

Development of Environmental Considerations within European Union Public Procurement

Abstract

This article analyses the development of environmental considerations in the field of public procurement within the European Union. Specific attention is devoted to the role of the Court of Justice of the European Union and the European Commission. This paper examines the judgments of the CJEU in *Beentjes v. Netherlands*, *Nord-Pas-de-Calais Region*, *Regina v. HM Treasury* and *Concordia Bus* cases. The article outlines the development of the concept of Green Public Procurement as defined by the Commission and the incorporation of environmental considerations in the legal framework on public procurement, namely Directive 2004/18/EC.

I INTRODUCTION

Public procurement has developed within the European Union (EU) as an economic tool subject to Community rules which are designed to facilitate the functioning of the internal market and to guarantee undistorted regime of competition, and the free movement of goods and services within the Community. Public procurement concerns itself with the procurement of supplies, works, services and utilities by public authorities. Since public procurement spending amounts to around 19,9% of European Union Gross Domestic Product,¹ the inclusion of environmental considerations in this procedure has the potential to significantly reduce environmental impact within the Union, stimulate green innovation and help the EU reach its sustainability goals.

¹ Data of 2009 reported in EU Annual Growth Survey 2012, COM(2011) 815, Brussels, 23.11.2011 as used by Centre for European Policy Studies, *The Uptake of Green Procurement in the EU27*, College of Europe, Brussels, 2012.

Over the last decades environmental considerations have started to play a role in procurement mainly through case law. The new legal regime, comprising of two directives on public procurement,² has partially codified these considerations. This has given Member States the opportunity to take environmental considerations into account, next to economic ones. However, the Commission has taken the lead in the promotion of green procurement. In a series of communications it has introduced the concept of Green Public Procurement (GPP), to be implemented by Member States by means of National Action Plans. GPP is defined 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 produced.’³

In this paper it will be researched how environmental considerations have developed within the public procurement regime of the European Union. In chapter II of the paper a general overview of the development of public procurement in the EU will be presented. Chapter III will focus on the case law relevant with regard to environmental consideration and the new public procurement directives. Chapter IV will outline the development of the concept of Green Public Procurement by the Commission, while the Chapter V will evaluate the impact of the Commission on the development of public procurement policies in the Member States, to see in how far GPP is being implemented. A summary of the paper will be provided in chapter IV of the paper.

II PUBLIC PROCUREMENT IN THE EUROPEAN UNION

² Directive 2004/18 of the European parliament and 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,, [2004] O.J. L134; Directive 2004/17 of the European Parliament and the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy transport, and postal services sectors, [2004] O.J. L134.

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public Procurement for a Better Environment, COM(2008) 400 final, p. 4.

One of the main goals of the European Union is economic integration, to be reached by means of a common market. In this respect the proper functioning of the market is highly relevant. According to the Treaty of the European Union, the EU shall ‘establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability’.⁴ A common economic policy, a single currency and the safeguarding of the four freedoms⁵ have been important instruments for the establishment of the internal market. The latter, the safeguarding of the four freedom, occupies itself with the removal of tariff- and non-tariff barriers. Another important instrument the guarantee the proper functioning of the common market is the safeguarding of fair competition within the market, which is implemented by an extensive package on competition law of the EU. The aim of this regime is ‘the establishment of an effective, workable and undistorted regime of competition within the common market, in order to prevent potential abuse of market dominance and market segregation’.⁶

Over time, difficulties have been encountered in relation to non-tariff barriers, especially with regard to public authorities. State aid, indirect taxation, public monopolies and public procurement all constituted obstacles for the creation of the common market. As mentioned before, in this paper environmental considerations in public procurement are researched. Therefore, in this chapter the development of public procurement law in the European Union will be examined, in order to research the environmental aspects of the public procurement regime. The development of public procurement within the Union can be divided in four phases,⁷ which will be discussed subsequently.

The first generation of public procurement in the Union commenced in 1962 with two *General Programmes* which aimed to abolish practices of Member States that discriminated against foreign undertakings in the award of public contracts, favouring national undertakings. Coordination of national procedures and the removal of quotas were seen as a first step towards improvement. The 1966

⁴ Consolidated Version of the Treaty on European Union, 30 March 2010, [2010] OJ C38/01.

⁵ Free movement of goods, persons, capital and services.

⁶ Bovis, Christopher H., *EU Public Procurement Law* (Edward Elgar, Cheltenham, 2007), p. 2.

⁷ As done by Bovis, *EU Public Procurement Law*, chapter 2.

