



FACULTY OF LAW
Lund University

Emelie Eriksson

Green public procurement as a policy instrument

Study from a law and economics perspective on the efficiency of
using green public procurement to achieve sustainable development in
the EU

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Supervisor: Sanja Bogojević

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Summary

In 2013, approximately 18 % of member states GDP was spent on public procurement, making it a powerful tool for governments to use to further certain objectives.

Traditionally, public procurement has been used for protectionist purposes to safeguard national industry from foreign competition, which is why the EU has chosen to regulate this area of law to ensure the proper functioning of the internal market.

Environmental concern in public procurement was for long distrusted in the EU for merely acting as a cloak for national protectionist objectives. As environmental policy gradually gained recognition in the EU over time, so did green public procurement (GPP) as a policy instrument to achieve environmental as well as economic objectives.

On 11 February 2014, a new public procurement directive was adopted by the Council to help deliver the *Europe 2020 strategy*. This economic strategy was formulated in the aftermath of the financial crisis of 2008 and sought to rectify imperfections in the EU growth model by focusing on smart, sustainable and inclusive growth.

The *Europe 2020 strategy* identified GPP as a key market-based instrument to achieve the objective of sustainable growth by supporting the transition to a resource efficient and low carbon economy.

The rationale for promoting GPP is that contracting authorities, as financially strong market actors, can shape production and consumption patterns to work for a sustainable use of resources, which will be beneficial both to the environment, as well as the economy as a whole.

This thesis aims to examine, from a law and economics perspective, the conditions for GPP to function as an efficient policy instrument in terms of contributing to a sustainable development, as described in the *Europe 2020 strategy*. The innovative solutions presented in the new procurement directive to the deficiencies of the preceding directive is the point of departure for an assessment of GPP's efficiency as it is currently regulated.

The presentation shows that a series of obstacles currently face the mobilisation of GPP in the EU. The possibility to incorporate environmental criteria in procurement is no longer in question but the legality of a particular use of GPP depends largely on how a contracting authority formulates its environmental criteria. The elaboration of environmental criteria in line with EU law that generate environmental and economic benefits is a technically challenging task that gives rise to high transaction costs.

The current high costs and complex execution of GPP discourages contracting authorities from engaging in GPP, which undermines the possibility for GPP to support the shift towards a sustainable development. The uptake of GPP also varies a lot between member states, which is due to a lack of political leadership and a fragmented public procurement demand.

The new public procurement directive proposes a number of solutions to encourage an increased uptake of GPP among contracting authorities by facilitating and clarifying the use of GPP. Indicative targets have also been set by the Commission to further emphasise the importance of a wide use of GPP in the EU.

The thesis, however, show that the promotion of GPP is rarely founded in economic research or studies establishing GPP as an effective policy instrument to transform the market to become more sustainable.

Market conditions such as the price sensitivity of producers and consumers in relation to changes in market prices can for example have a substantial effect on GPP's ability to achieve sustainable development and should therefore be included in the assessment of its efficiency.

In addition, the voluntary element of GPP might impede its objective to achieve sustainable development as economic actors can choose not to participate in GPP if the costs of complying with environmental criteria exceed the potential economic benefits that might be gained from being awarded with the contract. Ambitious environmental criteria are more likely to deter tenderers from participating in GPP, which questions GPP's efficiency in generating substantial environmental benefits.

It remains to be seen whether the implementation of the new public procurement directive will contribute to an improvement of the challenges currently facing the mobilisation of GPP.

Sammanfattning

Under 2013 utgjorde värdet av medlemsstaternas offentliga upphandling ungefär 18 procent av deras BNP, vilket gör det till ett kraftfullt verktyg att använda för att främja vissa samhällsmål.

Traditionellt sett så har offentlig upphandling använts i ett protektionistiskt syfte för att skydda nationell industri från utländsk konkurrens, vilket är en bidragande faktor till att EU har valt att lagstifta på området för att säkerställa en fungerande inre marknad.

Miljöhänsyn i offentlig upphandling var länge misstrodd för att vara en täckmantel för nationella protektionistiska syften.

I takt med att miljöpolicy fick en ökad betydelse i EU så förändrades även synen på grön offentlig upphandling (GPP) som ett viktigt instrument för att uppnå miljömässiga såväl som ekonomiska fördelar.

Den 11 februari 2014 antogs ett nytt upphandlingsdirektiv av Rådet för att understödja *Europa 2020-strategin*. Denna ekonomiska strategi formulerades i efterdyningarna av finanskrisen 2008 och ämnade åtgärda brister i EU:s tillväxtmodell genom att fokusera på smart, hållbar och social tillväxt.

Europa 2020-strategin identifierade GPP som ett väsentligt marknadsbaserat instrument för att uppnå hållbar tillväxt genom att stödja övergången till en resurseffektiv ekonomi med låga koldioxidutsläpp.

Den logiska grunden för främjandet av GPP är att upphandlande myndigheter, som ekonomiskt starka marknadsaktörer, kan forma produktions- och konsumtionsmönster till att verka för en hållbar användning av naturtillgångar vilket främjar både miljön såväl som ekonomin i sin helhet.

Syftet med denna uppsats är att, från ett rättsekonomiskt perspektiv, undersöka förutsättningarna för GPP att fungera som ett effektivt policy instrument i betydelsen att verka för en hållbar utveckling, som beskrivet i *Europa 2020-strategin*. De innovativa lösningarna som presenteras i det nya upphandlingsdirektivet som ett svar på bristerna i det föregående direktivet utgör utgångspunkten för en bedömning av GPP's effektivitet som det för nuvarande är reglerat.

Uppsatsens presentation visar att mobiliseringen av GPP i EU för nuvarande möter en rad hinder. Möjligheten att inkorporera miljökriterier i offentlig upphandling är inte längre ifrågasatt men legaliteten av en enskild användning av GPP beror i stor grad på *hur* den upphandlande myndigheten formulerar sina miljökriterier. Utformandet av miljökriterier i enlighet med EU rätt som genererar miljömässiga och ekonomiska fördelar är en tekniskt utmanande uppgift som ger upphov till höga transaktionskostnader.

De höga transaktionskostnaderna och det komplicerade utövandet av GPP gör att upphandlande myndigheter ofta avstår från att tillämpa miljökriterier, vilket underminerar möjligheten för GPP att verka för en hållbar utveckling. Tillämpningen av GPP varierar också mycket mellan olika medlemsstater vilket antas bero på en brist på politiskt ledarskap och en fragmenterad offentlig efterfrågan av GPP.

Det nya offentliga upphandlingsdirektivet presenterar en rad lösningar menade att uppmuntra en ökad tillämpning av GPP bland upphandlande myndigheter genom att underlätta och klargöra dess användande. Indikativa mål har också fastställts av Kommissionen för att ytterligare understryka vikten av en ökad tillämpning av GPP i EU.

Denna uppsats visar emellertid på att främjandet av GPP sällan grundar sig i ekonomisk forskning eller studier som fastställer att GPP faktiskt är ett effektivt policyinstrument som kan bidra till att förändra marknaden i en hållbar riktning.

Marknadsförutsättningar såsom priskänsligheten hos producenter och konsumenter i förhållande till förändrade marknadspriser kan exempelvis ha en betydande effekt på GPP's förmåga att åstadkomma en hållbar utveckling och borde därför ingå i en bedömning av dess effektivitet.

Därutöver är det frivilligt för producenter att delta i GPP, vilket kan motverka dess målsättning att bidra till en hållbar utveckling då ekonomiska aktörer kan välja att inte delta i GPP om kostnaderna för att uppfylla miljökriterier överstiger de potentiella ekonomiska fördelarna som följer av att vinna en upphandling. Det är också mer troligt att potentiella anbudsgivare väljer att avstå från att delta i en grön offentlig upphandling om miljökraven är högt ställda, vilket ifrågasätter GPP's effektivitet i förhållande till att generera betydelsefulla miljövinster.

Det återstår att se om implementeringen av det nya direktivet i nationell lagstiftning kommer att bidra till en förbättring av de utmaningar som för tillfället möter mobiliseringen av GPP.

Preface

This thesis marks the end of an academic era that for long seemed never-ending and it is with mixed emotions and a great deal of optimism that I now embark on a new chapter of my life.

First, I would like to thank my supervisor, Sanja Bogojević, whose inspiring and engaging lectures in EU environmental law inspired me to write my thesis within this area of law.

Second, I wish to extend a great deal of gratitude to the love of my life, Anton Schleenvoigt, who has stood by me through thick and thin and continues to support me in everything I do.

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A special thank you goes out to me beloved parents for always believing in me and for allowing me to move back home for a short period of time in order to finish this thesis.

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Emelie Eriksson

Karlshamn, May 27th 2014.

Abbreviations

CBA	Cost and Benefit Analysis
CJEU	Court of Justice of the European Union
CPB	Centralised Purchasing Body
ECJ	European Court of Justice
GPA	Government Procurement Agreement
GPP	Green Public Procurement
LCA	Life Cycle Costing Analysis
LCC	Life Cycle Costing Assessment
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

"When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal. For the rational study of the law the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."

- Oliver Wendell Holmes, 1897

1 Introduction

1.1 Background

Public procurement is the practice whereby a public authority procures from the market the goods, works and services it needs in order to fulfil its obligations.¹ These obligations give rise to a wide range of transactions in the public market, such as procuring new stationery for a municipality or commissioning large-scale projects for the construction of public roads.

Public procurement has attracted much regulatory action in the EU for its potential to influence the internal market objective.² In 1988, the Commission identified public procurement as a significant non-tariff barrier to trade and the reason was two-folded.³

First, public procurement is an economic activity involving considerable economic strength. Approximately 18 % of member states GDP⁴ is spent on procurement, which makes it a powerful tool for governments to use to further certain objectives. Traditionally, such objectives have included protectionist measures to safeguard national industry by e.g. favouring national tenderers and excluding foreign firms from access to their procurement market. Governments are generally prone to such behaviour and it is therefore crucial for the EU to regulate procurement in order to ensure the functioning of the internal market.⁵

Second, the identity of the procurer in a market context creates a need for regulation. Public bodies can act as any market operator when procuring goods, works and services but should not be equated with simpler organisations. Public bodies are characterized by their complex structure, their significant size, disparate obligations and political and social objectives.⁶

The objectives of public entities are part of what differentiate them from private entities. Where private entities seek to maximize their profit in a competitive market context, public entities pursue objectives of providing services to the public without market pressures. This lack of commercial pressure has instigated legislative action in the EU to ensure a sound and efficient use of public economic resources, which is otherwise underpinned by strong competition, and to decrease the proneness to protectionism and corruption in public procurement.⁷

¹ Arrowsmith and Kunzlik, 2009. p. 9

² Bovis, 2006, p. 12

³ Commission, 1988

⁴ <http://www.europarl.europa.eu/news/en/news-room/content/20140110IPR32386/>

⁵ Arnould, 2004, p. 187-188

⁶ Trepte, 2004, p. 6

⁷ Bovis, 2012, p. 1

Free trade theory is what underlines the creation of the EU single market.⁸ According to this theory, the opening up of national markets to international trade will create prosperity and secure peace in Europe.

The economic objective of protecting the single market by opening up national markets to undistorted competition still remain today but is now complemented by a variety of other objectives acknowledged by the EU, such as social objectives to encourage employment of the disabled or environmental objectives of reducing environmental harm.⁹ The EU is thus a multi-valued international organisation where the maximization of wealth by free trade is no longer the predominant policy.¹⁰

Political and social objectives are thus becoming increasingly important alongside economic objectives in the EU. The new directive on procurement, adopted by the Council on 11 February 2014, provides a perfect example of this development as the modernized directive stems from the *Europe 2020 strategy*, which is an economic policy that *inter alia* emphasises the importance of integrating environmental concern in procurement to achieve benefits of enhanced competitiveness and sustainable growth.¹¹

The Commission elaborated the *Europe 2020 strategy* in the aftermath of the financial crisis of 2008. The strategy is, however, not confined to finding a remedy for the repercussions of the recession in the short term. The Commission also seeks to transform the current European growth model in the long term by promoting a smarter, more sustainable and inclusive growth.¹²

Green public procurement (GPP) as a policy instrument is identified as being instrumental to achieve the objective of sustainable growth by supporting the transition to a resource efficient and low carbon economy.¹³

GPP has been defined by the Commission as “*a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life-cycle when compared to goods, services and works with the same primary function that would otherwise be procured*”.¹⁴

This definition means that contracting authorities are now able to take into account environmental concern in procurement and also compare tenders on the basis of environmental performance. The core of GPP is thus the

⁸ Arrowsmith, 2010, p. 44

⁹ McCrudden, 2007, p. 25

¹⁰ Caranta and Trybus, 2010, pp. 16-17

¹¹ http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/reform/fact-sheets/fact-sheet-07-environmental_en.pdf

¹² Commission, 2010

¹³ Bovis, 2012, p. 1

¹⁴ Commission, 2008

ambition to avoid or limit environmental harm when procuring goods or services from the market.

The central role of GPP not only in EU environmental policy but also at the core of its economic strategy marks a shift in the policy context of the EU. Where it was once discredited for curtaining national protectionist measures, it is now essential in ensuring the future competitiveness of the EU.¹⁵

1.2 Purpose and question formulations

The *Europe 2020 strategy* sets out high ambitions for the EU growth model to become more sustainable. Sustainable development is to be achieved by decoupling economic growth from an inefficient use of resources and environmental degradation.¹⁶ Sustainable development is thus an expression of the EU rhetoric that economic and environmental objectives can in fact be aligned, which is interesting considering that the two policy strands have previously been conceived of as antagonistic and polemic.¹⁷

GPP has been described in the *Europe 2020 strategy* as a key policy instrument to attain the objective of sustainable development. The rationale for GPP is that contracting authorities, as financially strong market actors, can shape production and consumption patterns to work for a sustainable use of resources, which will be beneficial both to the environment, as well as the economy as a whole.¹⁸

After the elaboration of the *Europe 2020 strategy*, the Commission found it necessary to modernize the former procurement directive to facilitate a wider use of GPP and further elevate its status.¹⁹

A wider use of GPP is thus strongly promoted in the EU with high expectations on positive environmental and economic outcomes. Yet, few studies have been conducted to establish *if* GPP is an effective policy instrument to achieve sustainable growth, especially from an economic perspective, and *how* it should be used to best achieve the desirable results.²⁰

The purpose of this study is therefore to examine the conditions for GPP to function as an efficient policy instrument in terms of generating a maximum of environmental and economic benefits. The innovative solutions presented in the new directive to the deficiencies of the former will be the point of departure for an assessment of GPP's efficiency as it is currently regulated.

¹⁵ Kunzlik, 2013, p. 102

¹⁶ Commission, 2008

¹⁷ Lee, 2005, pp. 26-28

¹⁸ Commission, 2008, p. 2

¹⁹ Directive 2004/18/EC

²⁰ SOU 2013:12, p. 376

The study from a law and economics perspective of the conditions for GPP to function as an efficient policy instrument will ultimately help answer:

To what extent does GPP, as presented in the Europe 2020 strategy, meet the objective of promoting sustainable development in the EU?

1.3 Method and material

The initial method to be used in this study is the traditional legal method in order to establish the legislative framework applicable to public procurement. Accordingly, relevant legislation, preparatory work on proposed laws, case law and legal doctrine will be examined to set a taxonomy for public procurement regulation.

The focal point of this thesis is EU law as the major influence on national regulation on procurement derives from secondary legislation, primary law, and case law from the Court of Justice of the European Union (CJEU). Domestic law will also be addressed to a lesser extent to discuss the practical implications of the EU GPP regulation. Swedish law will be the sole object of study in this regard.

