, the criteria have to be linked to the subject matter.[75]

The *Concordia Bus Finland* case was also the first case where the Court accepted ecological considerations. Unlike the Commission which takes a restrictive stance which will be shown below, the Court struck a balance and introduced a necessary 'link' between the criteria and the subject matter. This gives public authorities a wide margin of discretion to use *environmental considerations* as award criteria. This has been introduced in Article 55(1)(a) of Directive 2004/17/EC and Article 53(1)(a) of Directive 2004/18/EC under the Title 'environmental characteristics'. The preamble now explicitly reminds of this in recital 1 and 2 of the preamble to Directive 2004/18/EC. In the first recital also *social criteria* are mentioned. The CJEU has been very restrictive in regard to social criteria.

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[74] See Regulation 1221/2009/EC**.**

[75] Case C-513/99 *Concordia Bus Finland Oy Ab*, para. 59.

In *Beentjes* and in *Comission v France* the Court accepted social considerations such as diminishing long term unemployment.[76] Some authors are nevertheless of the opinion that social criteria are different from environmental criteria. They argue that the Treaty only mentions the integration principle (Article 11 TFEU) but not social considerations.[77] Moreover, environmental criteria are now explicitly listed in the Directives. But only the preamble mentions social criteria. The concept of the Directives gives the contracting authorities the possibility either to use 'green' procurement or 'sustainable' procurement. According to the Rio definition of 1992 the concept of sustainability is much broader. Sustainability encompasses ecological, social and economic considerations.[78] The Court has not yet decided this issue under the new Regulations. The case *Commission v. Kingdom of the Netherlands* did not clarify much in this regard. However, the Court implicitly accepted that the Max Havelaar label is permissible.[79] Underlying issues of this label are social and ecological but also economic considerations.[80]

These considerations are also called 'secondary objectives' or 'horizontal objectives' of public procurement law.[81] The German term *'vergabefremde Kriterien'*[82] however is misleading. The Court made it clear that a link between the subject matter and the award criteria is required. Thus, a link is mandatory and it depends where a distinction can be made. The Commission argued before the decision 'Bus Concordia Finland' that environmental criteria have to give the contracting authority a direct and therefore economic advantage. In the light of the abovementioned decision the Commission is still of the opinion that PPMs (Production and Process Methods) are not permissible because there is no direct

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[76] Case C-31/87 *Gebroeders Beentjes*; Case C-225/98 *Commission* v *France*.

[77] FRENZ, notes 2964-2985.

[78] Rio Declaration on Environment and Development, Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163 (last visited 1 June 2012)

[79] See also Footnote 64.

[80] See case C-368/10 *Commission v. Netherlands*.

[81] S. Arrowsmith and P. Kunzlik, *Social and Environmental Policies – New Directives and New Directions*, p. 9.

[82] See A. Egger, *Europäisches Vergaberecht*, Nomos Verlagsgesellschaft, Baden-Baden: 2008. , para. 1178.

link.[83] This position is however contradictory since the Commission accepts that renewable energy is permissible.[84] Unlike organic food, renewable energy is not different from 'ordinary' energy. The only difference remaining is how it was produced. Renewable energy is therefore a PPM *par excellence*. Presumably, the Commission would like to restrict the *ENV and Wienstrom* case to the energy sector. PPMs will be dealt with in detail below.

Nevertheless, several authors stress that a government can also include 'secondary objectives'. In this case it acts less as a "customer" than as a political actor. Arrowsmith and Kunlik use the term 'functional objectives'. In their opinion customers would also favour products without the involvement of child labour. The question should therefore be whether the authority acts as a 'purchaser' or as a 'regulator'. As long as it acts as a purchaser it should strictly comply with Public Procurement law. This is especially true for the Public Sector Directive which allows only requirements that relate to 'performance of the contract.' (Article 26 of Directive 2004/17/EC). In other words, it is about 'consumption' and not 'regulation' of the market. Their reasoning is based on the case Keck[85] with regard to eco-labelling. They essentially argue that in comparison with the context of 'certain selling arrangements' that a similar legal figure should be developed.[86]

In the alternative, the Court could specify the 'direct link' on a case by case basis. The Court seems to give the contracting authorities a wide discretion. In the 'Concordia Bus Finland' case the Court accepted environmental reasons even though the environmental criteria were not included in the Directive at that time. In the *EVN Wienstrom* case the Court accepted that 45% of the award criteria consist of 'green criteria'.[87]