Directive⁸ on the elimination of measures that either prescribe the use of domestic products, or prohibit the use of imported ones, constituted the first legal step in this area. In the next decade the first directives on public supplies were created,⁹ which prohibited the use of quantitative restrictions and measures having an equivalent effect in procurement contracts¹⁰ and introduced certain principles. Among these were the need to advertise contracts on a community-wide scale, non-discrimination regarding technical specifications and objectivity. Also, in 1971 the first Directive¹¹ on public works was adopted. However, procurement was not only a topic on European level. In 1977 the GATT Agreement of Government Procurement¹² was signed between the major economies of that time. The aims of this international agreement were similar to the before adopted EU directives on public procurement, ‘particularly in relation to transparency of laws and procedure on government procurement and the elimination of protection for domestic suppliers and of discrimination between domestic and foreigner suppliers’.¹³ This agreement was codified in Directive 80/767.¹⁴

The second generation of public procurement law was marked by a Commission action programme¹⁵ aiming to amend the supplies directives, for more open and coordinated procurement, towards EU and non-EU undertakings. Changes were made as well in public works, where the definition of contractors was broadened to create more market access. In 1990 progress was also made in the field

⁸ Commission Directive 66/683/EEC of 7 November 1966 eliminating all differences between the treatment of national products and that of products which, under Articles 9 and 10 of the Treaty, must be admitted for free movement, as regards laws, regulations or administrative provisions prohibiting the use of the said products and prescribing the use of national products or making such use subject to profitability, [1966] O.J. L220/30.

⁹ Commission Directive 70/32 of 17 December 1969 on provision of goods to the State, to local authorities and other official bodies, [1970] O.J. L13/1; Council Directive 77/62 of 21 December 1976 coordinating procedures for the award of public supply contracts, [1977] O.J. L13/1.

¹⁰ See art. 34 and 35 TFEU.

¹¹ Council Directive 71/304 of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches, [1971] O.J. L185/1.

¹² Became part of Community law by virtue of Directive 80/271, [1980] O.J. L 215/1.

¹³ Bovis, *EU Public Procurement Law*, p. 34.

¹⁴ Council Directive 80/767 of 22 July 1980 adapting and supplementing in respect of certain contracting authorities Directive 77/62/EEC coordinating procedures for the award of public supply contracts, [1980] O.J. L215/1.

¹⁵ European Commission White Paper on the Completion of the Internal Market, COM(1985) 310 final.

of public utilities procurement contracts, concerning transport, water, energy and telecommunication. Before 1990 these fields were regarded as important domestic policy instruments and were thus a contested subject in EU law-making. However, Directive 90/531 included utilities in the EU public procurement legislation for the first time, with a more restricted legal regime that left more choice for contracting authorities in the award of contracts. Around this time also the European Economic Area countries were included in the public procurement regime.

The third generation of the *acquis* correlated with the completion of the single market in 1992. Modernizing economies created a shift from works and supplies to an economy largely based on services. Therefore the Member States saw the need to engage in the procurement of public services, and adopted a Directive¹⁶ to this purpose. This Directive was similar to the other public procurement directives and called for community-wide advertisement of contracts, non-discrimination regarding technical specifications and objectivity.¹⁷ To incorporate changes in the procurement field, especially regarding services, the directives concerning supplies, works and utilities were consolidated. At the same time, a new World Trade Organization (WTO) Government Procurement Agreement was signed at the international level, comprising a ‘unique instrument of international law which is based on a series of bilateral agreements rather than a multilateral arrangement’.¹⁸ Also, in this timeframe the Commission made an effort to incorporate environmental consideration into the procurement procedures. To this goal, it published several communications. In one of these, the 2001 Communication, *Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement*,¹⁹ it clarified how environmental considerations could be integrated in the procurement procedures in multiple ways, whereas the directives did not contain references to environmental concerns or related requirements.

¹⁶ Council Directive 92/50 of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, [1992] O.J. L 209.

¹⁷ Bovis, *EU Public Procurement Law*, p. 40.

¹⁸ Bovis, *EU Public Procurement Law*, p. 49.

¹⁹ 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..

The fourth and current generation was marked by the new public sector and public utilities directives of 2004, as set out by the Commission's 2000 Work Programme. These directives were adopted to modernize legislation with regard to the internal market. The largest change has been the creation of one Directive covering supplies, works and services²⁰ (2004/18/EC). Both this Directive, as well as Directive 2004/17/EC²¹ on utilities were adopted with the purpose of simplifying and modernizing the procurement regime, while at the same time making a clear-cut distinction between the two.²² Within these directives, especially in Directive 2004/18/EC, environmental considerations started to play a bigger role, implementing case law that dealt with for instance environmental award criteria. This Directive, as well as the case law, will be discussed in the next chapter with regard to environmental considerations.