Furthermore, the analysis of GPP as a policy instrument will be conducted from a Swedish perspective, using government official reports and stated opinions from interested parties such as the Swedish Competition Authority and the Expert group in studies of public finance²¹. Swedish experiences of incorporating environmental criteria are especially valuable since Sweden is one of four top performing EU countries in GPP performance²², meaning procurement processes where at least one of the EU “core” GPP criteria has been used.²³

Commission guidelines and communications will also be assessed since the Commission has become a strong political actor in the development of GPP in the EU and issues policy documents important to this area of law. Commission communications are not legally binding but represent the Commission’s position on certain topics and may represent future intentions to initiate legislative action.²⁴

As GPP is described in the *Europe 2020 strategy* as a *market-based* policy instrument, it is inescapable to address its interdisciplinary character of incorporating economic theory with the law.

²¹ Expertgruppen för studier i offentlig ekonomi (ESO)

²² CEPS Report, 2012

²³ EU GPP criteria are common environmental criteria that can be used by contracting authorities of the member states in their procurement processes. The “core” criteria of EU GPP criteria constitute the essential elements of a product’s environmental performance. See section 4.3.1.2.

²⁴ http://ec.europa.eu/civiljustice/glossary/glossary_en.htm#Communication

The method used in this study will therefore not be limited to traditional legal method, but also encompass an economic analysis of existing law.

Economic analysis of law, also known as law and economics, is concerned with assessing law from an external economic perspective. The perspective is external in the sense that it finds the logic of the law outside of the law itself. This logic is the maximization of economic efficiency or wealth.²⁵

Applying economic analysis of law to GPP regulation therefore involves an assessment of its efficiency in terms of the ability to maximize common wealth. Economic analysis of law is rather flexible and can be used to evaluate the efficiency of a regulation related to economic as well as non-economic objectives, e.g. environmental protection.²⁶ Such an analysis is therefore particularly valuable for the evaluation of GPP as this instrument is meant to attain objectives of both an economic as well as a non-economic nature.

Law and economics scholarship has shown that economic efficiency can be measured using one of two standards, either the pareto efficiency standard or the Kaldor-Hicks efficiency standard (also known as the compensation principle).²⁷

Pareto efficiency is acquired when a certain action or a measure increases wealth for at least one individual without decreasing wealth for another individual. For example, if a certain regulation entail that purchasers get a significant reduction in their expenses while the suppliers are not economically affected by the regulation.

Pareto efficiency is particularly hard to attain in regulation, as different legal measures are often a result of a compromise between opposing interests in society where some individuals gain advantages from a regulation and others do not.²⁸

The Kaldor-Hicks efficiency standard is therefore easier to apply, as specific regulation can be considered efficient even if some actors are disadvantaged by it, provided that the total benefits achieved by the measure outweigh the costs. This standard is also called the compensation principle, as the advantaged group must, in theory, be able to compensate the disadvantaged group and still keep a surplus of benefits.²⁹

Regulation usually creates both winners and losers, which is why the Kaldor-Hicks efficiency standard is most frequently used in law and economics analysis.³⁰ GPP regulation is certainly no exception as producers of conventional products will often be disadvantaged compared to producers providing eco-friendly products.

²⁵ Posner, 1979, p. 103 ff

²⁶ Korling and Zamboni, 2013, pp. 178-179

²⁷ KKV, 2009, p. 16

²⁸ Hovenkamp, 1989-90, p. 1037

²⁹ Dahlman, Glader and Reidhav, 2004, p. 54

³⁰ Mercurio and Medema, 2006, p. 105

This thesis will thus apply the Kaldor-Hicks efficiency standard to assess GPP regulation as presented in the new directive on procurement. The efficiency will be evaluated in terms of whether GPP is an efficient instrument to use to generate benefits for the environment and the economy as a whole that outweigh the costs of engaging in GPP.

The environmental benefits that GPP is expected to generate are primarily reduced levels of carbon emissions through a sustainable use of natural resources. The economic benefits are expected to follow from the environmental benefits as resources are used more efficiently and competitive green markets are created and expanded due to an increased public demand in green goods.³¹ This is ultimately meant to enhance the EU's competitiveness and make the EU less reliant on foreign sources for raw materials and commodities.³²

Economic analysis of law will help to show economic weaknesses in EU GPP regulation as it is currently formulated that also affects the expected environmental benefits to be generated by GPP.

1.4 Delimitations

First of all, this thesis does not claim to provide a comprehensive evaluation of the public procurement process of the EU. The aim of this study is to assess the efficiency of using GPP in the EU to attain sustainable development from a law and economics perspective. The presentation of the procurement process in large therefore serves the purpose of demonstrating the possibilities and limitations for GPP in the EU, which will allow a subsequent evaluation of GPP's efficiency.

The assessment of GPP's efficiency in attaining policy objectives is however a complex undertaking, especially since it includes non-economic objectives such as environmental protection that are hard to measure and monetize. The lack of empirical data on the effects of using GPP³³, as mentioned above, further limits the scope of an efficiency analysis.

This thesis will therefore present the legal and economic *conditions* for GPP to function efficiently by assessing the challenges facing the mobilisation of GPP in the EU and the possible solutions to these challenges presented in the new directive on procurement.

Consequently, the thesis will not provide a definitive answer as to *if* GPP is an efficient policy instrument in terms of promoting sustainable development, since it depends on a wide range of factors such as how the market will in fact react to an increased uptake of GPP criteria by contracting authorities and how authorities should conduct their procurement processes to best achieve desired environmental and economic benefits. These factors will, however, be presented in the thesis to allow a

³¹ Commission, 2010, p. 15

³² Commission, 2008, p. 2

³³ ESO 2013:10, p. 29

discussion of whether it is reasonable to suggest that GPP will be efficient in achieving environmental and economic objectives.

This thesis will exclusively address public procurement in the classical sector. Procurement in the utilities sector, i.e. in the water, energy, transport and postal services sectors is often subject to a similar legal structure and many of the problems and measures presented in the classical sector are thus also valid for the utilities sector.³⁴

Furthermore procurements below the threshold values in the directives will only be mentioned in brief as somewhat simplified regulation apply to them.

1.5 Disposition

This thesis is divided into three core parts. The first part aims to present the legislative framework of the EU procurement regulation including a brief account of the Swedish procurement order and a concise description of relevant international agreements. The idea is to provide an overview of the procurement process and its underlying economic incentives.

The second part focuses on GPP in particular and how this policy instrument has become one of the key market-based instruments in the policy landscape of the EU.

First, EU environmental policy will be assessed to portray how environmental concern has gained recognition over time. Second, the EU general policies will be presented to understand the motives behind identifying GPP as a key market-based instrument.

Third, relevant case law of European Court of Justice (ECJ) to the legal area of GPP will be thoroughly evaluated, as it has been instrumental to the development and acceptance of environmental concern in procurement. The balancing exercise of the ECJ between the internal market objective and environmental concern will be of particular interest.

The third part will use the findings of the two previous sections to discuss the efficiency of using GPP to achieve sustainable development from a law and economics perspective.

The new directive on procurement adopted by the Council on 11 February 2014 will be evaluated in light of the deficiencies of the former directive of 2004. The presentation will aim at answering whether the new directive present efficient solutions, in terms of facilitating a wider use of GPP, to challenges currently facing the mobilisation of GPP. This section will finally include a discussion of the market conditions that are a prerequisite for GPP to function efficiently.

Lastly, this study will provide a well-founded analysis of whether GPP should be promoted as a key policy instrument to achieve the objective of sustainable growth set out in the Europe 2020 strategy.

³⁴ KKV, 2009, p. 14

2 The legal framework of public procurement

2.1 The EU procurement regime

Mastering, or at least understanding the basic concepts of EU public procurement, demands a study of the underlying purpose of the EU procurement regime. This introductory section will therefore in brief describe one of the fundamental objectives of the EU, namely the internal market objective, and how it has influenced the elaboration of the EU procurement regime and why public procurement in general and GPP in particular can present a barrier to trade.

The creation of a common “single” market, where there are no barriers to trade between the member states, represent the very foundation of the EU. This market is to be obtained by a progressive approximation of the economic policies of the member states.³⁵

A common market is meant to encourage transnational trade, which in turn is thought to maximize economic wealth and ensure peace in the European region. It is believed that an economic interdependence among member states will prevent future aggression.³⁶

The European Commission has identified public procurement as a significant non-tariff barrier to trade.³⁷ Such a barrier is often elusive in character as it is not as openly discriminatory as a tax on imported goods and services and can represent a significant restriction on trade due to the financial strength of its purchaser, the public authority.³⁸

Public authorities have previously been inclined to protect national industry by e.g. restraining foreign competitors from entering their market.³⁹ Certain public contracts, such as infrastructure contracts, involve a considerable amount of financial means and therefore attract extensive economic activity. Public authorities can thus be put under a lot of political pressure to favour national industries as it creates jobs and generates money for the near community.

Regulating public markets in a way to reduce the possibility for states to use procurement in such a way is thus an integral part in achieving the internal market objective.⁴⁰

³⁵ Bovis, 2006, p. 9

³⁶ Arrowsmith, 2010, p. 44

³⁷ Commission, 1988

³⁸ Foster, 2013, p. 256-257

³⁹ Until 1952, the Swedish procurement regime included an explicit provision commanding public authorities to give precedence to domestic goods over foreign. (Pedersen, 2013, p. 9)

⁴⁰ Bovis, 2012, p. viii-ix

Using public procurement to promote environmental benefits present a particular threat to the internal market. Procurement for the promotion of policy objectives such as environmental protection does not necessarily have to be economically efficient. Instead, public bodies can conclude that a certain financial loss is tolerable in light of the objective to be attained.⁴¹

The EU public procurement does not exclude the possibility for member states to take into consideration environmental objectives, especially as the present EU Treaties themselves expressly promote such objectives.⁴² However, the pursuit of environmental objectives needs to be in line with EU law. A study of the legislative framework of public procurement is therefore crucial to grasp the possibilities as well as the limitations of GPP in particular. Relevant primary law addressing public procurement will first be presented before secondary law is assessed followed by national and international law.

2.1.1 TFEU and the general principles of EU law

The significance of the Treaty on the functioning of the European Union (TFEU) on public procurement is expressly stated in recital 2 of the public sector directive of 2004.⁴³

The recital states that the award of public contracts among member states are subjected to the provisions of the Treaty concerning the free movement of goods and services and the freedom of establishment. The principles derived from the free movement provisions are equally to be respected when awarding a public contract. Contracts above a certain value will be subjected to the public sector directive for the purpose of coordinating national procedures for the award of contract. Secondary law is, however, still to be interpreted in accordance with the rules and principles of the Treaty.

Recital 2 of the public sector directive reflect the idea that primary law constitute the foundation on which secondary law on the award of public contracts is formulated, even though the Treaty does not expressly regulate public procurement and the award of contracts.

The significance of certain Treaty provisions in public procurement has instead been elaborated by the ECJ and the following description of relevant Treaty provisions will include some examples of case law from the ECJ.

The Treaty provisions applicable to procurement are all intimately connected to the internal market objective, which is at the core of the legal efforts to regulate procurement. The creation of an internal market demands the abolition of discriminatory behaviour between member states. The principle of non-discrimination on grounds of nationality articulated in art 18 TFEU is therefore instrumental to the internal market objective.

⁴¹ Arrowsmith, 2010, p. 49

⁴² See Recital 9, art 3(3) TEU and art 11, 191 TFEU, also section 3.1

⁴³ Directive 2004/18/EC

Art 18 is applicable in all areas of Community law where there are no special provisions on non-discrimination. As the free movement provisions constitute such special provisions, art 18 is of importance merely as supplementary regulation and also as an expression of the principle of equal treatment⁴⁴, which will be further discussed below.

The following section will describe the free movement provisions each in turn, with the exception of the free movement of people and capital⁴⁵, and the general principles of EU law derived from these provisions.

2.1.1.1 Free movement of goods (Art 34 TFEU)

The free movement of goods is regulated in Article 34 TFEU and prohibits all quantitative restrictions on imports and all measures having equivalent effect between member states. Quantitative restrictions on trade are measures, which put up a partial or total ban on imported or exported products.

The landmark decision of *Dassonville*⁴⁶ further clarified that measures having equivalent effect to quantitative restrictions signify all measures capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.

The scope of application of art 34 is evidently large and covers measures that can be divided into three subcategories. The application of EU law might vary depending on which subcategory a particular measure adheres to and it is therefore of importance to describe the three types each in turn.

The first and second type of measure either discriminates directly or indirectly between domestic and imported products. These measures are called distinctly and indistinctly applicable measures and are both discriminatory in their *effect*.⁴⁷

A requirement to use only domestic products in a construction contract⁴⁸ represent a distinctly applicable measure while a requirement that material for construction must conform to a domestic standard⁴⁹ represent an indistinctly applicable measure.

The third type of measure applies equally to domestic and imported products and is not even discriminatory in its effect. For these types of measures, the ECJ has made a distinction between measures that relate to the *characteristics* of a product and those that refer to the selling

⁴⁴ Sundstrand, 2012, p. 38

⁴⁵ For the purpose of public procurement, the free movement of people will not be addressed as employment contracts are expressly excluded from the public procurement regulation. (Sundstrand, 2013, p. 25, footnote 1). Furthermore, the free movement of capital will neither be addressed; as such rights do not constitute contracts that public bodies need to expose to competition. (Sundstrand, 2012, p. 37)

⁴⁶ C-8/74

⁴⁷ Arrowsmith, 2010, p. 67-68

⁴⁸ C-234/89

⁴⁹ C-45/87

arrangements of a product.⁵⁰ The requirement for a certain operative system to be used⁵¹ constituted an infringement of art 34 as it related to the characteristics of the product while for example rules on opening hours of a retail store fell outside the scope of art 34 TFEU.

Contracting authorities seeking to engage in GPP must thus make sure that, for example, an environmental criterion does not discriminate directly or indirectly between domestic and imported goods or includes a specification on product characteristics that hinder trade. Authorities are for example prohibited from requiring that a public contract can only be awarded to domestic suppliers of green products or that possible tenderers must comply with domestic environmental standards without accepting equivalent foreign standards. Derogations from art 34 TFEU can however be justified under art 36 TFEU if the measure in question seeks to safeguard objectives of public interest, such as the protection of health and life of humans, animals or plants and does not confer an unrestricted freedom of choice on the contracting authority. A measure with a potential impact on the trade of goods might also be justified on the basis of “mandatory requirements” acknowledged by the ECJ. Environmental protection is considered a mandatory requirement but such an objective must still be proportionate in relation to the goal to be attained.⁵²

2.1.1.2 Freedom to provide services (Art 56 TFEU)

Art 56 TFEU includes an obligation for member states to guarantee access to EU citizens other than their nationals to exercise services within their territories. It is prohibited to restrict the freedom to provide services for EU citizens who are established in another state than the recipient of the service. It is equally prohibited to restrain suppliers of services from other member states from participating in government contracts.⁵³

Equal to art 34 TFEU, there are three types of measures that can violate the freedom to provide services.

Distinctly applicable measures are those that discriminate directly on the grounds of nationality of the service provider. An obvious example can be found in an Italian case where a certain portion of a public works contract was reserved for subcontractors established in the region where the works were to be performed. This measure was directly discriminatory, notwithstanding that Italian subcontractors from other regions of Italy were equally discriminated.⁵⁴

Indistinctly applicable measures might include requirements of having an office open to the public in the province where the service is to be provided or an award criterion favouring firms who produce products needed to

⁵⁰ C-267-8/91

⁵¹ C-359/93

⁵² Arrowsmith, 2010, p. 74

⁵³ Arrowsmith, 2010, p. 70

⁵⁴ C-360/89

perform a service, within a certain distance from the province where the service is to be provided.⁵⁵

Measures that have an equal impact on domestic and foreign firms, just as any other measure having an impact on trade in services, are *prima facie* caught by art 56 TFEU as established by the ECJ.⁵⁶ No restriction has been made to this general approach such as the one in the case of Keck & Mithouard.