Furthermore, this approach is also in accordance with the case law of the Court. In Commission v Germany the Court stated that a tender that has the aim to protect the environment is not sufficient to disregard the principle of non-

[83] European Commission, *Buying Green! A Handbook on Green Public Procurement*, p. 29.
[84] Ibid.
[85] Joined cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.
[86] S. Arrowsmith and P. Kunzlik, *Social and Environmental Policies – New Directives and New Directions*, p. 413-415.
[87] Case C-448/01 *EVN AG and Wienstrom GmbH v. Republic of Austria*, para. 42.

discrimination. The freedom of establishment and the freedom of services to transport waste have to be justified. Finally, the Court expressly stated that the contracting authority has the burden to proof that a technical reason to exclude tenderers far away is necessary to protect the environment and public health.[88]

The CJEU even ruled that a public service concession which did not fall in the scope of the old Directive has at least to comply with the general principles of non-discrimination and transparency.[89]

The term 'environmental characteristics' is not defined. The integration principle in Article 11 TFEU requires that: 'Environmental protection requirements must be integrated into the definition of the Union policies and activities, in particular with a view to promoting sustainable development.' But it does not specify how 'environmental protection' should look like. The Commission issued GPP criteria and lists 'key environmental impacts'. These GPP criteria are not binding for the Member States.[90] They may deviate from these standards. Some of the mentioned 'key environmental impacts' are as follows:

- Air pollution
- Emissions (CO^2)
- Waste and packaging
- Noise
- Impact on human health
- Biodiversity
- Exploitation of finite resources
- Impact on river eco-system and local population to hydropower schemes.[91]

In essence, the contracting authority is free to determine the relevant environmental criteria if it chooses to award the contract to the most economically advantageous tender (see Article 55(1)(a) of Directive 2004/17/EC). Otherwise, if it chooses to select the tenderer with the lowest price (see Article 55(1)(b) thereof)

[88] Joined cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECRI-3609, para. 60-66; AG Geelhoed in joined cases C-20/01 and C-28/01 *Commission v Germany*, para. 77.

[89] Case C-324/07 *Coditel Brabant SA* [2008] ECR I-8457, para. 24-25; Case C-532/06 *Emm. G. Lianakis AE* [2008] ECR I-251, para. 34.

[90] COM (2008) 2126, p. 4.

[91] SEC (2008) 2126, p. 15-30.

it cannot determine other criteria. However, the Commission highlights the fact that environmental-friendly products are not per se more expensive. Contracting authorities should take into account costs that incur during their life cycle. The Commission's *handbook* states that the lifespan, the discount rate and the data availability has to be checked. That means that sometimes the cheapest product is also the most environmentally friendly product. Beer bottles in glasses may reflect a consumer preference and they are therefore presumably not more expensive.[92]

Nevertheless, the procedure would not give the contracting authority the possibility to deviate from the cheapest offer. It could however use a different but non-discriminatory calculation method that shows the life-cycle costing of the product concerned. The electricity consumption for 'high pressure mercury lamps' compared to 'metal halide lamps' is 40% higher.[93] The initial purchasing costs are higher, but are outweighed by lower operating costs. Thus, the contracting authority should look at the life cycle costing.[94]

It is noteworthy that the 'environment' is not just 'a reason' but has a lot *facettes* to its concept. While some criteria might raise no problems, others strongly interfere with the fundamental freedoms and the general principles of EU law.

For obvious reasons, it should not be allowed to prefer local distributors to mitigate greenhouse gas emissions while transporting. The Court has not accepted local preferences.[95] Whilst this could be justified for overriding reasons in the general interest when checking conformity with fundamental freedoms,[96] a more proportionate way would be available. The contracting authority could require that the tenderer delivers the goods as environmentally friendly as possible. This could be achieved through deliveries in one bulk or via trains rather than using lorries.

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[92] S. Arrowsmith and P. Kunzlik, *Social and Environmental Policies – New Directives and New Directions*, p.16.

[93] European Commission, *Buying Green! A Handbook on Green Public Procurement*, page 43.

[94] See COM (2003) 302 final.

[95] Case C-21/88 *Du Pont de Nemours Italiana SPA* [1990] ECR I-889, para. 10; Case C-360/89 *Commission v Italy* [1992] ECR I-3401, para. 8.