III CASE LAW OF THE EUROPEAN COURT OF JUSTICE AND DIRECTIVE 2004/18/EC

The public procurement legal framework²³, in particular the rules on the criteria on which the contracting authorities shall base the award of public contracts, was often subject to the scrutiny of the Court of Justice of the European Union (hereafter, CJEU).

The purpose of the present analysis is, firstly, to consider the Court of Justice's case law on contract award criteria and to identify the Court's contribution to the development of environmental considerations as criteria for the award of public contracts. The analysis will then seek to provide an insight into how

²⁰ Directive 2004/18/EC, [2004] O.J. L134.

²¹ Directive 2004/17/EC, [2004] O.J. L134.

²² Bovis, *EU Public Procurement Law*, p. 50.

²³ Prior to 31st of March 2004 the rules for public contracts were contained in four Directives: Directive 92/50/EEC of 18 June 1992 relating to the co-ordination of procedures for the award of public service contracts; Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts; Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts; and Directive 93/38/EEC of 14th of June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

environmental considerations were incorporated in the consolidated legal framework on public procurement, in particular Directive 2004/17/EC and Directive 2004/18/EC.

1. Stages in the public procurement process

The public procurement process takes place in five different stages, implementing the principle of transparency, fairness, non-discrimination and objectivity.²⁴ The first phase of the process is the advertising of the public procurement contracts. In order to enhance transparency, the directives on public procurement require that the contracting authorities which wish to award a public contract should publish information notices in the Official Journal of the European Union. There are three types of notices:

1. Prior information notice, which is not compulsory.²⁵
2. Contract notice.²⁶
3. Contract award notice.²⁷

The second phase of the public procurement procedure is the selection and qualification of bidders. The selection procedure involves an examination of the suitability and capability of the candidates which must be checked by the contracting authorities in accordance with the criteria of economic and financial standing²⁸ and technical and professional ability.²⁹ This evaluation should be carried out in conformity with the principle of non-discrimination.³⁰

In the next phase – award criteria - the contracting authorities make an assessment on the basis of criteria specified in the contract notice in order to identify which of the eligible tenderers will deliver best value for money.

²⁴ Bovis, *EU Public Procurement Law*, p. 63.

²⁵ Article 35(1) of Directive 2004/18/EC.

²⁶ *Ibid.*, Article 35(2).

²⁷ *Ibid.*, Article 35(4).

²⁸ *Ibid.*, Article 47.

²⁹ *Ibid.*, Article 48.

³⁰ *Ibid.*, Article 44(1).

For the purpose of clarity it is important to differentiate between the selection phase in the public procurement process and the award criteria. The selection criteria are focused on the tenderer and its capacity to perform the contract that will be awarded at the end of the procedure for the award of a public contract. The award criteria, in contrast are focused on the bid. The two procedures may take place simultaneously in the process. However, the examination of the tenderer's suitability and the examination of the award criteria are two different procedures governed by different rules.³¹

The fourth phase of the public procurement process is the award of the contract. Once the candidates are selected and the evaluation of the tenders is completed, the contracting authorities can award the contract.

The last phase involves the execution of the awarded contract. Even though the directives on public procurement do not cover contract clauses, the contracting authorities are free to define clauses related to the mode of execution of the contract.³²

For the purpose of the present chapter, only the award criteria will be considered in the light of the Case law of the Court of Justice of the European Union.

2. The award Criteria

As it was already mentioned above, the award criteria are designed to help the contracting authorities to get the best value for money. The directives on public procurement provide for two criteria on which the contracting authorities shall base the award of public contracts³³ - the *lowest price* or the *most economically advantageous tender*. When the *lowest price* criterion is applied, the price is the

³¹Case C-31/87 *Gebroeders Beentjes v. Netherlands*, [1988] ECR 04635 para. 15-16.

³² COM(2001) 274 final, p. 23.

³³ Article 36 of Directive 92/50/EEC; Article 26 of Directive 93/36/EEC; Article 30 of Council Directive of 14 June 1993 concerning the coordination of procedures for the award of public services contracts, [1993] O.J. L199; 93/37/EEC; Article 34 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, [1993] O.J. L199; Article 55 of Directive 2004/17/EC; Article 53 of Directive 2004/18/EC.

only factor that is taken into consideration and the contract is awarded to the bidder offering the lowest price.

However, when a contracting authority wants to award a contract, taking into consideration not only the price but also other criteria in addition to – or other than – the price, the *most economically advantageous tender* criterion is applied. All public procurement directives provide that when the award is made on the most economically advantageous tender, various criteria can be taken into account: e.g. quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, price.³⁴

However, the most economically advantageous tender criterion and the issue of what factors can be taken into consideration when a contract is to be awarded on the basis of that criterion, prompted national courts to refer some key questions to the CJEU for preliminary ruling.