For the purpose of GPP, if a contracting authority requires tenderers to, e.g., provide evidence of environmental performance during the last 10 years of service, the authority must make sure that the requirement does not restrict access for tenderers to service markets, as art 56 TFEU covers all measures having an impact on trade in services. Measures taken to protect the environment can however be justified under art 62 TFEU, which refers back to art 52 TFEU, on grounds of public policy, morality or security. Hindrances to trade in services can equal to hindrances to trade in goods be justified by mandatory requirements established by the ECJ, including environmental protection.

2.1.1.3 Freedom of establishment (Art 49 TFEU)

Art 56 TFEU ensures the right for citizens of a member state to set up an agency, a branch or an affiliated company in another member state, on a permanent basis without having to worry about receiving a different treatment than nationals of the relevant state. Restrictions on these rights are strictly prohibited. In the context of public procurement, people established in another member state than their state of origin cannot be restricted from accessing public contracts. For example, a requirement that tenderers to certain data processing contracts had to be owned by the Italian government was considered discriminatory against non-Italian firms established in Italy, notwithstanding that Italian firms established in other regions of Italy were equally discriminated.⁵⁷

2.1.1.4 The general principles of EU law

The general principles of EU law are meant to assist the interpretation of Community law, including both primary as well as secondary law, to ensure that regulation is applied in accordance with the EU Treaties and are given full effect in the legal areas governed by Community law.⁵⁸ These principles have been given constitutional status⁵⁹ and take precedent of both secondary law and international agreements signed by the EU.

The more exact meaning of the general principles of EU law has largely been developed through the ECJ's interpretation of the free movement

⁵⁵ C-234/03

⁵⁶ C-384/93

⁵⁷ C-3/88

⁵⁸ Sundstrand, 2012, p. 42

⁵⁹ C-101/08, para 63

provisions. The general principles thus emanate partly from primary law, partly from the case law of the CJEU⁶⁰ and ultimately help secure a well functioning internal market.

Some of the general principles of EU law underlie the public sector directive, as explicitly stated in recital 2 of the public sector directive 2004/18/EC. Art 2 of the same directive directly refers to general principles of particular relevance to public procurement law, namely the principle of equal treatment⁶¹, the non-discrimination principle⁶² and the transparency principle.⁶³ The CJEU has further acknowledged the principle of proportionality⁶⁴ and the principle of mutual recognition⁶⁵ to be of relevance to the legal field of procurement.

The major part of the CJEU's case law on public procurement make reference to the general principles and their significance for the interpretation of EU law on procurement can thus not be understated, as will be shown in the upcoming section regarding the case law of the CJEU⁶⁶.

Another general principle, relevant for GPP in particular, is the environmental integration principle that follows from art 11 TFEU and art 37 in the EU Charter of Fundamental Rights. This principle requires EU institutions as well as member states to integrate environmental concerns in their decision-making process to avoid environmental degradation and will be further assessed in the upcoming section regarding EU environmental law and policy.

2.1.2 Directive 2004/18/EC

2.1.2.1 Purpose

The Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Public Sector Directive), was installed to induce efficiency in EU procurement regulation, to facilitate the application of the rules in member states, to create opportunities for member states to seek value for money and

⁶⁰ Pedersen, 2013, p. 19

⁶¹ All suppliers submitting tenders must be treated equally and be given equal opportunities to be awarded with the contract.

⁶² It is strictly prohibited to discriminate tenders directly or indirectly on grounds of nationality, e.g. giving priority to domestic suppliers as opposed to foreign.

⁶³ The contracting authority must give adequate information about the public contract and how the tenders will be assessed so that economic operators accordingly can draw up competitive tenders. The information given by the authority concerning the requirements and criteria to be used in the procurement process cannot be substantially changed during the process.

⁶⁴ The requirements and criteria used in procurement must be proportional to the purported objective. The requirements cannot go beyond what is necessary to achieve the purpose of the procurement.

⁶⁵ Certificates etc. issued by competent authorities of one member state must be accepted in the other member states provided that they correspond to certificates demanded in the procurement process.

⁶⁶ Sundstrand, 2012, p. 43, See section 3.3

to secure a fair and equal competition.⁶⁷ Environmental concern was equally part of this modernisation effort, in accordance with the integration principle in art 11 TFEU, requiring environmental protection to be integrated into Community policy and activity, especially with a view to promote sustainable development,⁶⁸ further discussed below.

Previously, it had been discovered that a mere 20 % of all tenders in the EU were published in the Official Journal of the EU and only 10 % of the concluded procurement contracts in the EU were of a cross border nature.⁶⁹

The EU had discovered, already in the 1970s, that the free movement provisions were inadequate to ensure the proper functioning of public procurement in the EU as the Treaty made no explicit mention of public procurement.⁷⁰ A need thereby arose to coordinate the procedures for the award of public contracts at Community level with secondary law and the first directive was adopted in 1971.⁷¹ Various directives followed from the original and the directive currently in effect from 2004 is a result of the previous.⁷²

The previous as well as the current directive on public procurement have all been founded on the free movement provisions and the principles derived there from. The purpose of the directives has always been to eliminate barriers to the freedom to provide services and goods, thereby protecting the interests of economic actors established in one member state who seek to provide services and goods to public authorities established in another member state.⁷³

The aim of the directives was thus to avoid both the risk of preferential behaviour towards domestic tenderers as well as the possibility for public authorities to be guided by non-economic considerations.⁷⁴

The public sector directive of 2004 was thought to help create an internal market for public contracts by subjecting public authorities to a great number of obligations and restrictions, which they are forced to respect when awarding public contracts.⁷⁵

The Directive was also meant to reflect the preceding case law of the ECJ who had elucidated the lawfulness of using social and environmental criteria in public procurement in four important cases, which will be discussed below.⁷⁶ Directive 2004/18/EC was the first directive that expressly addressed the possibility for contracting authorities to take environmental

⁶⁷ Nielsen and Treumer, 2005, p. 9

⁶⁸ Directive 2004/18/EC, Recital 5

⁶⁹ *ibid.*

⁷⁰ Sundstrand, 2013, p. 28-29

⁷¹ Directive 71/305/EEC

⁷² Sundstrand, 2012, p. 58-59

⁷³ C-360/96, para 41

⁷⁴ C-380/98, para 17

⁷⁵ Troels and others, 2012, p. 25-26

⁷⁶ See section 3.3

concern into consideration in procurement. Authorities were now given the opportunity to incorporate environmental objectives in their technical specifications, contract performance conditions and award criteria when choosing the economically most advantageous tender. These possibilities will be mentioned in passing in the upcoming sections to allow a more thorough analysis in the subsequent section regarding GPP.

2.1.2.2 Scope of application

For the public sector directive to be applicable, two conditions must be met.

The first involves the parties to a public contract. The Public Sector directive applies only to the award of public contracts between an *economic operator* and a *contracting authority*. The term “contracting authority” comprises a wide range of entities within the realm of State, regional or local governance as well as bodies governed by public law.⁷⁷

The term “economic operator” targets entities described as contractors, suppliers and service providers belonging to the private realm of trade.⁷⁸

The second condition involves the nature of the contract concerned. The Public Sector directive is only applicable to contracts in writing for pecuniary interest, meaning in money or moneys worth, having as their object the execution of works, supply of products or the provision of services.⁷⁹

Furthermore, the contract must be of a value exceeding the stated thresholds in the Public Sector Directive.⁸⁰

Certain public contracts are expressly excluded wholly or partially from the application of the directive. Public contracts belonging to the utilities sector such as water, energy and transport services are for example exempt from the scope of the directive.⁸¹

Also, contracts that fall below the thresholds are exempted from the scope of the directive. These contracts are however still subjected to fundamental Treaty provisions, especially the non-discrimination principle in art 18 TFEU, provided that the contract in question is of certain cross-border interest.⁸²

2.1.2.3 Procedures

When a contracting authority is to award a public contract, which falls within the scope of the Public Sector Directive, five types of award procedures are made available for the authority. The procedures are described either as open, restricted, competitive or negotiated procedures

⁷⁷ Directive 2004/18/EC, Art 1(9)

⁷⁸ Directive 2004/18/EC, Art 1(8)

⁷⁹ Directive 2004/18/EC, Art 1(2)(a),

⁸⁰ Directive 2004/18/EC, Art 7,

⁸¹ Directive 2004/18/EC, Art 12

⁸² C-507/03, para 29

with a notice or without. The open and restricted procedures will now be mentioned in brief as these are the most commonly used and do not require specific circumstances.⁸³

The general rule is that contracting authorities have the liberty to choose between the open and the restricted procedure when awarding any public contract.⁸⁴ They are both formal tendering procedures where a contracting authority is obliged to determine clear specifications as the basis for the submission of bids, advertise the contract in the EU's Official Journal and evaluate the bids on objective criteria without extensive negotiations with the interested parties.⁸⁵

Similar rules apply to the two procedures yet there are differences. The open procedure is open in the sense that any interested economic operator can submit a tender.⁸⁶ The restricted procedure on the other hand is restricted in the sense that economic operators can *request* to participate but may only submit a tender if they are invited to do so after the selection stage by the contracting authority.⁸⁷

2.1.2.4 Qualification and award criteria

The Public Sector Directive distinguishes between two sets of criteria. The first set of criteria is aimed at establishing whether a supplier is able to perform a contract and the second to establish which of the qualified suppliers will be awarded the contract.

The public procurement process is thus divided into two separate stages regulated by different provisions.⁸⁸

The first is the selection stage where tenders are selected on the basis of certain predetermined criteria stipulated in the Public Sector Directive.

The process of selecting tenderers, as the process for the award of contract, is strictly regulated to prevent contracting authorities from impeding fair opportunities for participation for tenderers and conceal discriminatory behaviour.⁸⁹ The discretion of the member states are thus limited in the sense that they can only select economic operators on certain grounds listed in the Public Sector Directive to which financial standing and technical

⁸³ PwC, 2011, p. 4-5

⁸⁴ Directive 2004/18/EC, Art 28. Previously, authorities had to justify the use of the restricted procedure but it is now placed on an equal footing with the open procedure. The member states can, however, require the open procedure to be used as a main rule, as member states are allowed to impose *stricter* regulation than the directive.

⁸⁵ Arrowsmith, 2010, p. 132-133

⁸⁶ Directive 2004/18/EC, Art 1(11)(a)

⁸⁷ Directive 2004/18/EC, Art 1(11)(b)

⁸⁸ The separate stages of the public procurement process were established already in C-31/87, para 15, where the Court found that an examination of a contractor's suitability to perform a contract preceded an assessment of which contractor should be awarded with the contract.

⁸⁹ Arrowsmith, 2010, p. 141

capacity are the two most important criteria.⁹⁰ Furthermore, the directive also controls the evidence that may be used to justify exclusion.

In addition to technical capacity and financial standing, criteria aimed at the personal situation of the tenderer, involving the professional honesty, solvency and reliability of the tenderer, can be used to exclude tenderers⁹¹, for example if a tenderer has been convicted of a serious crime or has failed to pay its taxes. Authorities may also require tenderers to be enrolled on certain trade or professional registers in their state of establishment.⁹²

The second stage is the award of contract where the contractor who has submitted the best tender is chosen. The purpose of regulating how a contracting authority is to decide which contractor has submitted the best tender is to ensure a transparent procurement process where the authority is prevented from concealing discriminatory behaviour.⁹³

A contract can be awarded either to the contractor having submitted the tender with the lowest price for performance or the tender which is the most economically advantageous.⁹⁴

The lowest price basis is often used when a contracting authority seek to procure items of a simple nature where the quality does not vary a lot among suppliers.

The most economically advantageous tender (MEAT) criteria however, allow member states to take into consideration other factors than the lowest price such as quality, production costs, after sales service and delivery date.⁹⁵

The Public Sector directive provides a list of factors that can be considered by a contracting authority if the award of contract is based on the MEAT-criteria in art 53. Environmental characteristic is expressly stated as a factor that can be considered as opposed to the previous directives where it was only implied. This list is not exhaustive but if an authority chooses to use factors not listed in the directive, the factor must be linked to the subject matter of the contract⁹⁶ and of course be aimed only at identifying the economically most advantageous tender.⁹⁷ This requirement is set up to ensure that the use of the MEAT-criteria does not confer an unrestricted freedom of choice on the contracting authority.⁹⁸

Furthermore, if the MEAT-criteria are to be used, the contracting authority must reveal these criteria and their relative weighting in the contract notice

⁹⁰ Directive 2004/18/EC, Art 44, Art 47

⁹¹ Directive 2004/18/EC, Art 45

⁹² Directive 2004/18/EC, Art 46

⁹³ Arrowsmith, 2010, p. 168

⁹⁴ Directive 2004/18/EC, Art 53

⁹⁵ Arrowsmith and Kunzlik, 2009, p. 106

⁹⁶ Directive 2004/18/EC, Art 53(1)(a)

⁹⁷ C-31/87, para 19

⁹⁸ C-19/00, para 37

or in the contract documents.⁹⁹ The weighting can be expressed in percentage or in other ways such as points systems.¹⁰⁰ The requirement for weighting and prior notice enables contracting authorities and tenderers to verify whether a tender meets a certain award criteria, thereby ensuring the principle of equal treatment by inducing transparency and objectivity in the tender process.¹⁰¹

2.1.2.5 Technical specification

Recital 26 and art 23 of the Public Sector Directive govern the rules on technical specifications. Technical specifications include every technical prescription by the contracting authority, which define the characteristics of a product, service or works subject to procurement, in a way to fulfil the use for which it is intended.¹⁰²

Examples of technical specifications can be requirements on certain product and methods of production, certain levels of environmental protection or certain quality assurances and design. Technical specification is therefore an important tool for the contracting authority to use to further environmental objectives.

The rules in the Public Sector Directive are applicable to technical specifications in the absence of mandatory national technical rules in the member state of the procuring authority. Such national rules take precedent over art 23 of the Public Sector Directive if the legislation is compatible with EU law.

Technical specification requirements must be expressly stated in contract documentation such as a tender notice. Technical specification may not be used in a way to hinder equal access for tenderers and cannot impede one of the main objectives of the Public Sector Directive, namely the opening up of public markets to competition.¹⁰³

Technical specifications must therefore be formulated in a precise way so that tenderers are able to assess what the contracting authorities are seeking to procure, in other words, the subject matter of the contract. The authority must thus state measurable requirements against which tenders can be prepared and objectively evaluated.

References to technical specifications in contract documents must also be made in a certain prioritized order where national standards transposing European standards have the highest priority. Each reference to an international, European or national standard must be followed by the words “or equivalent”. Therefore, a contracting authority is prohibited from

⁹⁹ Directive 2004/18/EC, Art 53(2)

¹⁰⁰ Arrowsmith, 2010, p. 176

¹⁰¹ C-448/01, paras 50, 51

¹⁰² Directive 2004/18/EC, Annex VI, 1(a)

¹⁰³ Bovis, 2012, p. 79

rejecting a tender that has clearly indicated its ability to comply with a standard *equivalent* to the one referred to in the contract documents.

Technical specifications may not include information on required origin, production or special manufacturing, nor references to certain brands or patents. Exceptions might however be allowed if the technical specification refers to a certain brand followed by the term “or equivalent”.

