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PUBLIC POLICIES AND ENVIRONMENTAL ISSUES IN INTERNATIONAL PUBLIC PROCUREMENT

by

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I. Introduction. Green Public Procurement, a market instrument for environmental protection. Difficulties in developing and implementing

The European Commission defines the Green Public Procurement (GPP) as a process whereby public authorities seek to procure goods, services and works which have reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured[1]. The GPP has great potential as a market tool of environmental protection. It is an effective means of reducing the environmental impact of public consumption and also of directing the behaviour of economic operators towards environmental protection standards that go beyond the minimum levels set by the legal system.

Public procurement accounts for around 19.4% (2009) of the Gross Domestic Product (GDP) of the EU. This shows its capacity to set trends in production and consumption. From an environmental perspective, it has great potential to steer the market and economic operators toward the development of products, services and works with environmental characteristics and encouraging, as a result, business innovation[2].

Directive 2004/18/EC, 31 March 2004, on the coordination of procedures for the awarding of public works contracts, public supply contracts and public service contracts, has allowed the environment to be taken into account in the different phases of the contract procedure. Nevertheless, the application of the GPP gives rise to certain difficulties in the Member States. Firstly, the lack of knowledge about the economic benefits and a misperception of the magnitude of the costs[3]. Eventually the higher purchase prices of the GPP are in many cases compensated for by lower operating costs [4]. In order to change this view, it is necessary to train the contracting authority, as well as design methodologies for analysing costs throughout the life cycle of the services, products or works. The second limiting factor to the development of the GPP is the lack of clarity on the legal possibilities of the use of criteria and environmental clauses in the framework of the procurement procedure. This lack of legal certainty discourages the initiative of the contracting authorities for fear of establishing contractual clauses or awarding contracts in breach of the principle of equality and non-discrimination. Thirdly, another obstacle is the lack of information and tools for the GPP and of adequate training structures, and the lack of easy to implement GPP criteria. The difficulty or the substantial time for adequate assessment of environmental costs, in the absence of methodologies and adequate information, is a disincentive to integrate environmental considerations into public purchasing decisions[5]. There is a need to

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[1] Commission staff working document accompanying the Communication from the Commission "Public procurement for a better environment - Summary of the impact assessment" (SEC (2008) 2125, 16.7.2008), 3.

[2] Communication from the Commission "Public procurement for a better environment" (COM (2008) 400, 16.7.2008), 3.

[3] GPP may involve greater costs in certain types of contracts. In such cases, the joint procedures for procurement can generate economies of scale through the grouping of the demand, thereby reducing the administrative costs (Commission staff working document (2008), 7).

[4] Commission staff working document accompanying the communication from the Commission "Public procurement for a better environment", SEC (2008) 2126 final, 9.

[5] OCDE, *Marchés publics et environnement: problems et solutions pratiques* (2000), 92.

further promote the exchange of information and experiences amongst the regional and local authorities.

GPP and the requirement of high environmental standards allow configuring a responsible public market and excluding the companies that do not comply with environmental standards content in the tender conditions. GPP is a tool for States to achieve a more efficient use of resources, to influence the trends of production and consumption, to contribute to the construction of a model of sustainable socio-economic development and, consequently, in order to give answers to the current economic crisis. In fact, GPP is a market-based instrument of special importance in the socio-economic development strategy, "Europe 2020". However European Union has established legal limits and developed basic environmental standards to ensure uniformity in using environmental considerations in public procurement and to avoid risks to free competition, the market transparency and equal treatment.

The objective of this work is therefore examine that margin have States to use the green public procurement as a tool of orientation of the market and the economy, in accordance with the limits of the international and EU law on public procurement.

In the next section, I briefly mention the current legal and political framework of green procurement in international and European law. Then I look into what are the procedures and principles that must be respected by the states to implement the GPP.

II. Current legal and political framework of green procurement in international and European law

A. Agreement on Public Procurement and other international agreements

Since the 1970s there has been a trend toward the internationalization of the system of public procurement[6], as one expression of the processes of legal globalization in administrative issues[7]. National legislation has been brought closer to the international level with regards to public procurement, with the aim[8] of reducing the risk of discrimination and lack of transparency in the access to public markets. This approach was reflected initially with the approval of the Agreement on Government Procurement of 1979 which entered into force in 1981. This agreement was revised to broaden its scope and application, which gave rise to the adoption of the Agreement on Government Procurement (hereinafter GAP). The GAP was signed in Marrakesh on April 15, 1994 and is incorporated into Annex 4 to the Marrakesh Agreement establishing the WTO.