3. The case law of the CJEU

The decisions of the European Court of Justice (ECJ) have provided for the better understanding of how the most economically advantageous offer should be determined. Some of the most prominent cases of the CJEU will be considered in chronological order.

In the case of *Gebroeders Beentjes v. Netherlands*,³⁵ the Court of Justice was requested to rule on the compatibility with Community law of a condition to the award of a public works contract under which the contractor was required to employ a number of long-term unemployed persons. The *Arrondissementsrechtbank*, The Hague raised the question as to whether the contracting authorities can award a contract on the basis of non-economic considerations related to social policy.

The Court established that the contracting authorities are free to choose the factors and conditions on which they will award the contract in question,³⁶ provided that these factors and conditions are stated in the contract notice. The Court followed

³⁴ Article 36 of Directive 92/50/EEC.

³⁵ Case 31/87 *Gebroeders Beentjes v. Netherlands*, [1988] ECR 04635.

³⁶ *Ibid.*, para. 19.

the reasoning of Advocate General Darmon³⁷ and held that the list of criteria contained in Article 29 of Council Directive 71/305/EEC of 26 July 1971 concerning the contract award criteria is not exhaustive.³⁸ However, the Court provided for three conditions which given rules must satisfy in order to be included in the selection criterion:

- (1) the measure has no direct or indirect discrimination effect on tenders;³⁹
- (2) the contracting authorities cannot use such measure in order to disqualify candidates which could not meet the relevant requirement;⁴⁰
- (3) and last but not least, factors have to be relevant for determining the economically advantageous offer.⁴¹

It follows from the ruling in this case that even non-economic considerations related to social policy can be utilized as award criteria, provided that the above mentioned conditions are met.

The Commission, however, was of the opinion that only criteria with direct economic impact can be compatible with the Directive. A tenderer's capacity to employ the long-term unemployed was viewed by the Commission as “indirect and quite extraneous” to the subject matter of the contract and this would not improve the economic benefits of the contract to the procuring entity.⁴² The Commission was of the opinion that environmental considerations can be taken into account only where these criteria can result in direct economical advantage for the contracting authority.

In *Nord-Pas-de-Calais Region*⁴³ case the Court of Justice, however, reaffirmed what was already stated in *Beentjes*. The Court held that the contracting

³⁷ Case 31/87 *Gebroeders Beentjes v. Netherlands*, [1988] ECR 04635, Opinion of Mr. Advocate General Darmon.

³⁸ Case C-31/87 *Gebroeders Beentjes v. Netherlands*, [1988] ECR 04635, para. 20.

³⁹ *Ibid.*, para. 37 (iii).

⁴⁰ *Ibid.*, para. 28.

⁴¹ *Ibid.*, para. 37 (ii).

⁴² Commission Communication of 22 September 1989 - Public Procurement, Regional and Social Aspects, 22.09.1989, OJ C311, 12.12.89, COM(89) 400 final, p. 7, paragraph 48.

⁴³ Case C-225/98 *Commission of the European Communities v French Republic* [2000] ECR I-07445.

authorities, when applying the most economically advantageous offer are allowed to use as a criterion a condition linked to the campaign against employment provided that the condition is consistent with the fundamental principles of Community law and in particular the principle of non-discrimination. The Court held that such criterion should be in conformity with all the procedural rules laid down in the directive, in particular the rules on advertising.⁴⁴

Interesting enough, the approach followed by the Court in the case of *Beentjes* and *Nord-Pas-de-Calais Region* was not applied in later cases. An example for that is case *Regina v HM Treasury, ex parte University of Cambridge*⁴⁵ which was brought before the ECJ eleven years after the case *Gebroeders Beentjes* and delivered on 11th May 2000. One of the relevant issues in the case of *Regina v HM Treasury* was whether the contracting authorities can award a contract on the basis of considerations other than economic ones. The answer provided by the Court, contrary to that in *Beentjes*, was that the purpose of coordinating the procedures for the award of public contracts at Community level is to prevent the inclusion of criteria of non-economic nature, which otherwise could restrict the freedom to provide services and goods within the Community.⁴⁶ In *Regina v HM Treasury*, the Court upheld much more restricted approach than that in *Beentjes*. The Court left no margin of appreciation for the contracting authorities in their choice of criteria on which they would base the award of a contract.

Opposite to the Court's shift from more liberal approach rules (*Beentjes* case) to stricter and straightforward ones (*Regina v HM Treasury* case), the European Commission has been active in the years following the *Beentjes* case in preparing several communications devoted to sustainable development and the role of public procurement policies to favour environmentally-friendly products and services. In 2001 alone, the Commission adopted several communications

⁴⁴ *Ibid.*, Para. 51.