[96] Joined cases C-20/01 and C-28/01 *Commission v Germany*, para. 65.

4. Eco-labelling

2.6 EU eco-labels

Labels are used to identify attributes of products. This is the same for eco-labels which cover a broad area of environmental concerns. The idea behind most labels is vested in the rationale that the consumer has enough information to decide since they are associated with a logo. The same rationale applies for contracting authorities when they use public procurement. Carrying out research and setting standards is often burdensome and expensive. Sometimes expertise for technical products is also missing. But only for the Energy Sector the EU introduced a mandatory labelling scheme.[97] It is up to the Member States to set standards. Directive 66/2010/EU shows how labelling should look like but the Directive does not specify 'what' criteria should be included.

A specific problem for eco-labelling is assessing equivalent standards. Labels can be divided into three groups: public multi-criteria ecolabels (ISO 14024 labels; e.g. Milieukeur), public single issue labels (e.g. EU organic label) and private labels (e.g. Max Havelaar).[98]

Many eco-labels are provided by third parties such as Max Havelaar. The General Court ruled in *Evropaïki Dynamiki* that the European Environmental Agency which is bound by a similar obligation under the Financial Directive to procure its tenders that the EEA has to 'make a comparative assessment of the tenders' to assess 'whether the environmental policies (…) are genuine'. The General Court accepted that 'good intentions' do not have to be weighed equally but can play a role in this respect.[99]

The conditions to set requirements for the EU Eco-labelling scheme are stipulated by Regulation 66/2010/EU. Pursuant to Article 6 thereof the EU Ecolabel 'shall be based on the environmental performance of products'. The products have to be based on a scientific basis (paragraph 3), and to tackle 'the most

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[97] See also recital 41 of Directive 2004/17/EC.

[98] European Commission, Green Public Procurement and the European Ecolabel – Fact sheet, http://ec.europa.eu/environment/gpp/pdf/toolkit/module1_factsheet_gpp_policy.pdf (last visited 2 June 2012)

[99] T-331/06 *Evropaïki Dynamiki* [2010] ECR II-136, para. 76.

significant environmental impact'. Also 'social and ethical aspects' should be fostered.

Eco-labels should in any case be linked to the object of the contract, be based on scientific information, involve the consultation of all relevant stake-holders, such as government bodies, consumers, manufacturers, distributors and environmental organisations, and accessible for all interested parties (Article 23(6) of Directive 2004/18/EC).[100] Contracting authorities will usually oblige the tenderers to comply with national eco-labels or to show equivalent standards. This favours nonetheless national providers because they are most familiar with the standards.[101]

The case Dundalk deals with the core issue. In the case at hand the Irish government issued a tender and specified that only Irish pipes are permissible. Irish pipes were therefore a technical specification. The Court did not accept the argument of Ireland that an ISO specification or the equivalent standards would not have been appropriate. Even if the Irish pipes are unique the contracting authority has verify which pipes are equivalent and cannot restrict the contract solely to Irish pipes.[102]

However, the Court made in a very recent judgment an interesting note. The CJEU said that first of all an ecolabel cannot be declared mandatory (besides the Energy Star) and second that the contracting authority has to specify the equivalent criteria.[103] This means that the contracting authority has to inform the candidates how they fulfil the criteria. This runs counter the idea of simplification. Contracting authorities now have to gain some knowledge in order to use GPP. However, they do not have to understand the scientific calculation (if any) but should provide the information. Thus, the judgement brought clarification in this regard. It should be mentioned that small municipalities or agencies can make use of the joint public procurement.[104]

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[100] See recital 29 of Directive 2004/18/EC; European Commission, Green Public Procurement and the European Ecolabel – Fact sheet, 2.6.2012:
http://ec.europa.eu/environment/gpp/pdf/toolkit/module1_factsheet_gpp_policy.pdf

[101] Same opinion: Arrowsmith and Kunzlik, *Social and Environmental Policies – New Directives and New Directions*, page 431.

[102] Case 45/87 *Dundalk* [1987] ECR 783, paras 21-22.

[103] Case C-368/10 *Commission v. Netherlands*.

[104] European Commission, *Buying Green! A Handbook on Green Public Procurement*, page 20.