2.1.2.6 Contract conditions

A contracting authority is also allowed to require that certain conditions be fulfilled after the contract has been awarded. These conditions are called contract performance conditions and may include requirements of a social and environmental nature.¹⁰⁴

For these conditions to be valid they must comply with Community law, be indicated in the contract notice or in the technical specification and can only relate to the part of the tenderer’s activity which is linked to the subject matter of the contract. A contract performance condition can therefore not target the entire operation of a tenderer as this would not comply with the principle of proportionality. It must also be possible to verify that the contract performance condition is fulfilled when the contract is performed.¹⁰⁵

2.2 Public procurement in Sweden

The Swedish regime on public procurement is to a large extent based on EU directives such as the Public Sector Directive. This holds especially true for public contracts above states threshold values. Even regulation governing public contracts that fall below threshold values have come to resemble the regulation governing contracts above the thresholds.¹⁰⁶

The Public Procurement Act¹⁰⁷ currently in force in Sweden was inaugurated the 1st of January 2008 and implemented the Public Sector Directive of 2004. According to CJEU case law, the provisions of the procurement directives and the TFEU have direct effect in the member states meaning that the states are bound by the provisions and the provisions can be invoked by private suppliers before Swedish courts, regardless of whether Sweden as a state has inaugurated the provisions properly.¹⁰⁸ In the event of a discrepancy between Swedish law and EU directives, the directives usually take precedence.¹⁰⁹

Furthermore, the general principles of EU law are now explicitly included in Swedish procurement regulation and are consequently applicable on all

¹⁰⁴ Directive 2004/18/EC, Art 26

¹⁰⁵ Sundstrand, 2013, p. 160

¹⁰⁶ Pedersen, 2013, pp. 15, 7

¹⁰⁷ The Public Procurement Act (2007:1091)

¹⁰⁸ Arrowsmith, 2010, p. 66

¹⁰⁹ Sundstrand, 2013, p. 40

Swedish procurement, including contracts that fall outside the scope of the directives.¹¹⁰

2.3 International agreements

In 1994, the EU and its member states became parties to the Government Procurement Agreement (GPA) signed within the World Trade Organization.¹¹¹ The GPA means that the EU and the member states undertake to provide access for certain third countries to EU procurement markets and third countries that are parties to the agreement naturally have a reciprocal obligation.¹¹² The provisions of the GPA are largely incorporated into the EU procurement directives, to facilitate its application. However, when awarding contracts, Member States are prohibited from discriminating tenderers or goods from third countries that are parties to the GPA.¹¹³

In addition, the countries belonging to the European Economic Area have signed a particular agreement entailing that the same rules apply to them as the EU member states within the legal field of public procurement, at least for contracts above the threshold values.¹¹⁴

The above section has presented the intricate legal framework governing public procurement in the EU.

The thesis will now continue to address GPP in particular and how this policy instrument has been introduced into the public procurement regulation to achieve sustainable development.

¹¹⁰ 1 kap. 9 § LOU, 1 kap. 24 § LUF, 1 kap. 11 § LUFs och 1 kap. 2 § LOV.

¹¹¹ Council Decision 94/800/EC

¹¹² Arrowsmith, 2010, p. 56

¹¹³ Sundstrand, 2012, p. 57

¹¹⁴ Sundstrand, 2013, pp. 33-34

3 Green public procurement

3.1 Environmental law and policy in the EU

It is essential to study the evolution of environmental law and policy in the EU to understand how environmental concern in public procurement has gained recognition over time and led to the creation of GPP as a policy instrument to achieve sustainable development. This section will therefore present the most important regulation and policy in the field of environmental law in the EU.

The original EEC Treaty of 1957 was signed at a time when the European countries were still recovering from the repercussions of the Second World War. Understandably, environmental protection was not the number one priority for the policy makers of the newly created Union.¹¹⁵

By the early 1970s, environmental policy in the EU became increasingly important, as the EU grew aware of the acute and complex nature of environmental problems. The EU sought to create economic prosperity based on free trade theory but still acknowledged its responsibility not to allow a further deterioration of the environment in the name of free trade.¹¹⁶ Public and scientific concerns on the limits to growth thus led the Commission to act and an environmental action programme was formulated in 1973.¹¹⁷ Moreover, the European Council expressly aligned environmental consideration with the pursuit of economic objectives in the Union, emphasizing the necessity for a harmonious development of economic activity and a balanced expansion.¹¹⁸

Environmental policy first appeared as a way of achieving the single market objective but gradually gained independent recognition and an increase in status through various Treaty amendments.¹¹⁹

The development of environmental policy in the EU has to a large extent been induced by the ECJ who in many respects has acted as a judicial lawmaker in furthering legal provisions of the EU that had become stagnate partly due to the requirement for unanimity voting.¹²⁰

Prior to 1987, when the Single European Act (SEA) entered into force there was no legal basis in the Treaty giving legislative competence to EU organs to legislate in the field of environmental law. Nevertheless, in 1985 the ECJ

¹¹⁵ Lee, 2005, p. 1

¹¹⁶ Stone, 2004, p. 201

¹¹⁷ Commission, 1971

¹¹⁸ EEC, art 2

¹¹⁹ Lee, 2005, p. 1

¹²⁰ Stone, 2004, p. 199

stated in a landmark decision that environmental protection was one of the Community's essential objectives and argued that the free movement rights were not absolute in the sense that they could not be limited by justifiable objectives such as environmental protection.¹²¹ Remarkably, environmental protection was given constitutional value by the ECJ without any substantial legal justification such as a reference to international or national law.¹²² The legislative authority of the EU on environmental law was formally recognized two years after in the SEA and environmental policy was finally expressly included in the Treaty.¹²³

After the SEA had entered into force, environmental legislation was drafted in the form of framework legislation, which meant that the member states were somewhat free to interpret the legislation according to their national views on environmental protection. Due to the vague formulation of this body of law, the ECJ remained as a significant judicial lawmaker as the Court was responsible for the uniform interpretation of EU law.¹²⁴ The ECJ achieved uniformity by substantiating the provisions of environmental law and elaborated an intricate case law on environmental policy, often siding with environmental protection when given the possibility.¹²⁵

The Treaty presently in effect, the Lisbon Treaty on European Union (TEU), describes in Recital 9 and art 3(3) that a high level of environmental protection is one of the objectives of the EU along with an aim for sustainable development. These objectives are supplemented by the objectives set out in art 191 TFEU. Art 191 TFEU calls for a prudent use of natural resources, contribution to human health and the promotion of environmental protection at an international level.¹²⁶

Of particular importance is art 11 of the TFEU, stating that environmental protection requirements must be integrated into the definition and implementation of all other policies and activities of the EU, in particular with a view to promote sustainable development. Art 11 is called the integration principle and is to be interpreted widely to oblige European institutions to take environmental objectives into account in their policy making. There is no equivalent to this provision for a, sometimes, divergent interest to environmental protection such as the free movement of goods.¹²⁷ The integration principle is, however, not superior to other policy areas of the EU such as the internal market objective. The integration principle merely requires EU institutions to consider environmental protection throughout their decision making process.¹²⁸

¹²¹ C-240/83, paras 13, 15

¹²² Jacobs, 2006, p. 187

¹²³ Jordan and Adelle, 2013, pp. 19-20

¹²⁴ Jordan and Adelle, 2013, pp. 116-117

¹²⁵ Jacobs, 2006, pp. 192, 205

¹²⁶ Krämer, 2011, p. 1

¹²⁷ Krämer, 2011, p. 95

¹²⁸ Jans and Vedder, 2012, p. 23

The ECJ has expressly referred to the principle in their case law when interpreting the previous public procurement directives to allow environmental criteria to be considered when contracting authorities are using the MEAT-criteria. Without the integration principle, it is questionable whether authorities would be able to consider environmental aspects in cases where it impedes the internal market objective.¹²⁹

It deserves to be mentioned that art 37 of the EU Charter of Fundamental Rights (the Charter) bears many resemblances to art 11 TFEU in terms of requiring the integration of environmental concern in Union policy. Elements of art 3(3) TEU is also included in art 37 such as a call for a high level of environmental protection.

The placement of an integration principle in the Charter might be interpreted as a way of ensuring individuals a “right to the environment”. However, the limited access to justice for non-privileged individual applicants in the name of such a right speak strongly against such an interpretation.¹³⁰

Art 37 appears to be no more than an additional legal source promoting environmental concern in Union policy making and adding an environmental dimension to the Charter.¹³¹ Art 11 TFEU is more forthcoming as it has been given the legal status of general principle of the EU and has, as mentioned above, been applied and expressly referred to in the case law of the ECJ.

It is thus clear that the EU has grown into a multi-valued organisation where environmental objectives in procurement can no longer be automatically disapproved and distrusted for just curtaining protectionist behaviour.

Environmental concern has instead gradually been integrated into public procurement regulation as a result of a transformed policy climate in the EU, due in large to the progressive case law of the CJEU¹³² and the subsequent express Treaty provisions describing high levels of environmental protection as an essential objective of the EU.

The Treaty provisions also highlight that an integrated environmental concern in EU law should aim to attain sustainable development, which means to align interests of economic growth with environmental protection.¹³³ The subsequent section will address EU general policies that particularly target sustainable development and describe GPP as an important policy instrument to achieve this objective.

¹²⁹ Jans and Vedder, 2012, p. 25

¹³⁰ Durán, and Morgera, 2013, p. 3

¹³¹ Durán, and Morgera, 2013, p. 23

¹³² Further discussed in section 3.3

¹³³ Lee, 2005, p. 37

3.2 EU general policies

3.2.1 The Lisbon and Europe 2020 strategy

The first strategy trying to align environmental policy with economic theory was the Lisbon strategy first launched in 2000 and then re-launched in 2006.¹³⁴ This strategy was aimed at making Europe “the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion”.¹³⁵ The EU was believed to have a prime-mover advantage in green technology and the strategy therefore focused on the further development of resource-efficient processes and products to increase the EU’s global competitiveness by becoming more cost-effective. The Lisbon strategy acknowledged that public procurers could play a big role in achieving the goals set forth in the strategy by supporting and promoting innovation and especially eco-innovation in their procurement processes.

In 2008, the financial crisis created an economic recession in Europe and the *Europe 2020 strategy* was thus elaborated by the Commission to help deal with the repercussions of this crisis.¹³⁶ The strategy was also meant to target the imperfections of the EU growth model and set forth three prioritized areas of smart growth¹³⁷, sustainable growth¹³⁸ and inclusive growth¹³⁹. GPP was now highlighted as a key market-based instrument to achieve the sustainable growth objective. The *Europe 2020 strategy* also underlined the importance of procurement policy ensuring the most efficient use of public funds and that public markets must remain open within the Union, especially when faced with economic crisis.

Three out of seven “Flagship initiatives” meant to implement the *Europe 2020 strategy* directly pinpointed public procurement and changed the role to be played by public procurement in the EU. The original purpose to safeguard the internal market objective by co-ordinating national procurement procedures was supplemented with an ambition to create a demand-side policy among public purchasers.¹⁴⁰ First, the policy sought to facilitate the development of innovative industries by promoting the acquisition of innovative and environmental friendly products by public bodies. This development would ultimately increase Europe’s global competitiveness.

Second, as economic actors of the EU were seen as having a prime-mover advantage in green technology, the policy sought to increase this advantage

¹³⁴ Presidency Conclusions, 2000; Presidency conclusions, 2006

¹³⁵ Presidency Conclusions, 2006, para 5

¹³⁶ Commission, 2010

¹³⁷ The creation of an economy based on knowledge and innovation.

¹³⁸ Encouraging resource efficiency throughout the EU and greening the economy to obtain competitive advantages.

¹³⁹ Promoting job creation and reducing unemployment to deliver social and territorial cohesion. (Commission, 2010, p. 5)

¹⁴⁰ Commission, 2010, p. 5; Commission, 2010, ‘Flagship initiative...’; Commission, 2011

by directing public sector demand towards products with high environmental performance to promote the further development of this technology. Third, public sector demand was to be used to further resource efficient products and energy from renewable sources in order for the EU to become more cost-competitive in global trade.¹⁴¹

3.2.2 The EU Sustainable Development Strategy

The Lisbon strategy and the Europe 2020 strategy were both essentially economic policies, even though they included references to environmental protection. The EU Sustainable Development Strategy (SDS) was therefore created in 2001 after the Lisbon strategy had been adopted, and in 2006 it was renewed, and added “a third, environmental dimension to the Lisbon strategy”.¹⁴² This strategy sought to decouple economic growth from resource use, promote the development of eco-friendly technology and reduce environmental degradation.¹⁴³ The idea was that by influencing the demand for eco-friendly and resource efficient products among public authorities, the development of such products would increase and public sector demand would ultimately influence private purchasers to “buy green”. Sustainable consumption throughout the economy would be the result.¹⁴⁴

In addition to the SDS, the sixth environmental action programme of the EU suggested that a wider use of environmental characteristics be used in procurement and that environmental life cycle assessments of products should be allowed.¹⁴⁵ The seventh action programme has recently been adopted by the European Parliament and promotes incentives, standards and indicative targets for GPP to create a stronger market pull for green products and services.¹⁴⁶

The EU general policies clearly express high ambitions for GPP to reconcile economic interests with environmental protection to achieve sustainable development. The policies, however, seem to favour the term “sustainable growth” instead of sustainable development, which might imply that economic growth takes precedence of the environmental protection objective.

Concern has been raised that in times of financial distress, economic dialogue might devour the environmental protection objective.¹⁴⁷ However, considering how the EU chose to emphasize the importance of a continued

¹⁴¹ Commission, 2010, pp. 14-16,

¹⁴² Commission, 2001, ‘A sustainable Europe...’, p.2

¹⁴³ Commission, 2001, ‘A sustainable Europe...’, pp. 2, 7; Commission, Commission, 2001, ‘Green paper...’, p. 9

¹⁴⁴ Commission, 2006; Commission, 2001, ‘Green paper...’, p. 9

¹⁴⁵ Council Decision 1600/2002

¹⁴⁶ Council Decision 1386/2013/EU

¹⁴⁷ Lee, 2005, p. 36

focus on environmental issues in the *Europe 2020 strategy*, when faced with the financial crisis in 2008, such concern might seem unfounded.

Nevertheless, the question remains on how to ensure that environmental policies are continuously observed and enforced alongside an increased intra-Community and global trade. The ECJ has been instrumental in safeguarding environmental consideration in the EU and its case law might thus provide an answer on how to find a proper balance between environmental and economic interests.

3.3 Case law of the ECJ

Much of the ECJ's judging activity nowadays concerns the balancing of the sometimes-diverging interests of a functioning internal market and environmental protection. How the Court interprets relevant Treaty provisions and applies the general principles of the EU in its balancing exercise is thus important to understand the complexities linked to the objective of sustainable development as well as the progressive role of the Court in EU environmental law.

The ECJ has been instrumental in interpreting Treaty provisions and policies in a way favourable to the environment to allow a further development of EU environmental law.¹⁴⁸ The Court has continuously chosen an interpretation of the internal market objective that neither excludes the possibility for environmental concern, nor undermines the internal market. The Court has instead adopted a particular market mentality where environmental concern can be used to determine the boundaries to free trade objectives¹⁴⁹, which will be presented below.