⁴⁵ Case C-380/98 *Regina v HM Treasury, ex parte University of Cambridge* [2000] ECR I-08035.

⁴⁶ *Ibid.*, para 16-17.

emphasizing the relevance of environmental considerations in the purchasing of products and services.⁴⁷

Relying on the Court's rulings in the *Beentjes* and *Nord-Pas-de-Calais Region* cases, the Commission provided in its *Interpretative Communication on the Community Law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement*, that conditions relating to environmental protection or performance could be used as a criterion for the award of a contract. The Communication was focused on the different stages of a contract award and on how environmental concerns can be taken into account at each stage of the procedure.⁴⁸ Such considerations, according to the Commission can be taken into account:

- 1) When the contracting entity takes a decision on *the subject-matter of the contract*;
- 2) When the *technical specifications* are prepared;
- 3) In the *selection of tenderers*;
- 4) In the *drafting of award criteria*;
- 5) In the *contractual conditions*.

It follows that the Court and the Commission have not always been consistent in their approach to public procurement rules. However, the decisions of the CJEU have played an important role in the interpretation of the Community law regulating procurement procedures.

⁴⁷Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the Sixth Environment action Programme of the European Community: Environment 2010: Our future, Our choice- adopted by the Commission on 24.01.2001, COM(2001)31 final; Communication from the Commission: "A sustainable Europe for a Better World: A European Union Strategy for Sustainable Development". Commission's proposal to the Gothenburg European Council; adopted on 15.05.2011, COM(2001) 264 final; COM(2001) 274 final.

⁴⁸ COM(2001) 274 final, p. 6.

From an environmental perspective, the milestone case of the CJEU is *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v. Helsingin kaupunki and HKLBussiliikenne*⁴⁹ delivered in 2002.

In the case of *Concordia Bus*, the Court was asked whether environmental considerations such as low emissions and noise levels of vehicles could be included as factors in most economically advantageous criterion. In its ruling the Court followed the principle established in *Beentjes*, stating once again that contracting authorities are free to choose the factors for award criteria and that environmental considerations could be included in such criteria. The Court applied the limits from the *Beentjes* case and in particular, the principle of non-discrimination and also that the criterion applied must be expressly mentioned in the contract notice.⁵⁰ The approach followed in *Concordia Bus* was more liberal in relation to the possibility for using criteria relating to the preservation of the environment. The Court stated in paragraph 55 of the judgment that the criteria used by the contracting authorities to identify the economically most advantageous tender are not necessary to be of purely economic nature. The Court, however, did not confer an unrestricted freedom of choice on the contracting authorities and clarified that not any criterion of such a nature may be taken into consideration by the contracting authorities.⁵¹ Further, the Court established that criteria relating to the environment can be accepted as additional criteria under the most economically advantageous offer if they are based on qualitative and quantitative criteria related to the contract in question⁵² and that the criteria chosen by the contracting authorities must be necessary for the determining of the most economically advantageous tender.⁵³ The Court considered also the wording of Article 36(1) (a) of Directive 92/50/EEC on the award of public service contracts, in particular the use of the expression “for example” to reaffirm

⁴⁹ Case C- 513/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v. Helsingin kaupunki and HKLBussiliikenne* [2002] ECR I-07213.

⁵⁰ *Ibid.*, para. 62-63.

⁵¹ *Ibid.*, para. 58.

⁵² *Ibid.*, para. 60.

⁵³ *Ibid.*, para. 59.

that the criteria which can be used as a criteria for the award of a public contract to the economically most advantageous tender are not exhaustively listed.⁵⁴

The same is valid also for procedures for the award of a public contract falling within the scope of Directive 93/38/EEC of 14th of June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.⁵⁵

It follows from the ruling of the Court that criteria of non-economic nature can be accepted as criteria for the award of public contract. Criterion of environmental and ecological nature can also be included as factors for the award of a contract provided that the conditions set out in *Concordia Bus* case are satisfied.

4. Directive 2004/17/EC and Directive 2004/18/EC

In 2004, the rules on public procurement were consolidated. 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 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts were adopted.

Only the provisions of Directive 2004/18/EC will be assessed in the present section. Any reference to Directive 2004/17/EC will be explicitly mentioned.

The revision of EU procurement legislation is based on Court of Justice case-law on award criteria.⁵⁶ Even though, award criteria can play an important role in the establishment of sustainable markets,⁵⁷ it is not only the provisions on contract award criteria that have been amended on the basis of that case law. The relevance of environmental considerations is emphasized throughout the entire Directive. The Directive clearly states that contracting authorities may use environmental considerations in each stage of the procurement process.