2.7 Green energy and eco-labelling

'Green energy' is a very complex sector of GPP. It combines not only the environment and energy but also public procurement, especially Directive 2004/17/EC. In addition, a compulsory labelling scheme exists (Energy Star Programme[105]) which is unique. The main goals of energy policies are to guarantee the 'security of supply' and 'environmental sustainability' or also called 'green' or 'renewable' energy. This is further enhanced by the Unions policy to promote renewable energy (see Directive 2009/28/EC).

The Austrian claimed in *EVN and Wienstrom* that the security of supply of 'renewable energy' should be allowed in excess of what is necessary since seasonal changes in supply occur. However, this reasoning was not accepted because it was not linked to the subject matter. But the Court accepted that it does not have to be an 'economic advantage'. A 'direct link' is sufficient.[106]

Another aspect of 'green energy' is to use more efficient machines. For this purpose, the EU agreed on a mandatory and well-known labelling scheme for efficiency which shows the 'efficiency class' of a product (e.g. for refrigerators).[107]

Kunzlik highlights that the EU is required to step forward because of Article 11 TFEU (integration principle) which is not merely programmatic.[108] However, the integration is not directly applicable for the Member States but can be used to interpret Union law. The Union and its organs should also make a 'balanced assessment' and regard the 'precautionary principle'.[109] The precautionary principle means that it is better to act before harmful environmental consequences occur.[110]

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[105] Directive 2006/32/EC of the European Parliament and of The Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC, L 114.

[106] Case C-448/01 *EVN AG and Wienstrom GmbH v. Republic of Austria*, para 68.

[107] Directive 96/57/EC of the European Parliament and of the Council of 3 September 1996 on energy efficiency requirements for household electric refrigerators, freezers and combinations thereof OJ L 236.

[108] P. Kunzlik, *The procurement of 'green' energy*, in: S. Arrowsmith and P. Kunzlik (ed.), *Social and Environmental Policies – New Directives and New Directions*, Cambridge University Press, Cambridge 2009, page 381.

[109] J.H. Jansand and H.H.B. Vedder, *European Environmental Law*, 3rd ed., European Law Publishing, Groningen 2008, page 17.

[110] Ibid., page 37.

The Commission argues in its Handbook on GPP that criteria have to 'contribute to its characteristics, without necessarily being visible'. And adds that: 'you can, for example, specify that electricity should be produced from renewable sources or that food be produced using organic methods, as these methods of production are widely available to economic operators across the EU. It is not allowed however to insist upon a production process which is proprietary or otherwise only available to one supplier'.

Kunzlik strongly disagrees and brings forward *EVN and Wienstrom*[111] and *Preussen Elektra*[112] where the Court accepted 'renewable energy'. 'Green energy' is not different from 'ordinary energy. PPMs are therefore allowed as long as they are linked to the tender. In addition, in Concordia the Court accepted that it is also permissible to use an award criteria if only one supplier can fulfil the requirement as long as the criteria does not give the contracting authority an 'unrestricted freedom of choice'.[113]

The Commission issued core GPP criteria for the most commonly procured goods, public works contracts and service contracts. These criteria are non-binding but illustrate firstly the goals and secondly allow the Member States to compare their National Action Plans with other Member States.

The idea behind the core GPP criteria is that it can be achieved without a meaningful increase in cost whereas the comprehensive criteria are for best practice.[114] But this means that EU countries that would like to exceed must calculate extra-costs. De facto the tender has to be procured to find the 'most economically advantageous tender' in this case.

The core GPP criteria for electricity are according to the Commission as follows:

- *Subject Matter*
    - *Purchase of at least 50% electricity from renewable energy sources (RES-E) and/or high efficiency cogeneration.*
- *Specifications*

[111] Case C-448/01 *EVN AG and Wienstrom GmbH v. Republic of Austria*.
[112] Case C-379/98 *PreussenElektra*.
[113] Case C-513/99, para 59.
[114] European Commission, The Uptake of Green Public Procurement in the EU 27, 3.6.12: http://ec.europa.eu/environment/gpp/pdf/CEPS-CoE-GPP%20MAIN%20REPORT.pdf

- *At least 50% of supplied electricity must come from renewable energy sources and/or high efficiency cogeneration as defined by Directive2009/28/EC and Directive 2004/8/EC respectively*

- *Award criteria*
  - *The tenderer should indicate the proportion of electricity to be supplied from renewable energy sources*
  - *Additional points will be awarded for additional RES-E and/or high efficiency cogeneration.*
  - *1. Additional points will be awarded in proportion to the electricity to be supplied from renewable energy sources above the minimum requirement in the specification.*
  - *2. Additional points will be awarded in proportion to the electricity to be supplied from high efficiency cogeneration above the minimum requirement in the specifications*