Furthermore, the ECJ has instigated legislative action in the EU, as a result of its case law, such as the adoption of the Public Sector Directive in 2004. The Public Sector Directive was not merely adopted to eliminate barriers to the free movement of services and goods, but was also thought to reflect recent developments in the ECJ's case law on issues related to the environment.¹⁵⁰ Prior to 2004, the directives on procurement made no explicit mention of the possibility to include policy objectives such as environmental concern in the procurement process. Yet the Court had found, already in 1988, that such concern was compatible with the Treaty and the directives then in force.¹⁵¹

¹⁴⁸ Bogojević, 2013, pp. 73-75

¹⁴⁹ *ibid.*

¹⁵⁰ Kunzlik, 2013, p. 101

¹⁵¹ Kunzlik, 2013, p. 99

3.3.1 Beentjes & Nord-Pas-de-Calais

In 1987, a review body from the Netherlands asked the ECJ to give a preliminary ruling in a dispute concerning a decision to award a public works contract.¹⁵² Beentjes had initiated proceedings against the Netherlands Ministry of Agriculture and Fisheries as Beentjes had submitted the lowest tender but was still not awarded with the contract. The contracting authority stated that Beentjes was not in a position to comply *inter alia* with a condition to employ long term unemployed persons and was therefore excluded.

The Court was first faced with the question whether a condition stemming in social policy could be taken into account by the authority under the Public Works Directive then in force¹⁵³ and second, if such a condition was considered valid, if the authority was obliged to notify the tenderers in advance of the condition.¹⁵⁴

First of all, the Court established that it was open to the contracting authorities to choose the criteria on which they proposed to base their award of the contract if they chose to use the most economically advantageous criteria, but the choice was limited to criteria aimed at identifying the economically most advantageous tender.¹⁵⁵

Moreover, the Directive then in force did not provide an exhaustive body of Community law and thus the member states remained free to maintain or adopt substantive and procedural rules in regard to public works contracts. However, this freedom was restricted with a requirement for the condition to fully be in line with all relevant Community provisions, in particular the free movement provisions concerning establishment and freedom to provide services.¹⁵⁶ Furthermore, the Court stated that a criteria such as the employment of certain workforce, had to be given sufficient publicity by the contracting authorities by including it in the tender notice.¹⁵⁷

The conclusion to be made from this case is that the use of certain workforce criteria was not precluded by the Directive but had to be in line with relevant Community rules and principles and not be employed in a discriminatory manner. Even though the Court left it to the national court to decide whether the condition was discriminatory, it voiced concern that the condition could infringe the prohibition on discrimination based on nationality if the condition could only be complied with by domestic tenderers or if foreign tenderers had large difficulties in meeting the requirement.¹⁵⁸ The ECJ thus accepts the inclusion of social criteria in procurement but is very careful not to restrict Community objectives of non-discrimination and free movement. The ECJ can be said to have opened a small window for future environmental concern in public procurement but

¹⁵² C-31/87

¹⁵³ Directive 71/305/EC

¹⁵⁴ C-31/87, para. 14

¹⁵⁵ C-31/87, para 19

¹⁵⁶ C-31/87, para 20

¹⁵⁷ C-31/87, paras 21, 37

¹⁵⁸ C-31/87, para 30

the Community objectives of free trade and non-discrimination were still predominant at the time of *Beentjes*.

In a subsequent and similar case to *Beentjes*, the Commission tried to substantiate the findings of the *Beentjes* case and elaborate a rule concerning the use of social criteria at different stages of the procurement process. In the case *Nord-Pas-de-Calais*¹⁵⁹, the Commission brought a quite narrow infringement action against France for *inter alia* using as an additional *award criterion* a requirement for the promotion of employment in a French region. According to the Commission, social criteria could only be used as a *contract performance condition* as had been the case in *Beentjes*. The French contract notice had characterized the social criteria for unemployment as an award criterion and the Commission, on this ground, found the criterion to be in breach of the previous Public Works Directive as such criteria could only be based either on lowest price or the economically most advantageous tender.

The Advocate General Alber sided with the Commission and further emphasized that in *Beentjes*, the condition to employ long-term unemployed persons had no relation to the award of contract criteria. The French award criterion was therefore in breach of the Public Works Directive.¹⁶⁰ The AG further argued that the use of award criteria for social purposes would have a greater impact on the procurement process than contract performance conditions as it would be granted the status of sole, decisive award criterion and also did not serve to determine the most economically advantageous tender.¹⁶¹

The Court disregarded these claims and found that the use of an additional award criterion linked to a campaign against unemployment was not precluded by the Directive as long as it was in consistency with the fundamental principles of Community law, with special reference to the non-discrimination principle derived from the free movement provisions. Also, such a criterion had to conform to all the procedural rules laid down in the Directive, in particular the rules on prior advertisement in the tender notice to ensure the principle of transparency.¹⁶²

Also, the Court explicitly rejected the view of the Commission that the condition in question in the *Beentjes* case was a condition for the performance of a contract and not an award criterion. As it had been used as the basis for rejecting a tender the Court found that the condition in fact constituted a criterion for the award of contract.¹⁶³

The main argument of the Commission was thereby disapproved and the Court reprimanded the Commission for merely criticizing the reference to a

¹⁵⁹ C-225/98

¹⁶⁰ C-225/98, AG, para 43

¹⁶¹ C-225/98, AG, para 45

¹⁶² C-225/98, paras 50 ff

¹⁶³ C-225/98, para 52

social criterion as an award criterion in the contract notice. The Commission had negligently omitted to claim that the criterion was inconsistent with the fundamental principles of Community law, such as the non-discrimination principle, or that it violated the obligation to advertise the condition in the tender notice.¹⁶⁴

These two cases show that the use of social criteria was not automatically precluded but the Court could hardly be said to promote social and environmental concern in procurement in general.

3.3.2 Concordia

The ECJ's ruling in *Concordia* can be described as a break through for GPP as the Court expressly addressed the possibility to integrate environmental protection in procurement.¹⁶⁵

Again the issue was whether an award criterion based in policy consideration was valid under the Public Works Directive and the general principles of EU law.

The case concerned an outsourcing of the urban transport bus network in Helsinki where the contract was awarded based on the MEAT criteria. The awarding authority used three sets of criteria to assess which tender was the most advantageous overall to the city, namely the overall price of operation, the quality of the bus fleet and the operator's quality and environmental management. The last criteria could lead to additional points for tenderers whose bus fleets emitted nitrogen oxide and gave rise to noise that fell below certain levels.

Concordia was a company who was not awarded the contract, as its tender was not considered the most economically advantageous overall even though it had submitted the lowest price tender and had scored high points in the two criteria not related to environmental policy. Concordia therefore claimed that the award criterion favouring environmental performance was invalid under the procurement directives and discriminatory, especially considering that the only transportation firm that could provide a bus fleet that did not exceed stated levels of nitrous oxide and noise emissions, belonged to the contracting authority organising the tender procedure.

The Court reiterated its position in *Beentjes* that contracting authorities have the liberty to determine which factors will be used for choosing the tender that is the most economically advantageous, provided that they are not of a discriminatory nature, comply with the fundamental principles of EU law and that the award criteria is clearly published in the contract notice.

¹⁶⁴ C-225/98, para 53

¹⁶⁵ C-513/99

The Court also referred to the integration principle in current art 11 TFEU to argue that the Public Works Directive did not exclude the possibility to incorporate environmental concern in procurement when assessing tenders according to the MEAT criteria as the Directive did not provide an exhaustive list of relevant factors to be considered.¹⁶⁶

It was consequently made clear that criteria used to determine the most advantageous tender do not have to be “of a purely economic nature”. The Public Works Directive expressly referred to the criterion of the aesthetic characteristics of a tender and environmental objectives could constitute such characteristics, which might influence the value of a tender without conferring a direct economic advantage upon the authority.¹⁶⁷

However, all criteria referring to environmental protection are not valid *a priori*, but have to relate to the subject matter of the contract, not confer an unrestricted freedom of choice on the authority and be properly published in the tender notice.¹⁶⁸

The Court did not find the award criteria to be invalid as levels of nitrogen oxide and noise emissions were linked to the subject matter of the contract, namely the provision of urban transport services.¹⁶⁹ Moreover, awarding additional points to tenders which met certain specific and objectively quantifiable environmental requirements were “not such as to confer an unrestricted freedom of choice on the contracting authority” as they were clearly defined.¹⁷⁰ Also, the award criteria fully complied with the requirement for prior notification and clear publication in the tender notice.¹⁷¹

Lastly, the Court found that the environmental criteria in question were not discriminatory, even though the only tenderer able to comply with the criteria was linked to the contracting authority itself. The Court relied on the equal treatment principle, which is at the heart of the procurement directives.¹⁷² Firms that could provide bus fleets that met environmental requirements were not in an identical situation as firms who were unable to meet such demands and Concordia was thus not excluded from the award of contract on discriminatory grounds.¹⁷³

The Court in *Bentjees* and *Nord-Pas-de-Calais* can be said to have opened a small window for social and environmental concern in procurement as it acknowledged such considerations in principle. In *Concordia*, however, the Court finally opened the door for GPP, but still made sure to state that the intention was not to allow any type of environmental consideration in procurement enter through the door. The above stated requirements of e.g. a

¹⁶⁶ C-513/99, para 57

¹⁶⁷ C-513/99, paras 54, 55

¹⁶⁸ C-513/99, paras 58 ff

¹⁶⁹ C-513/99, para 65

¹⁷⁰ C-513/99, para. 66

¹⁷¹ C-513/99, para 67

¹⁷² C-513/99, para 81

¹⁷³ Arrowsmith and Kunzlik, 2009, p. 63

link to the subject matter of the contract still had to be fulfilled to ensure a fair competition. Environmental considerations were thus clearly balanced against free trade objectives. The following case of *EVN* will further show how the balancing exercise evolved from being primarily occupied with traditional Community concerns of ensuring the functioning of the internal market to allowing environmental consideration to a larger extent.

3.3.3 EVN

The findings in *Concordia* as to the possibilities to use environmental objectives in award criteria were further developed in *EVN* where the limits to this possibility were in focus.¹⁷⁴

The issue at hand was an award criterion incorporating environmental objectives to determine the most economically advantageous tender. The Republic of Austria sought suppliers of electricity who could supply Federal offices with electricity from renewable sources as far as possible. The award criteria relating to the “effect of the services on the environment in accordance with the contract documents” was given a 45 % weighting. However, the contracting authority did not require evidence of where the electricity stemmed from as it conceded that it was technically difficult to establish such an origin. Furthermore, the award criterion was not limited to provision of electricity to the authority but also targeted the possibility to provide electricity to the public at large and favoured tenderers who could exceed the stated needs for electricity of the authority.

As in *Concordia*, the Court sought to establish whether the award criterion was related to the subject matter of the contract, if it conferred an unrestricted freedom of choice on the authority, if the award criterion was expressly mentioned in the contract documents or the tender notice and if it complied with all the fundamental principles of EU law, in particular the principle of non-discrimination.¹⁷⁵

First of all, the Court established that the contracting authorities are not just free to choose the criteria on which they will award the contract, but also determine which weighting will be given to a particular criterion. The weighting must however enable an overall evaluation of the award criteria used to identify the most advantageous tender.¹⁷⁶

The Court also pointed out that the award criteria in question, promoting the use of renewable energy sources, was useful for environmental protection and the Community as a whole as it reduced greenhouse gas emissions, which the member states have all pledged to combat.¹⁷⁷

Nevertheless, the Court relied on the principle of equal treatment and held that tenderers must be in a position of equality both at the time when they

¹⁷⁴ C-448/01

¹⁷⁵ C-448/01, paras 33, 34

¹⁷⁶ C-448/01, para 39

¹⁷⁷ C-448/01, para 40

draw up their tenders and when those tenders are being assessed. The award criteria must be applied uniformly and objectively to all tenders in order to comply with the principle of equality¹⁷⁸ and it must also be possible to verify that the award criteria has been complied with to satisfy the obligation of transparency in procurement processes.¹⁷⁹

In the present case, the contracting authority had made it clear that it did not intend nor was able to verify if the electricity from the tenderers was produced from renewable energy sources. The principle of equal treatment was thus not respected as the transparency and objectivity of the tender procedure was not ensured.¹⁸⁰ An award criterion must be accompanied by requirements, which permit the tenders to be properly verified against the principles of Community law relevant to public procurement.¹⁸¹

Furthermore, the award criterion was not considered linked to the subject matter of the contract as it distributed points to tenderers being able to supply an amount of electricity exceeding the stated needs of the contracting authority. The Court found that the subject matter of the contract was the supply of electricity to the contracting authority as stated in the tender notice and not to a non-defined group of customers.¹⁸² The award criterion in question was thus not compatible with Community law on public procurement.¹⁸³

The *EVN* case strengthened the requirement for award criteria to be linked to the subject matter of the contract, notwithstanding that the award criteria in question had environmental foregrounds and would have furthered the EU environmental policy to combat climate change caused by carbon emissions.

The Commission for long held on to a distrustful attitude against GPP and called for a restrictive interpretation of the Directives then in force, favouring economic objectives of free trade.¹⁸⁴

The Court was also a bit hesitant towards policy considerations in procurement at first. At the time of *Beentjes* and *Nord-Pas-de-Calais*, the internal market objective was still in many ways prevalent and the Court's argumentation was therefore largely focused on the free movement provisions and whether or not a certain social consideration created a hindrance to trade. The Court in these cases accepted social considerations in procurement in theory, when certain conditions were met, but it was still not possible to derive a promotion of GPP in general from the Court.¹⁸⁵

Environmental objectives however became more accepted in procurement as the policy climate of the EU evolved, to a large extent prompted by the

¹⁷⁸ C-448/01, paras 47, 48

¹⁷⁹ C-448/01, para 49

¹⁸⁰ C-448/01, para 51

¹⁸¹ C-448/01, para 52

¹⁸² C-448/01, para 67

¹⁸³ C-448/01, para 70

¹⁸⁴ McCrudden, 2007, p. 394

¹⁸⁵ Caranta and Trybus, 2010, p. 21

jurisprudence of the Court. At the time of *Concordia* and *EVN*, the Treaties expressly mentioned environmental protection as a Community objective and the Court seized this opportunity to interpret the procurement directives then in force more broadly to allow environmental concern in the procurement process.¹⁸⁶ The innovative case law of the CJEU ultimately instigated legislative action and the Public Sector Directive was subsequently adopted in 2004.

The Public Sector Directive reflected the preceding case law of the CJEU in terms of expressly addressing environmental aspects to procurement such as the possibility to include “environmental characteristics” in technical specifications and in award criteria on the MEAT basis.¹⁸⁷

3.3.4 Dutch Coffee

It is consequently of great interest to examine a case decided after the adoption of the Public Sector Directive, as it expressly referred to environmental consideration in procurement.

In the case *Dutch Coffee*¹⁸⁸ from 2012, a Dutch contracting authority sought to purchase coffee and tea with specific eco- and fair-trade labels. The Court conducted a separate assessment of the ecological and the fair trade requirement. The Court characterized the ecological requirement as a technical specification and accordingly applied art 23(3) b of the Public Sector Directive. The article expressly stated a possibility for authorities to formulate technical specifications that include environmental characteristics and recital 29 of the directive further affirmed that such a characteristic might refer to a given production method.¹⁸⁹ The Commission had long argued that a requirement for certain production processes and methods to be used was prohibited by the Directive if the requirement did not relate to the procured product’s characteristics at the stage of consumption, i.e. when the product is used, re-used, re-cycled or disposed of.¹⁹⁰

The Court judged the Commission wrong by concluding that such requirements are in principle lawful, do not have to relate to a product’s consumption characteristics and can be used as a technical specification.