⁵⁴ Case C-513/99 *Concordia Bus Finland Oy Ab, formerly Stage coach Finland Oy Ab, v. Helsingin kaupunki*, para. 54.

⁵⁵ *Ibid.*, para. 91-93.

⁵⁶ Recital (1) of the Preamble of Directive 2004/18/EC.

⁵⁷ 'Identifying Opportunities for Sustainable Public Procurement Briefing Series, Legal Briefing No. 7: 'Award Criteria' October 2011 (ClientEarth, Justice for the Planet), <http://www.clientearth.org/reports/procurement-briefing-no-7-award-criteria.pdf> (last visited 3 May 2012).

First, in the Preamble of the Directive a reference is made to Article 6 of the Treaty of the European Community (now Article 11 TFEU) which requires environmental protection to be integrated into the other policies of the Community.⁵⁸ Secondly, the Preamble provides for the possibility for contracting authorities to define environmental requirements for the technical specifications of a given contract. They can use, but are not obliged to use appropriate specifications that are defined in eco-labels, such as the European Eco-label.⁵⁹ The possibility for environmental characteristics to be included in the technical specifications and as a result in the selection criteria is later re-affirmed in Article 23(3) (b) of the Directive. Third, the Directive provides for the application of environmental management measures or schemes during the performance of a public contract in which the nature of the works so requires.⁶⁰

The examples provided of cases delivered by the CJEU in relation to the most economically advantageous offer as an award criterion, demonstrate the hesitation of the Court to confer unrestricted choice on the contracting authorities to use non-economic considerations as award criteria. However, Article 53(1)(a) of Directive 2004/18/EC provides that when the most economically advantageous tender is to be determined, several criteria linked to the subject-matter of the public contract in question, should be taken into consideration. Article 53(1)(a) provides non-exhaustive list of criteria, including, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running-costs, cost-effectiveness, etc. Article 53(1)(a) explicitly provides for the possibility for a contracting authority to include environmental considerations in the criteria for the award of public contracts. Article 53 of the 2004 Procurement Directive provides that:

- (1) ... the criteria on which the contracting authorities shall base the award of public contracts shall be either:
 - (a) when the award is made to the tender *most economically advantageous* from the point of view of the contracting authority, various criteria linked to

⁵⁸ Recital (5) of the Preamble of Directive 2004/18/EC.

⁵⁹ Ibid., Recital (29).

⁶⁰ Ibid., Recital (44); Article 26 of the Directive 2004/18/EC.

the subject matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, *environmental characteristics*, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or
(b) *the lowest possible price only*.⁶¹

Directives 2004/17/EC and 2004/18/EC were adopted on 31 March 2004, with a deadline for transposition into national legislation of 31 January 2006 for all Member States.⁶² Romania and Bulgaria were required to implement the directives by 1 January 2007, the date of their accession to the EU. To date, both directives have been fully transposed by all the Member States, the last Member State to transpose the directives being Belgium in 2010.⁶³

However, next to the environmental developments within case-law and the directives, as mentioned before, the Commission has taken up an important role in promoting environmental considerations by developing the concept of Green Public Procurement. How the Commission has gone about this will be examined in the next chapter.

IV GREEN PUBLIC PROCUREMENT

As mentioned in the foregoing chapters, the Commission has been making an effort to emphasize the importance of including green considerations in the public procurement procedures. It had started to do so already before the new directives. In the above mentioned Communication, *Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement*⁶⁴ the Commission described how environmental concerns could

⁶¹ Art. 53 of Directive 2004/18/EC.

⁶² Article 80 of Directive 2004/18/EC and Article 71 of Directive 2004/17/EC.

⁶³ Working document of the Internal Market and Services Directorate General of the European Commission for discussion, 'EU public procurement legislation: delivering results. Summary of evaluation report', p. 8, http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/executive-summary_en.pdf (last visited 3 May 2012).

⁶⁴ COM(2001) 274.

be considered in every step of the public procurement process, regardless of the lack of references to environmental considerations in the old directives.

The Commission first emphasized the potential of Green Public Procurement (GPP) in a 2003 Commission Communication⁶⁵ when it recommended Member States to adopt National Action Plans to implement GPP before 2007.⁶⁶ It was however in 2008, under the *Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan*⁶⁷ that GPP was strengthened and the Commission published a Communication on *Public Procurement for a Better Environment*.⁶⁸ The objective of this Communication was to ‘provide guidance on how to reduce the environmental impact caused by public sector consumption and how to use GPP to stimulate innovation in environmental technologies, products and services’⁶⁹ by the creation of common GPP criteria.