- *Contract performance clause*
  - *At the end of each year of the contract the contractor must disclose the origin of the electricity supplied to the contracting authority to demonstrate that at least 50% came from renewable energy sources and/or high efficiency cogeneration.*
  - *Verification: Relevant documentation from the Guarantee of Origin schemes has to be submitted. Alternatively any other equivalent proof will be accepted. This is not required from certified suppliers of 100% green electricity (i.e. carrying a Type-1 ecolabel which uses a definition of RES-E at least as strict as that of Directive 2009/28/EC).*[115]

Furthermore, the Commission states comprehensive criteria that are even stricter. Suffice to say that the subject matter should be clear. It is interesting to see that the Commission is of the opinion that 'renewable energy' can be set as a selection criteria. Article 51(3) of the Utilities Directive does not mention supply con-

[115] European Commission, EU GPP Criteria for Electricity, http://ec.europa.eu/environment/gpp/pdf/criteria/electricity.pdf (last visited: 3 June 2012)

tracts. It is therefore doubtful whether in case of electricity exclusion from the tender would be valid.[116]

However, this problem is of minor importance since the Court accepted broad award criteria in EVN Wienstrom of 45%.[117] The Court did not consider whether this was rightfully 'labelled' as award criteria. One could argue that the requirement was a disguised selection criteria. Finally, a contract clause would be permissible (see above).

[116] Same opinion: P. Kunzlik, *The procurement of 'green' energy*, in: S. Arrowsmith and P. Kunzlik (ed.), *Social and Environmental Policies – New Directives and New Directions*, Cambridge University Press, Cambridge 2009, page 400.

[117] Case C-448/01 *Concordia Bus Finland Oy Ab*.

5. Conclusion

To sum up, there is a strong consensus that environmental considerations can be decisive in the award phase. While only 10% of the green tenders use environmental criteria in the award phase, it should be answered if GPP can also be used either as a technical specification or as a personal requirement.

A crucial question in practice is to determine how environmental criteria should be implemented in the tender. Environmental criteria could firstly be implemented as a technical specifications (e.g. eco-labelling), as a suitability criteria (e.g. management system) or as an award criteria.

The Court accepted in EVN Wienstrom the fact that the award criteria were counted 45% of the contract. As mentioned above, a management systems could either be used in the specifications, in the selection phase, in the award phase and/or as contract clause.

Most countries use environmental specifications in the technical specifications (38%), as a subject matter (25%), technical/practical ability of the tenderer (14%), in the contract clauses (15%) and only marginally as an award criteria (10%). The study stems from 2012 and reflects the attitude of 1'818 votes (multiple responses possible).[118] It shows clearly that technical specifications are most commonly used. This could be explained by the fact that often management systems are required such as EMAS or ISO 14001. However, this results are problematic. It would be more proportionate to allow more tenderers but to use environmental concerns as award criteria. Only core values such as the prevention of child labour should be set as technical specifications.[119]

Finally, it is noteworthy to mention that most countries implemented GPP criteria and developed a National Action Plan. 48% of the 27 Member States use all criteria in regard to Office and IT equipment whereas only 3% use the EU GPP core criteria for buildings (construction). This is explained by the fact that 53% of the EU countries use some sort of 'green' criteria. To sum up, all GPP

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[118] European Commission, The Uptake of Green Public Procurement in the EU 27, http://ec.europa.eu/environment/gpp/pdf/CEPS-CoE-GPP%20MAIN%20REPORT.pdf (last visited 3 June 2012).

[119] Same opinion with a similar procurement regime: Schweizerische Eidgenossenschaft, Recommendations for the federal procurement offices, Sustainable Procurement, November 2010, p. 7-9,
http://www.bbl.admin.ch/bkb/00389/02588/index.html?lang=de (last visited 4 June 2012).

criteria are used but in some areas the Member States still prefer national criteria.[120] This can also be seen for eco-labels. It should be closely checked that this does not lead to discrimination.

[120] European Commission, 'The Uptake of Green Public Procurement In the EU 27', http://ec.europa.eu/environment/gpp/pdf/CEPS-CoE-GPP%20MAIN%20REPORT.pdf (last visited 3 June 2012).