A referral to a certain production process or method such as a requirement for tea and coffee to be produced ecologically, must however be defined sufficiently. The duty of precision was derived from the principle of equal treatment¹⁹¹ and the obligation for a transparent procurement process. A technical specification must be defined in a precise way so that tenderers are able to make out the subject matter of the contract and know what is required of them.¹⁹²

¹⁸⁶ McCrudden, 2007, p. 395

¹⁸⁷ Kunzlik, 2013, pp. 100, 101

¹⁸⁸ C-368/10

¹⁸⁹ C-368/10, para 61

¹⁹⁰ Kunzlik, 2013, p. 99

¹⁹¹ Expressly stated in Directive 2004/18/EC, Art 2

¹⁹² C-368/10, para 62

The Court proceeded to interpret the requirement for tea and coffee to bear a fair trade label and found that it could not be characterized as a technical specification as it did not relate to a production process or method. Instead it related to the conditions on which a putative supplier had purchased the product and was thus subjected to art 26 of the Public Sector Directive regarding contract performance conditions.¹⁹³

The Dutch authority had also employed award criteria to favour tenders with specific eco- and fair trade labels. The findings of the *EVN* case, where it was found that it was possible to use an award criteria requiring that electricity be produced from renewable energy sources, provided some guidance.¹⁹⁴ The Court in *Dutch Coffee* interpreted *EVN* as meaning that an award criterion does not have to relate to an intrinsic character of the product, i.e. something that is part of its material construction, but can in fact refer to the product in question being of fair trade origin. Such a criterion would still be linked to the subject matter of the contract.¹⁹⁵

However, a criterion favouring products of fair trade origin must be defined with sufficient precision and it must be possible to verify tenderers' compliance with the criterion. The duty of precision has already been discussed above and the duty of verification follows the same logic. The principle of equal treatment entails an obligation for authorities to ensure a transparent procurement process so that certain tenderers are not subjectively favoured to the detriment of others. Environmental criteria must thus be formulated in such a way as to enable contracting authorities as well as other tenderers to verify if the winning tender complies with the criteria or not.

The conclusion to be drawn from this case is that how a contracting authority characterizes a certain environmental condition affects how the Court will interpret it as different rules apply to different types of conditions. Also, the Commission no longer opposes the possibility of using environmental criteria in procurement but duties of precision and verification still remain mandatory for authorities.¹⁹⁶

¹⁹³ C-368/10, paras 73-75

¹⁹⁴ C-448/01, para 34

¹⁹⁵ C-368/10, paras 91, 92

¹⁹⁶ Kunzlik, 2013, p. 105

4 Analysis of green public procurement and the new directive

4.1 Green public procurement from a law and economics perspective

The above sections have illustrated that the attitude in the EU towards GPP has undergone a dramatic change and is no longer considered primarily as a threat to the internal market objective.

Instead, GPP has been aligned with the internal market objective in the *Europe 2020 strategy*, where it is described as a key market-based instrument to achieve both economic and environmental objectives of the EU. GPP has thus gradually received recognition for its potential ability to produce environmental as well as economic benefits.

The previous sections have focused on the *possibility* to use GPP as a policy tool and the legal framework with which it must comply. EU environmental policy as well as EU general policy linked to GPP was described to show the evolution of EU environmental law and the environmental and economic objectives underlying the promoted use of GPP. Relevant case law of the ECJ was also presented to show how the Court balances sometimes diverging economic and environmental interests and how the relevant case law has contributed to the strengthening of GPP as an environmental policy instrument in the EU.

This part of the thesis will proceed to discuss the practical and economic implications of using environmental criteria in procurement from a law and economics perspective. The economic background of GPP will first be presented along with a discussion of whether GPP can truly be described as a *market-based* instrument or if another denomination is more accurate.

4.1.1 Economic thought and market-based instruments

According to economists, the causes of, for example, climate change, are the underlying incentives shaping individual, firm and government decisions. These actors are perpetually imposing small costs on the earth's population as a result of e.g. carbon emissions. If an individual is using a washing machine, driving a car to work or taking a bath, he/she is contributing to a degenerate ecosystem.¹⁹⁷ The costs of deteriorating the environment are

¹⁹⁷ Keohane and Olmstedt, 2007, p. 4

however invisible to the responsible actor when the action takes place and will therefore be exterior to his/her decision process.¹⁹⁸ The same holds true for firms engaged in economic activity.

According to economic theory, this scenario is not a by-product of an efficient market, but rather a consequence of a market failure. The market has failed to provide individuals and firms with the right incentives to alleviate environmental problems. There is hence a need for markets that secure environmental protection by rewarding actors who contribute to climate stabilization.¹⁹⁹

A question arises whether these special types of markets arise by themselves or if they require governmental intervention. Adherents of a conservative wing argue that governments, for long, have installed cost-blind-statutes being overly intrusive and thus hindering innovation and economic growth. They adhere to Adam Smith's image of the invisible hand²⁰⁰ and claim that rational self-interested decision-making can combine to advance the common good without explicit coordination. Accordingly, free markets are socially desirable means of allocating goods and services.²⁰¹ Conservative economists assume that markets consist of rational actors in possession of perfect information leading them to make decisions in line with the greater good of all. Such an ideological view of an efficient market leads to scepticism about regulation.²⁰²

However, some economists admit that, even though some free markets will be efficient in allocating goods, they will still be unlikely to provide sufficient levels of environmental protection.²⁰³ The costs and benefits of environmental protection are not internalised in firms' decision-making process and there is a lack of sound resource management.²⁰⁴ Market actors are in fact rarely in possession of perfect information to make rational decisions for the greater good of all.²⁰⁵

Some economists therefore concede to the need for a regulatory push but favour market-based instruments to help remedy market failures and restore efficiency in the market rather than "command-and-control-type regulation" such as prescribing certain performance standards or the use of certain eco-friendly technology.²⁰⁶

The Organisation for Economic Cooperation and Development (OECD) has defined market-based instruments as 'instruments that affect costs and

¹⁹⁸ Keohane and Olmstedt, 2007, p. 65

¹⁹⁹ Keohane and Olmstedt, 2007, pp. 3-4

²⁰⁰ Hardin, 1968, p. 2

²⁰¹ Keohane and Olmstedt, 2007, p. 54

²⁰² Bogojevic and Driesen, 2013, p. 2

²⁰³ Keohane, Olmstedt, p. 55

²⁰⁴ Keohane, Olmstedt, p. 64

²⁰⁵ Known as "bounded rationality" (Mercuro and Medema, 2006, p. 245)

²⁰⁶ Keohane and Olmstedt, 2007, p. 130-133

benefits of alternative actions open to economic agents, with the effect of influencing behaviour in a way favourable to the environment'.²⁰⁷

Market-based, or economic, instruments thus *directly* affect price mechanisms in the market and environmental taxes are a classical example of such an instrument. Environmental taxes forces economic actors to internalise the costs of environmental damage in their cost and benefit analysis (CBA) as high levels of, for example, carbon emissions result in higher taxes. An economic instrument can also function in the opposite direction by granting subsidies to economic actors contributing to emission abatement.²⁰⁸ The core of economic instruments is that economic actors have leeway to either decrease environmentally harmful behaviour or continue with “business as usual” and pay the price of environmental taxes.

Regulatory instruments, or administrative, on the other hand, prescribe certain environmental performance or behaviour of economic actors. For example, the government might impose a requirement that certain technology be used to abate carbon emissions. Economic actors are consequently not free to choose whether or not to comply with the regulation as it is ‘commanded’.²⁰⁹

The question is to which category GPP belongs. GPP is described as a market-based instrument in the *Europe 2020 strategy* but the question remains if this is an adequate description of GPP.

GPP is not easy to categorise as it can assume both the role of an administrative instrument as well as an economic. It depends on how the criteria and requirements of the tender notice are formulated. If a public body seeks to procure products bearing a certain eco-label, as in the *Dutch Coffee* case, and includes this in their technical specifications, then GPP takes on the role of an administrative instrument, as a particular environmental standard is required and every tenderer has to comply with the same standard. GPP can also be characterised as an economic instrument if contractors are financially rewarded on the basis of the technology used in production.²¹⁰

GPP more often than not takes on the role of an administrative policy instrument as criteria is frequently formulated in terms of specific environmental certificates to be provided by tenderers or that emissions should be reduced with exactly the same amount by all tenderers.²¹¹

It therefore seems peculiar that GPP is described as a *market-based* policy instrument in the *Europe 2020 strategy*. A possible explanation might be the voluntary element of GPP.

²⁰⁷ Richardson, 1998, p. 22

²⁰⁸ Keohane and Olmstedt, 2007, pp. 130-131

²⁰⁹ *ibid.*

²¹⁰ SOU 2013:12, p 395

²¹¹ Lundberg and Marklund, 2012, pp. 10-11, footnotes 13, 14

It is not mandatory for economic actors to participate in a procurement process and comply with environmental criteria of the relevant process. Instead, firms can decide whether it is economically advantageous to participate in a procurement process, based on a CBA. If the costs of adapting production processes in a sustainable direction outweighs the expected economic benefits of being awarded with a public contract, firms will choose not to participate, much like they will choose to pay an environmental tax instead of e.g. investing in green technology.²¹² Economic actors thus have leeway to decide whether they want to conform to environmental criteria in a procurement process or instead suffer the economic loss of not being awarded with a public contract. GPP thus clearly affect the costs and benefits of alternative actions open to economic agents but not necessarily in a way favourable to the environment. If the costs of becoming more sustainable are considerable in relation to the economic benefits, economic actors will simply choose not to submit a tender and are not subjected to a tax or a fee for not participating in GPP.

The rationale for GPP is, however, that the often substantial economic value of a public contract will in fact incentivise firms, including firms with high environmental impact, to participate in green procurement as the economic benefits will outweigh the costs of altering production processes in a sustainable direction.

An increased uptake of GPP among public authorities will naturally encourage more economic actors to participate in GPP and sustainable development is meant to follow.²¹³

The next section of this thesis will therefore include an assessment of the challenges currently facing the mobilisation of GPP in the EU, in part due to inadequacies of the old Public Sector Directive. The demand and supply side of GPP will both be evaluated to understand the complexities linked to GPP.

The new public procurement will first be presented to understand its background and purpose. Subsequently the innovative solutions of the new directive will be evaluated in light of the problematic practical implications of the old directive. Possible market reactions to an increased uptake of GPP will also be discussed as GPP is ultimately meant to transform the EU growth model to become more sustainable.

The findings of this section will then be used to discuss whether GPP can be considered as an efficient policy instrument to achieve sustainable development, using the Kaldor-Hicks efficiency standard.

²¹² ESO 2013:10, p. 71

²¹³ ESO 2013:10, p. 42

4.2 Directive 2014/24/EU

After the *Europe 2020 strategy* had been presented, the Commission stated that the old Public Sector Directive needed to be modernized to make way for the new role of GPP, which was to increase demand for innovative and green products.²¹⁴

The Commission had found that there was a great deal of uncertainty as to the legal possibilities of including environmental criteria in the tender documents and fear among member states of infringing Community law and principles.²¹⁵ This uncertainty constituted a serious obstacle to the mobilisation of GPP²¹⁶ and the directive thus needed to be clarified and its scope enlarged to encompass the enforced environmental and economic objectives of GPP.

On 11 February 2014, the Council adopted a new directive on procurement²¹⁷ to help reach the objectives of the Europe 2020 strategy by modernizing the procurement directives and remedying the deficiencies of prior regulation.

The new role of GPP is made clear already in recital 2 of the directive where references are made to the *Europe 2020 strategy* and GPP is described as a key instrument to achieve the objectives of the strategy including a smart, sustainable and inclusive growth in the EU.

The new directive has two complementary objectives to the original objective of co-ordinating national procurement procedures to protect the internal market objective. First the intention is to allow procurers to make better use of public procurement in support of common societal goals such as environmental protection and second to increase the efficiency of public spending in general.²¹⁸

These two additional objectives are however not enclosed with *general* mandatory requirements for environmental procurement or requirements obliging member states to address environmental aspects in all procurement processes. The differences between individual sectors of the procurement market have been found to be too vast to impose general obligations.²¹⁹ Instead the EU has installed two tracks of measures meant to strengthen market pull towards the production of eco-friendly products, called the twin-track approach.²²⁰

The first track takes into account the specificities of different sectors in procurement and promotes the installation of *sector-specific* mandatory standards. These standards are meant to impose higher standards than the

²¹⁴ Commission, 2011; Commission, 2011, Green paper...

²¹⁵ Commission, 2001, p. 6

²¹⁶ Commission, 2008, p. 4

²¹⁷ Directive 2014/24/EU

²¹⁸ Directive 2014/24/EU, Recital 2

²¹⁹ Directive 2014/24 EU, Recital 95(1)

²²⁰ Commission, 2007

harmonised standards already in place concerning e.g. the general marketing of relevant goods, works or services in the EU.²²¹ Such standards have already been installed regarding office equipment.²²²

The second track of the approach concerns various regulations meant to motivate the voluntary use of GPP in sectors where there are no mandatory harmonised procurement standards. Such regulations include common EU GPP criteria, life-cycle costing methodologies, centralised and joint purchasing, indicative targets for the use of GPP and guidance for member states as to the legal boundaries in the EU of using GPP.

The measures of the second track are mainly to be implemented through the new directive and will therefore be the main focus for the upcoming section.

4.3 Challenges currently facing green public procurement

Two documents describe how GPP is to be promoted in the EU, the Commission's *Sustainable Consumption and Production and Sustainable Industrial Policy (SCP/SIP) Action Plan* and the *Communication on Public Procurement for a Better Environment*.

These two documents identified five types of obstacles to the mobilisation of GPP in the EU. One of these obstacles was the restrictive meaning and legal uncertainty of the prior Public Sector Directive, to which the new directive presents a possible solution as already explained in the preceding section. The four remaining obstacles will now be addressed each in turn followed by the suggested solutions included in the new directive and/or in EU policy.

4.3.1 Costs

Eco-friendly and resource efficient products are often believed to be more expensive than conventional products without an environmental dimension.²²³ This increase in cost can cause reluctance among public bodies as they have a limited amount of resources and have to use it as efficiently as possible.

Every effort from a public body to launch a policy instrument such as GPP inevitable increases costs and strain national budgets. Resources are needed when using GPP to require suppliers to conform to certain environmental standards, especially if this standard goes beyond what is typically required in the market. Such requirements can include demands that products be produced ecologically or that buses for a local transportation system must not emit high levels of carbon.

²²¹ Communication, 2008, SCP/SIP; Commission, 2008

²²² Regulation 106/2008

²²³ SOU 2013:12, p. 459

Furthermore, the EU procurement regime has for long been complex and rather unpredictable, especially before environmental consideration was expressly stated in secondary law and member states had to rely on the changing case law of the CJEU. The complexity still remains after the status of GPP has been raised in the directives as duties of precision and verification still burden the member states. The formulation of requirements and criteria in line with Community law and principles is a technically challenging endeavour and requires a lot of expertise.²²⁴

This challenging legal exercise clearly requires resources to be executed properly, especially since member states risk infringement actions if they do not comply with EU regulation. In addition, when a public body has required a supplier to fulfil certain environmental conditions, there is a need to follow up with the supplier to ensure observance of the conditions, which further induces transaction costs.²²⁵

Costs are thus created partly to ensure that a certain environmental policy complies with the relevant legal framework, partly to verify that the political ambitions of a policy are also achieved.

The high costs currently linked to environmental concern in procurement poses a serious threat to the mobilisation of GPP as it makes member states more unwilling to engage in GPP, especially in times of financial distress where resources are immensely strained.

The new directive therefore includes a number of solutions meant to reduce the increased transaction costs currently inherent in GPP.

Measures presented in the following are not only meant to address the problem of high transaction costs but also serve to solve other problems to GPP. An introduction will therefore be given in this section of three important types of measures in part meant to reduce costs. The measures will then be reiterated in upcoming sections where they present a solution to other problems facing GPP.