The Commission defines 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 produced.’⁷⁰ What is important in this respect are the objectives, the obstacles and the approach. The main objective of the Commission is providing guidance to Member States in how they can reduce the environmental impact of their procurement and also to show how GPP can stimulate innovation with regard to green product, technologies and services. The main obstacles that have been encountered are the ‘limited established environmental criteria’ for products and services, ‘insufficient information on life cycle costing’, legal uncertainty ‘about possibilities to include environmental criteria’⁷¹ and low awareness of the benefits of green services and products. The main approach with

⁶⁵ Communication from the Commission to the Council and the European Parliament on Integrated Product Policy - Building on Environmental Life-Cycle Thinking, COM(2003) 302 final.

⁶⁶ COM(2008) 400 final.

⁶⁷ 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.

⁶⁸ COM(2008) 400 final.

⁶⁹ European Commission, ‘Public Procurement for a Better Environment’. *European Commission Environment*, http://ec.europa.eu/environment/gpp/gpp_policy_en.htm (last visited 2 May 2012).

⁷⁰ COM(2008) 400 final, p. 4.

⁷¹ Ibid.

which the Commission has aimed to implement GPP was by the creation of GPP criteria in certain products markets at a European level, which are environmental criteria that can be used by contracting authorities at the level of the selection and the award of contracts. The Commission considered it necessary to create these criteria in order to avoid a situation in which each Member State has different environmental criteria, which could distort competition in the market. Also, criteria on an EU level reduce administrative costs for undertakings as well as public authorities. With the use of common GPP criteria the procurement procedures of Member States can qualify as GPP.

GPP criteria can be used either at the stage of selection criteria or award criteria. Selection criteria ‘focus on the factors linked to an economic operator’s overall capacity to perform a contract and assist in the identification of appropriate suppliers.’⁷² Here contracting authorities can require a certain environmental technical capacity or environmental management system. Second are the award criteria, ‘on which the contracting authorities will compare offers and base its award.’⁷³ As explained before, contracting authorities can choose whether they want to base the award on the lowest price or the economically most advantageous tender. When they opt for the second option, where other criteria than price can be taken into account, they can include GPP criteria. Thus, the difference is that selection criteria can set a minimum requirement that all bids should comply with, while award criteria are preferences which stimulate environmental performance but are not mandatory. The effect of the environmental award criteria will depend on the weight of the criterion in the award procedure.

For certain groups of products or services the Commission has already created GPP criteria. 10 sectors/product groups have been identified as the most appropriate for the implementation of GPP criteria. These are construction; food and catering services; transport; energy; office machinery and computers; clothing, uniforms and other textiles; paper and printing services; furniture; cleaning

⁷² European Commission, ‘Glossary’. *European Commission Environment*, http://ec.europa.eu/environment/gpp/gpp_policy_en.htm (last visited 2 May 2012).

⁷³ European Commission, ‘Glossary’. *European Commission Environment*, http://ec.europa.eu/environment/gpp/gpp_policy_en.htm (last visited 2 May 2012).

procedures and services and equipment used in the health sector.⁷⁴ The GPP criteria that have been developed within these sectors are based on existing ecolabel criteria of the European level, on national environmental criteria or on information of experts in civil society and the industry. Furthermore, criteria will be based on life cycle assessment (LCA) which ‘is a process of evaluating the effects that a product has on the environment over the entire period of its life’.⁷⁵ Examples of ecolabel criteria are the EU Ecolabel of the EU Energy label.⁷⁶ The criteria that have now been developed differentiate between core and comprehensive criteria. Core criteria are generally easy to apply, with an aim of minimizing administrative costs for undertakings, while comprehensive criteria are a helpful tool for authorities that want to further their environmental plans and reach a high level of GPP performance.

The procedure of including environmental consideration into public procurement by means of GPP criteria has been picked up by the Member States in different ways. The first step towards implementing the GPP goal for Member States is adopting a National Action Plan, as was called for by the Commission in 2003. How different Member States have taken up the GPP project will be evaluated in the next chapter.

V IMPLEMENTATION IN THE MEMBER STATES

The Commission encouraged National Action Plans as an important tool for greening public procurement in the EU Member States. The National Action Plans should lay down an assessment of the procurement situation as it is and set targets for the next three years, indicating how these targets will be achieved. National Action Plans are generally not legally binding but should be regarded as instruments

⁷⁴ COM(2008) 400 final, p. 7.

⁷⁵ European Commission, ‘Glossary’. *European Commission Environment*, http://ec.europa.eu/environment/gpp/gpp_policy_en.htm (last visited 2 May 2012).