4.3.1.1 Life cycle costing

A new provision in the new directive includes a possibility to consider life cycle costing (LCC) of a product, works or service when awarding a contract based on MEAT-criteria.²²⁶ This means that contracting authorities are encouraged to budget for all costs during the life cycle of a product. A high purchase price of an eco-friendly product might consequently be compensated by low operation- and maintenance costs during the whole life cycle of a green product.²²⁷

Member states have already been able to consider LCC when determining the economically most advantageous tender but the express stating of this

²²⁴ Kunzlik, 2013, p. 104

²²⁵ SOU 2013:12, p. 396

²²⁶ Directive 2014/24/EU, recital 96, art 68

²²⁷ SOU 2013:12, p. 411

possibility in the new directive is meant to further facilitate, clarify and increase the use of this method.²²⁸ LCC is thus an additional support for member states in their promotion of sustainable growth.²²⁹

LCC can be used as an award criterion favouring the tender with the lowest *cost*, as opposed to the tender with the lowest *price*. The preceding proposal for a new directive on procurement intended to replace the lowest *price* criterion for the award of contracts by a lowest *cost* criterion.²³⁰ This article was however up for negotiation and did not succeed in making it into the final directive. Instead, contracting authorities shall now base the award of contracts on the MEAT-criteria within which they can take into account either lowest price or lowest cost using a cost-effectiveness approach, such as LCC, to establish who has submitted the best tender.²³¹

All costs arising during the life cycle of works, supplies or services can be included in a LCC analysis. This entails both internal as well as external costs. Internal costs are those that fall directly upon the contracting authority or other users, e.g. cost due to development, production, transport use and maintenance of a product.²³² External costs, on the other hand, are costs directly linked to the life cycle, namely negative externalities of environmental harm arising during the extraction of raw materials used to produce the product or simply environmental harm caused by the product itself. Examples of such external costs are green house gas emissions and costs arising from an effort to combat such climate changes.²³³

External costs can be assessed in a life cycle assessment (LCA) provided that they can be given a monetary value, which must be possible to verify. LCA is an instrument for assessing a product's total effect on the environment and the result of such an assessment is then added to the life cycle costing analysis. LCA is basically a contracting authority conducting a cost and benefit analysis (CBA) of a tender where the cost of conducting a CBA is also included and weighed against the expected environmental benefits of a certain product or service.²³⁴

Furthermore, a life cycle assessment of external costs must be based on objectively verifiable and non-discriminatory criteria, be accessible to all interested parties and the data required by the contracting authority must be possible to be provided with reasonable effort by normally diligent economic operators.²³⁵

Moreover, contracting authorities are required to indicate in their tender documents the method used to determine the life-cycle costs on the basis of

²²⁸ SOU 2013:12 p. 472

²²⁹ Directive 2014/24/EU, recital 96

²³⁰ Proposal 2011/0438

²³¹ Directive 2014/24/EU, art 67(1)(2)

²³² SOU 2013:12, p. 466

²³³ SOU 2013:12 p. 469, Directive 2014/24/EC, recital 96(2)

²³⁴ ESO 2013:10, p. 54

²³⁵ Directive 2014/24/EU, art 68(2)

the required data. The elaboration of such methods often exceeds the expertise and limited resources of the authority.²³⁶

The Commission anticipate that common methodologies on how to calculate life cycle costs relevant to specific sectors will be developed by the EU to alleviate this burden from the authorities. The new directive also allows the Commission itself to adopt common life cycle methodologies by way of delegated legislation.²³⁷ If the Commission adopts such a method, then contracting authorities are *required* to use that method when awarding a contract in the relevant sector based on life cycle costs.²³⁸ However, to this day only one sector is subjected to a common life cycle methodology and that is the sector of clean and energy-efficient road transport vehicles covered by Directive 2009/33/EC.

In all other areas of procurement, contracting authorities have to elaborate life cycle costing methodologies independently if they wish to use such measures. This is a serious impediment especially to the use of LCA as this assessment is complex both in terms of resources needed to conduct the assessment and in terms of the analytical expertise required of the practitioners.

The Swedish Environmental Management Council (SEMCO) has stated that LCA is best suited for assessments of energy-intensive products such as lighting, office supply and ventilation. The SEMCO has further advised procuring authorities to focus primarily on *internal* life cycle costs due to the complexity of addressing external costs in procurement.²³⁹

This recommendation has lead the Expert group in studies of public finance (ESO)²⁴⁰ to questions whether GPP can be viewed as an environmental policy instrument when the recommended primary task is not to internalise negative externalities but instead focus on the simpler task of analysing internal costs in procurement.²⁴¹

An assessment of external costs is often needed to assess whether GPP is efficient as an environmental policy instrument to achieve for example reduced levels of carbon emissions.²⁴² If contracting authorities are advised against using such assessments they are excluding from the analysis important environmental concerns of combating global climate change, which is essential to the *Europe 2020 strategy*. One of the strategy's main objectives is to attain sustainable growth through a low carbon economy and ensure resource efficiency. This objective will be severely impeded if contracting authorities are only inclined to address the possible environmentally harmful *internal* costs of a product.

²³⁶ Kunzlik, 2013, p. 112

²³⁷ Directive 2014/24/EU, art 68(3), 87

²³⁸ Directive 2014/24/EU, recital 96(3), art 68(3)

²³⁹ SOU 2013:12, p. 467

²⁴⁰ Expertgruppen för studier i offentlig ekonomi

²⁴¹ ESO 2013:10, p. 55

²⁴² ESO 2013:10, p. 54, 55

Road transport vehicles are a good example of a product whose internal costs of development and production might be developed to inflict minimum harm on the environment. However, the pollution that the vehicle inevitable will give rise to at the consumption stage is a negative externality with a far more serious effect on the environment than the internal costs of production and development of the vehicle, which is probably why there is already a common life cycle costing methodology in place for this type of product.

It is thus of outmost importance that common life cycle methodologies are developed by the EU to facilitate the use of LCA as well as LCC to relieve contracting authorities from the burden of developing these complex methodologies themselves. Taking into account external costs are crucial for the attainment of environmental objectives.

4.3.1.2 EU GPP criteria

Contracting authorities of the member states are as mentioned subjected to duties of precision and verification in their development of technical specification and award criteria. Increased transaction costs are an inevitable result of these duties and the Commission has therefore suggested the creation of common GPP criteria to help reduce these costs.

Common EU GPP criteria follow the same logic as common life cycle costing methodologies, namely the installation of clear, verifiable and justifiable environmental criteria for contracting authorities to use in their procurement processes to help alleviate the financial burden on authorities of developing such criteria independently.²⁴³

Common GPP criteria are also meant to secure an undistorted competition among member states by making GPP criteria compatible throughout the EU. This will equally facilitate access to public contracts for small and medium size enterprises (SMEs) as they often have a limited capacity to master differing procurement procedures.

EU GPP is far more developed than common life cycle methodologies and currently covers 21 product groups typically purchased by public bodies including electricity, copying paper and toilets and urinals. These sectors are prioritized areas and were chosen from a multitude of criteria such as the scope for environmental improvement, public expenditure, economic efficiency and the potential to set an example to private or corporate consumers.²⁴⁴

EU GPP criteria are however optional to use, compared to common life cycle methodologies, which might explain why these criteria are currently more developed. Member states of the EU are probably more reluctant towards adopting common life cycle methodologies, as the new directive

²⁴³ Commission, 2008, p. 3

²⁴⁴ ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm

now obliges authorities to apply them when using life cycle costing in the award criteria.²⁴⁵

Two types of criteria are made available to contracting authorities when procuring goods from the sectors covered by EU GPP criteria. The first is the “core GPP criteria” which focus on the essential elements of a product’s environmental performance, thereby simplifying the application of GPP criteria and bringing down administrative costs. The second is the “comprehensive GPP criteria” which authorities can use if they wish to require higher levels of environmental performance and innovation or include more aspects that go beyond a product’s essential elements. Comprehensive criteria are derived from the core criteria and the differences between the two basically boil down to levels of ambition of the procuring public body.²⁴⁶

4.3.1.3 Centralised and joint purchasing

Another effort to help contracting authorities decrease transaction costs is the promotion and reinforcement of procurement through centralised purchasing bodies (CPBs) and joint purchasing, which is regulated in the new directive in art 37 and 38.

CPBs are contracting authorities installed voluntarily by a member state with the objective to provide *centralised* purchasing activities. Such activities include the acquisition of supplies and/or services intended for one or several contracting authorities or the elaboration of framework agreements to be used by authorities for works, supplies or services.²⁴⁷

Joint procurement is less institutionalised and systematic than centralised public purchasing and is defined as an agreement between two or more contracting authorities to perform certain specific procurement jointly.²⁴⁸

The common and principal rationale of using CPB and joint procurement is to join the needs and purchasing powers of contracting authorities to obtain better prices. For the purpose of GPP, CPB and joint procurement can be used to generate cheaper prices for large volumes of environmentally friendly and innovative products.

Transaction costs are also reduced, as contracting authorities do not have to initiate procurement processes separately.

CPBs were allowed already at the time of the old Public Sector Directive²⁴⁹ but the new directive has installed a specific article for CPB and introduced a new article for “occasional joint procurement” to further promote the use

²⁴⁵ Directive 2014/24/EU, recital 96(3), art 68(3)

²⁴⁶ Commission, 2008, p. 6

²⁴⁷ Directive 2014/24/EU, Art 2(14)(16)

²⁴⁸ Directive 2014/24/EU, Recital 71, Art 38

²⁴⁹ Directive 2004/18/EC, Recital 15, Art 1(10), Art 11

of these two instruments.²⁵⁰ The new directive also clarifies that the enforced status of CPB does not preclude the use of joint procurement in any way, especially since joint procurement can help contracting authorities receive better prices for innovative products thereby promoting innovation in the EU.²⁵¹

Joint procurement and CPBs are thus both seen as a possible entry-door for GPP, as contracting authorities that lack knowledge or support for GPP can be incentivised to engage in such activities if transaction costs are reduced due to a joint effort in procurement.

Installing a CPB or engaging in joint procurement is, however, in no way mandatory. Whether to have a CPB and how such a body should operate, depends on the level of ambition of the particular member state in relation to public procurement and GPP in particular.

It is questionable whether the EU approach to encourage and clarify the possibility to use CPBs or joint procurement will increase the uptake of GPP in the EU as it is highly dependant both on the political ambition of each member state, if they choose to install a CPB or not, as well as the political will of each contracting authority to turn to a CPB or join forces with another procuring authority when engaging in GPP.

4.3.2 Expertise deficit

Compared to other traditional policy instruments such as environmental taxes, GPP is rather decentralised in its execution. Politicians on different levels of the national political system formulate policy objectives to be achieved by GPP but leave it to the individual contracting authorities to concretize these objectives into applicable environmental requirements and criteria in line with Community law and principles.²⁵²

The possibility to use environmental criteria in procurement is as mentioned above no longer in question but the legality of a particular use of green public procurement depends largely on *how* a contracting authority formulates its environmental criteria. The elaboration of such criteria is as mentioned above a complex exercise and places a considerable burden upon contracting authorities.

For long, member states have been hesitant towards incorporating environmental objectives in their procurement processes as the legal practicability of doing so have been surrounded by great uncertainties and member states have feared infringement actions.²⁵³ The elaboration of such criteria is a complex and technically demanding exercise and many of the contracting authorities lack the required expertise to formulate efficient

²⁵⁰ Directive 2014/24/EU

²⁵¹ Directive 2014/24/EU, Recital 71(1)

²⁵² ESO 2013:10, pp. 48-49

²⁵³ SOU 2013:12, p. 387

environmental requirements. Furthermore, authorities have been unaware of the eco-friendly products and solutions available on the market.²⁵⁴

This deficit in expertise and knowledge clearly presents a barrier to GPP, as authorities are more unwilling to engage in activities where they experience a lack of competence or where they are unaware of the availability of green products.

The new directive is therefore in large part meant to simplify the complicated rules regarding GPP so that contracting authorities are more inclined to take environmental consideration into account and know what is expected from them.²⁵⁵

The measures proposed by the new directive to decrease transaction costs are equally meant to address problems of expertise deficits among contracting authorities. Common EU GPP criteria and life cycle costing methodologies both serve the purpose of providing clear and easily applicable techniques to be used in GPP. Contracting authorities are thus relieved from the burden of elaborating criteria and methodologies themselves and do not need to fear infringement actions, provided that they have used the designated techniques properly.

Moreover, centralised and joint purchasing allows the expertise in GPP to be concentrated, thus facilitating the use of environmental criteria in procurement.²⁵⁶

The Commission has also launched several efforts to provide better guidance for contracting authorities wanting to engage in GPP. These efforts include guidebooks on the application of GPP under the Public Sector Directive and a website dealing exclusively with GPP which includes a “training tool kit” for GPP.²⁵⁷

4.3.3 Political leadership and targets

In 2012 the Centre for European Policy Studies (CEPS) published a report on the uptake of GPP in the EU.²⁵⁸ The report showed that the uptake was very fragmented among member states where the four top performers exhibited an uptake of up to 60 % while as many as twelve member states displayed an uptake of less than 20 %.²⁵⁹ The uptake of GPP was established according to member states use of the “core” elements of EU GPP criteria.

This fragmentation was partly explained by a lack of political leadership in the worst performing countries. The top performers had adopted national

²⁵⁴ Commission, 2008, SCP/SIP

²⁵⁵ http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/reform/fact-sheets/fact-sheet-07-environmental_en.pdf

²⁵⁶ Kunzlik, 2013, p. 108

²⁵⁷ http://ec.europa.eu/environment/gpp/toolkit_en.htm

²⁵⁸ CEPS Report, 2012

²⁵⁹ CEPS Report, 2012, p. 5

action plans for the implementation of environmental concern in procurement at an early stage while others still lacked a national action plan at the time of the study.²⁶⁰

Voluntary targets for increasing the uptake of GPP have been proposed by the Commission to help remedy this fragmentation. The idea is that political targets set by the Commission express the political support for a wider use of GPP and the Commission will also be responsible for the monitoring of the improvements made in GPP performance.²⁶¹ The ambition is to help the current underachieving member states to increase their uptake of GPP to a level corresponding to the uptake of the high performing states.

An ambitious target was set by the Commission in 2008 that by 2010, 50 % of public procurement processes in the EU would be green in terms of using all of the “core” elements of EU GPP criteria. This target was not met as a mere 26 % of public contracts included all of the core criteria. However, 55 % included at least one EU GPP criterion.²⁶²

Targets are easily set but clearly harder to achieve. Merely expressing a desire for underachieving states to catch up to the top performing states is unlikely to contribute to an improvement in the uptake of GPP.

The Commission is to monitor the improvements made in GPP performance in the EU but the Commission has no authority to bring action or sanction states that do not meet the expected targets for GPP. Indicative targets are instead meant to motivate the *voluntary* use of GPP, which is highly dependent on the political ambition of the particular member state.

In member states where the general public is ignorant of environmental problems or are struggling with high levels of political instability, GPP might not be a prioritised area on the political agenda.

The related issue of fragmented public procurement demand in the EU will be further elaborated below.

4.3.4 Fragmentation of public procurement demand

As shown in the precedent section, the public demand for using GPP varies a lot between member states. Some states have installed ambitious guidance materials on GPP as well as CPBs to support the use of environmental criteria in procurement while others lack such political ambition.

In addition, contracting authorities of the member states wishing to engage in GPP choose different ways of incorporating environmental criteria in their procurement processes. Environmental criteria have different value

²⁶⁰ CEPS Report, 2012, p. 43

²⁶¹ Commission, 2008, p. 4

²⁶² CEPS Report, p. vii

depending on how they are formulated and when in the procurement process they are used. GPP criteria used in the technical specifications will require tenderers to comply with the requirement if they wish to submit a tender. Environmental criteria used as award criteria on the other hand will be given a certain weighting but may not result in a “green contract” as a tenderer can submit a tender scoring the highest points based on, e.g. lowest price.²⁶³

Also, contracting authorities are autonomous bodies in relation to the policy makers at national and EU levels. The political ambition behind a policy instrument such as GPP might not be reflected in the practical execution as contracting authorities can choose to interpret the policy objectives differently.²⁶⁴

Public demand is fragmented in the absence of common standards around which public demand can be aligned across member states.

Centralised and joint purchasing can provide a solution, as the numbers of public purchasers and their demands are concentrated in one procurement process. The joint purchasing powers of the public bodies will also help improve the conditions for formulating strong environmental criteria.

Also, developing EU GPP criteria and sector-specific life cycle costing methodologies will further enhance common standards and decrease varying environmental criteria.²⁶⁵

Furthermore, the first track of the new directives “twin-track-approach” encourages the elaboration of mandatory sector-specific harmonisation standards in the EU. These standards prevent contracting authorities from procuring goods that do not meet required environmental standards. Fragmented public demands will thus be aligned in the sense that they have to meet or exceed harmonised standards.²⁶⁶

Mandatory sector-specific harmonisation standards are, however, to the present day inadequately developed and only cover the office equipment sector²⁶⁷, which undermines the ability of such standards to align fragmented public demand.

4.4 Market conditions for green public procurement

The above section has focused on the demand side of GPP, i.e. how to promote an increased uptake of GPP among contracting authorities of the member states, in light of the challenges currently facing the mobilisation of GPP in the EU.

²⁶³ CEPS Report, 2012, p. 43

²⁶⁴ ESO 2013:10, pp. 71-72

²⁶⁵ Kunzlik, 2013, p. 109

²⁶⁶ Commission, 2008, pp 5-6; Commission, 2008, SCP/SIP, p. 4

²⁶⁷ Regulation 106/2008, Kunzlik, 2013, p. 109

It is, however, equally important to assess the supply side of GPP and how the market is likely to react to a wider use of GPP by contracting authorities. Two topics will be discussed in the following that are linked to producer and consumer behaviour in the market, namely price sensitivity and the voluntary participation by producers in procurement processes.

4.4.1 Price sensitivity

Price sensitivity for changes in market prices among producers is an important question to discuss when evaluating the effect GPP is likely to have on the market.

If a contracting authority seeks to substitute its procurement of conventional products for green products, the consumption and demand for green products will naturally increase.²⁶⁸ Whether this substitution policy will result in positive environmental effects is however in part dependent on the price sensitivity of producers. This price sensitivity is *inter alia* related to the potential for large-scale production advantages, i.e. when a product's average production price declines as more units are produced.²⁶⁹

If the price sensitivity of producers is low then the increased public demand for green products is not likely to result in environmental benefits. Producers will not be inclined to increase their supply to meet the demand as this might require quick investments to adapt their production process. The producer will thus consider the marginal costs²⁷⁰ to be too high to produce more green products, which is often the case at short sight.

Low price sensitivity among producers can also be due to a distorted competition where there are few competitors in the relevant market. In this scenario, the prices for green products will increase as public demand increases but the production processes and supply of green products will remain the same.²⁷¹

If instead the price sensitivity of producers is high then an increased public demand for green products will not result in significantly raised prices for these products, as the marginal costs will be low to meet the increased demand. This is often the case in the long term when producers have already adapted their production processes to meet an increased public and private demand for green products.²⁷²

The authority's substitution policy towards green products in this scenario has better chances of generating environmentally beneficial results, as the supply of green products will increase without significant price raises and consumers will be inclined to purchase these products.²⁷³

²⁶⁸ ESO 2013:10, p. 69

²⁶⁹ Marron, 1997, pp. 285-305

²⁷⁰ i.e. the costs of producing one more unit.

²⁷¹ ESO 2013:10, p. 69

²⁷² ESO 2013:10, p. 70

²⁷³ Jørgensen, 2012

Consumers' price sensitivity is also important. Consumers' price sensitivity is related to their income, how they value environmental quality and the price of the product.²⁷⁴

If a contracting authority has a significant market share and decides to buy green instead of conventional products, the market prices for both types of products will be likely to be affected. The increased demand for green products will raise the price for these products while the reduced demand for conventional products will lower the price. Private consumers might then be more inclined to buy the conventional products because of the low price, which counteracts the authorities efforts to promote a wider production and consumption of green products.²⁷⁵

It is therefore important to discuss whether a change of attitude among contracting authorities in favour of GPP affects private consumer behaviour. The efficiency of a market-based instrument is partly dependent on whether there is congruence between authorities environmental preferences and private consumer valuation of green products.²⁷⁶ If authorities efforts to procure goods in ways to secure sustainable growth leads to an increase of sale of cheaper conventional products among private consumers, then GPP actually results in greater environmental damage and should be avoided.²⁷⁷

Recent studies in Sweden show that consumers appreciate environmental quality and the private consumption of ecological products is increasing from year to year.²⁷⁸ Whether this is a result of Sweden being a top performer in GPP or a growing awareness of environmental issues among the public is difficult to answer but it remains to be said that consumers' price sensitivity is an important issue to address when discussing the potential efficiency of using GPP to alter market behaviour.

4.4.2 Voluntary participation

There is an important element of voluntariness on the supply side in public procurement as mentioned above.²⁷⁹ Potential suppliers can choose not to submit a tender in a green procurement process if the costs of complying with environmental criteria outweigh the economic benefits to be gained by being awarded with a public contract. GPP as a policy instrument thus have a limited scope of application as it only applies to suppliers who choose to participate in the procurement process, which differentiates GPP from other traditional economic policy instruments such as environmental taxes that apply to all economic actors operating in a particular market.

²⁷⁴ ESO 2013:10, p. 69

²⁷⁵ ESO 2013:10, pp. 10-11

²⁷⁶ Andreoni, 1990, pp. 464-477

²⁷⁷ ESO 2013:10, p. 73-74

²⁷⁸ http://www.svd.se/naringsliv/nyheter/sverige/starkt-ar-for-ekologisk-mat_8939400.svd

²⁷⁹ See section 4.1.1., pp. 42, 43

The effect that GPP is foreseen to have on the market, according to the *Europe 2020 strategy*, is thus largely dependent on the level of participation of potential suppliers.²⁸⁰

The EU general policies, including the *Europe 2020 strategy*, have put much emphasis on how public procurement demand must increase to incite more firms to participate in green procurement.

Consumer demand is, however, also an important factor to consider when discussing firms' willingness to participate in a green procurement process. Suppliers often want reassurance that their green products will be sold in the private market and generate profit if they fail to submit the best tender in a GPP process.²⁸¹ If the prospect of generating profit in the green private market is low due to low consumer interest for green products, then suppliers will not risk costly investments to accommodate the production of green products but instead focus on a continued production of conventional goods.²⁸²

An increase of public procurement demand in green products must thus be met by a corresponding increase in private demand to ensure the efficiency of GPP to achieve sustainable development.

Furthermore, the formulation of environmental criteria and requirements affect economic actors' decision to participate in green procurement processes.²⁸³

Stringent environmental criteria are more likely to deter possible tenderers from participating in GPP as costly investments in green technology will often be required to comply with the criteria. Stringent criteria are, however, often necessary to produce environmental benefits of value and secure a sustainable development.

For GPP to be efficient in terms of generating a maximum of environmental benefits, it is crucial that firms giving rise to large quantities of negative externalities actually participate in GPP and alter their production processes in a sustainable direction.

The voluntary element of GPP is thus countervailing the environmental objective of GPP as the largest polluters will not be embraced by GPP regulation.

²⁸⁰ ESO 2013:10, p. 71

²⁸¹ ESO 2013:10, p. 71

²⁸² ESO 2013:10, p. 61

²⁸³ ESO 2013:10, p. 86

5 Conclusions

The identification of GPP as a key market-based instrument in the *Europe 2020 strategy* has spurred a development in the EU where a wide use of GPP is strongly promoted and described as essential for the future competitiveness and growth of the EU.

GPP follows the logic of art 11 TFEU and art 3(3) TEU to integrate environmental concern in the policy making and activities of EU institutions and member state authorities, with the intention to promote sustainable development, meaning the decoupling of economic growth and environmental deterioration.

The concept of sustainable development is alluring as economic benefits will theoretically be achieved without considerable governmental interference in the market.

The high ambitions set for GPP to attain sustainable development are, however, badly rooted in empirical data and research of how GPP actually operates in a market context, especially from an economic perspective.

The encouragement of GPP in EU law instead seems to rest on simplistic political assumptions that if financially strong contracting authorities decide to alter their demand towards green products, this shift in public demand will create a snowball effect and the private market as a whole will become sustainable.

Economic analysis of public procurement regulation should be the starting point of any policy suggesting the use of GPP to rectify or mend environmental problems and economic inefficiencies, as such an analysis can present economic weaknesses in political reasoning and legislation.

GPP is described as a market-based instrument in the *Europe 2020 strategy* and such instruments clearly have their basis in economic theory. Yet, the promotion of GPP by the Commission is rarely founded in economic research or in studies that establish GPP as an effective economic policy instrument to achieve sustainable growth.

The ability for GPP to generate environmental and economic benefits is instead assumed and a wider use of GPP is accordingly promoted.

The focus in the EU general policies relating to GPP lies on how to change the environmental preferences of government authorities and how to legally enable authorities to take environmental aspects into consideration when procuring goods from the market.

No reference is made in the *Europe 2020 strategy* to market conditions that might affect the efficiency of GPP, which is remarkable considering that GPP is a market-oriented instrument meant to transform the EU growth model to become more sustainable.

The discussion on the possibilities and limits to GPP is thus rather one-sided as it only considers the demand side of procurement, assuming that the supply-side is interrelated.

This is clearly an inadequate approach, as an altered demand for green products among contracting authorities does not necessarily automatically transform the demand and supply of green products in the private market.

This thesis has shown that the mobilisation of GPP to achieve sustainable development faces considerable obstacles both on the demand side of procurement as well as on the supply side. This is largely due to the fact that the costs of engaging in GPP often outweigh the environmental and economic benefits to be gained by participating in GPP.

Contracting authorities of the member states, representing the demand side, are reluctant to engage in GPP due to the current high transaction costs linked to the elaboration of environmental criteria, the assessment and verification of tenders with an environmental dimension and the follow-up on contractors after a GPP contract has been awarded to ensure the observance of environmental contract conditions.

Green products are in addition often more expensive to purchase, which further increases costs.

In order for GPP to generate expected environmental benefits, it is essential that contracting authorities elaborate clear and ambitious environmental criteria. It is however a complex and demanding exercise to elaborate strong environmental criteria that fulfils a precise and verifiable environmental objective in accordance with ECJ case law, Community law and principles.

The new directive and the EU general policies present several efforts to reduce transaction costs such as installing common EU GPP criteria that help alleviate costs of developing GPP criteria individually on a national level and promoting the use of CPBs and joint procurement to join the needs and powers of contracting authorities so that they will be able to *inter alia* gain better prices in procurement.

Life cycle costing (LCC) methodology, as part of the MEAT criteria, has been particularly highlighted as an efficient solution to reduce transaction costs during the award phase.

LCC assessments enable contracting authorities to assess all costs during the life cycle of a product to determine which supplier has submitted the best tender. A high purchasing price of a green product can thus be compensated by low maintenance costs and a long life span.

A life cycle costing assessment is, however, not facilitating the use of environmental criteria in procurement but rather the opposite. Both internal and external costs can be taken into account in LCC and assessing such a wide range of costs that can occur during the whole lifetime of a product is of course a highly demanding exercise, both financially and technically.

Yet, well functioning LCCs present a great opportunity to secure environmental protection as negative externalities can be assessed and internalised in public authorities decision-making process in a life cycle costing analysis (LCA).

The complexity of addressing external costs in procurement has, however, led the Swedish Environmental Management Council (SEMCO) to recommend Swedish contracting authorities to focus mainly on internal costs and reserve the assessment of external costs in a LCA for energy-intensive products such as lighting and ventilation.

Such a recommendation made by an authority of a high performing state in GPP, i.e. Sweden, questions the efficiency of using GPP to address negative externalities when LCA is perceived to be too complex and expensive in the average procurement process even for the authorities belonging to a state where there is strong political leadership promoting the use of GPP.

The Commission has suggested that common life cycle methodologies for certain sectors be developed to facilitate the use of LCC assessments and LCAs but to this day only one sector is covered by such a methodology and that is the sector of clean and energy-efficient road transport vehicles.

Developing methodologies for the measuring of life cycle costs is still predominantly the responsibility of the individual contracting authority. Sweden has commissioned an expert body (SEMCO) to elaborate such methodologies for national use to make it easier for Swedish authorities to use environmental criteria. Sweden is, however, as mentioned one of the top performers in GPP.

The major part of the proposed solutions of the new procurement directive to the challenges currently facing the mobilisation of GPP in the EU are measures intended to motivate the *voluntary* use of GPP. Mandatory sector specific standards and harmonised mandatory methodologies for LCC assessments currently covers very few sectors and the use of GPP is thus highly dependant on the political ambitions of the different member states in relation to GPP. Reports show that such ambition varies a lot between different member states where the top performers exhibit an uptake of environmental criteria in 60 % of the state's procurement processes while the underachieving states employ environmental criteria in less than 20 % of their procurement processes.

The fragmented green public procurement demand in the underachieving states threatens the objective of an EU-wide transition to a sustainable economy, which GPP is meant to support.

In addition to the important question on how to increase the uptake of GPP among contracting authorities in the EU is the question of how the market is likely to react to an increased uptake of GPP.

This thesis has shown that the efficiency of GPP in achieving environmental and economic objectives is largely dependant on the price sensitivity of producers and consumers in relation to changes in market prices due to GPP.

Furthermore, GPP is described as a market-based instrument in the *Europe 2020 strategy* but this thesis has shown that this denomination is not necessarily adequate to describe the particular features of GPP.

GPP differs from other market-based instruments, as it does not directly address price mechanisms in the market such as taxes or subsidies. GPP only affects the costs and benefits of alternative actions open to economic agents that choose to participate in GPP and thus have a limited scope for application.

Economic actors will decide whether or not to participate in GPP depending on how the environmental criteria are formulated and conduct a CBA based on the costs of complying with the requirements weighed against the economic value of being awarded with the public contract.

GPP, however, does not necessarily affect costs and benefits in a way that is *favourable* to the environment as strong environmental criteria are likely to deter tenderers from participating in GPP if the costs of complying with the criteria will exceed the potential economic benefits that might be gained from winning the contract. The voluntary element of GPP therefore potentially impedes the prospect of attaining environmental objectives such as emission abatement, as high polluting firms will often not be incentivised to engage in GPP processes.

Sustainable development is the core objective of GPP according to the *Europe 2020 strategy*, meaning the alignment of economic and environmental interests.

The high transaction costs currently linked to GPP cast doubt upon the economic efficiency of using this instrument to achieve sustainable development. The environmental benefits generated by GPP must outweigh the costs for GPP to be considered efficient according to a Kaldor-Hicks efficiency standard.

For GPP to be efficient in terms of generating substantial environmental benefits, it must be assessed whether this instrument addresses negative externalities. This thesis has shown that it is a complicated exercise to conduct a LCA and authorities, even from the top performing states, are generally discouraged from conducting such an analysis.

Furthermore, the elaboration of strong environmental criteria is likely to result in low participation of tenderers as mentioned above.

GPP can be used to favour tenderers who already produce green products and have a high environmental performance but to achieve sustainable development, GPP must incite conventional producers to alter their production processes and become more sustainable.

As GPP is currently regulated, it is questionable whether GPP will be efficient in achieving the goals set out in the *Europe 2020 strategy*.

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