⁷⁶ European Commission, *Buying Green! A Handbook on Green Public Procurement*, 2nd ed., Publications Office of the European Union, Luxembourg 2011, pp. 34-40.

that will help governments steer their procurement policies in a green direction.⁷⁷ The latest statistics⁷⁸ show that in 2010 21 of 27 Member States had adopted a National Action Plan. In the 2008 Communication *Public Procurement for a Better Environment*,⁷⁹ the Commission proposed ‘that, by the year 2010, 50% of all tendering procedures should be green, where “green” means “compliant with endorsed common “core” GPP criteria”’.⁸⁰ In 2011 the Commission assigned the Centre for European Policy Studies (CEPS), together with the College of Europe, to conduct a study to see whether the target had been met. In this study targeted surveys were conducted amongst the contracting authorities of the 27 Member States, regarding the public contracts within the ten sectors that had been identified as appropriate for GPP (see above).

The outcome of this study was that, though there has been a large uptake of GPP in the Member States, the level of 50% had not been reached yet. Within their research CEPS came to nine important conclusions that tell us something about how GPP is being taken up in the EU. First, they found that the uptake of GPP core criteria is significant. It was found that in 26% of the last contracts that were signed all core criteria were included, and in 55% at least one was.⁸¹ Second, the amount of contracts that include at least one core criteria is rising, which means that general uptake of GPP core criteria is on the rise. Third, also in view of value of procurement there is an increase. It was found that 38% of the procured value contained CPP core criteria. Fourth, the majority of contracting authorities (regional, local and central government authorities) include “green” elements in procurement. Fifth, large differences can be seen amongst the Member States of the Union. For instance, the four frontrunners, which are Belgium, Sweden, Denmark and the Netherlands, included all core criteria in at least 40% of their contracts while this number dropped to less than 20% in as much as twelve Member States. Sixth, the researchers found that numbers do not only differentiate between countries but also

⁷⁷ European Commission, ‘GPP National Action Plans’. *European Commission Environment*, http://ec.europa.eu/environment/gpp/gpp_policy_en.htm (last visited 2 May 2012).

⁷⁸ Ibid.

⁷⁹ COM(2008) 400 final.

⁸⁰ Ibid., p. 8.

⁸¹ Centre for European Policy Studies, *The Uptake of Green Procurement in the EU27*, College of Europe, Brussels, 2012. p. 48.

between the ten sectors. For instance, only transport seemed to reach the Commissions goal of 50% while four other groups did not even reach 20%.⁸² Seventh, CEPS found that some of the core criteria are used a lot more than others. Eighth, it appears that life cycle costing is not used much, the most common criterion for determining the most suitable contractor is still purchasing costs in 64% of the contracts. Last, the surveys showed that many contracting authorities encounter difficulties in including GGP criteria in public procurement. Thus, CEPS have concluded that there still are many hurdles, but that GPP seems to be moving in an upwards direction.

VI CONCLUSION

The purpose of the present paper was to provide an overview of how environmental considerations in public procurement process developed in the period between 1966 to date.

As one of the elements of the Single Market policy, public procurement policy aims to facilitate the functioning of the internal market and to guarantee undistorted regime of competition, and the free movement of goods and services within the Community.

EU directives on public procurement date from 1966, when the Directive on the elimination of measures that either prescribe the use of domestic products, or prohibit the use of imported ones was introduced. Since then, directives on public procurement and state aid have been adopted in order to create a fair competition necessary for the proper functioning of the market.

Prior to 31st of March 2004 the rules on public contracts did not contain any explicit reference to considerations other than economic ones. With the evolution of public procurement policy, non-economic considerations have evolved in public

⁸² For instance textiles and food products, found in Centre for European Policy Studies, *The Uptake of Green*, p. 49.

procurement and the adoption of new directives consolidated the changes in that field through the years.

The significance of environmental protection in relation to public procurement has been demonstrated in the CJEU's jurisprudence. The existing current legislation on public procurement enables the Member States and their public authorities to take into account non-economic considerations, such as employment policies and environmental considerations on the same footing alongside the economic ones.

Since the adoption of Directive 2004/18/EC and Directive 2004/17/EC, action in the field of environmental policy has evolved at the initiative of the European Commission and the Member States. The public authorities of the Member States, by taking the approach to choose goods services and works with a reduced environmental impact, have made an important contribution towards general uptake of GPP criteria.

The study conducted by the Centre for European Policy Studies (CEPS), together with the College of Europe shows that GPP has been endorsed in a number of EU policies. Nevertheless, there are still some additional actions which should be taken in order to facilitate the implementation of environmental consideration in the public procurement process. Based on the study made by CEPS and the College of Europe, the European Commission is reviewing its policy in this field with the aim of increasing the use of green criteria in public procurement throughout the EU in the future.

Undoubtedly, a rise of environmental concerns in public procurement is already a fact. Thus, it can be concluded that that GPP is moving in an upwards direction, which will hopefully result in further harmonization of national GPP policies, contributing to the achievement of sustainable development.