The EU is party to the GAP[9], so this is part of the EU legal order. It is binding on both the EU Institutions and the Member States[10]. It has made an impact on the configuration

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[6] ESTORNINHO, M. J., *Direito europeu dos contratos públicos* (Almedina, Coimbra, 2006), 28 ff.

[7] MEILÁN GIL, J. L., "Global administrative law and human Rights", and RODRÍGUEZ-ARANA MUÑOZ, Jaime, "Approach to the principles of global administrative law", in ROBALINO-ORELLANA, J., *Global administrative law* (Cameron May, London, 2010).

[8] OCDE, op. cit., 43.

[9] Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, with regards to matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986-1994).

of EU law on public contracts, which in general terms is fully compatible with this Agreement[11].

The GAP does not refer to the environment. This does not preclude the integration of criteria or environmental clauses in public procurement procedures, provided that they comply with the requirements of transparency and non-discrimination of the Agreement. In fact they offer a flexible framework for the contracting authorities to take environmental factors into account in the different phases of the procurement procedure[12].

The review of the Agreement (2012)[13], not yet in force, has provided legal certainty on the use of public procurement as a tool to contribute to the achievement of environmental goals. The new text expressly provides the integration of environmental considerations as technical specifications (article X.6) and as award criteria (article X.9).

On the other hand, at international level we must highlight the adoption of the Model Law on Procurement of Goods, Construction and Services (1994), by the United Nations Commission on International Trade Law. The adoption of this Model Law (which is not legally binding on the parties) is justified because of the unsuitability of the existing regime in some countries, or by their absence. This document is clearly influenced by EU law although their level of requirement is clearly lower[14]. This Model Law does not contain provisions on the use of environmental and social clauses[15]. On July 1st, 2011, the new UNCITRAL Model Law on Public Contracts was approved. This law aims to reflect the new practices, such as the use of electronic communications in public procurement, or the experience gained in the implementation of the Model Law as the basis for legislative reforms[16]. It integrates the possibility that contracting authorities can require suppliers or contractors who possess "professional, technical and environmental qualifications", that

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[10] MORENO MOLINA, J. A., "Acuerdo sobre contratación pública de la OMC", in BERMEJO VERA, J. (dir.), BERNAL BLAY, M. A. (coord.), *Diccionario de contratación pública* (Iustel, Madrid, 2009) 29.

[11] MEILÁN GIL, J. L., op. cit., 31.

[12] MCCRUDDEN considers that "*GPA was capable of being interpreted to give significant legal space to procurement linkages* (…)" (*Buying social justice. Equality, government procurement and legal change* (Oxford University Press, 2007) 573 and 593). See also KUNZLIK, P., "Régime des marchés publics à l'échelle internationale et possibilités d'intégration de facteurs environnementaux dans les achats publics", in *La performance environnementale des marchés publics. Vers des politiques cohérentes* (OCDE, 2003) 170.

[13] See the initial proposal on WTO, GPA/W/297, 11.12.2006. The legal checks and linguistic equivalence of the revision of the GAP have been completed in 2010 (WTO, GPA/W/313, 16.12.2010). See, about the proposal, ANDERSON, Robert, D., "Renewing to WTO agreement on government procurement: progress to date and ongoing negotiations", *Public Procurement Law Review*, No. 16, 2007. The Committee on Government Procurement (WTO) adopted on 30 March 2012 the revised Government Procurement Agreement after a final review required by the Ministerial Conference decision in December 2011 (GPA/113, 2 de abril de 2012, http://www.wto.org/english/news_e/news12_e/gpro_30mar12_e.htm [accessed may 29, 2012]).

[14] MORENO MOLINA, J. A., op. cit., 32 and 33.

[15] ARROWSMITH proposed amending it to regulate this issue in the Model Law ("Public procurement: an appraisal of the UNCITRAL Model Law as a global standard", *International and Comparative Law Quarterly*, No. 53, January 2004, 44).

[16] See http://www.uncitral.org [accessed December 11, 2011].

they consider appropriate in the circumstances of the contract to be awarded (article 9.2 (a). It also allows the "environmental characteristics" to be used as criteria for the evaluation of tenders (article 11.2 (b).

B. The stages of consideration of environmental issues in public procurement law in the European Union

Since 1998, the EU has developed a comprehensive strategy for the implementation of the principle of environmental integration of the current article 11, TFUE. This principle implies that the requirements for environmental protection must be integrated into the definition and implementation of the Union's policies and activities, with the purpose that they all contribute to the EU's objective of sustainable development. This process has been developed through specific integration strategies for each policy of the EU, amongst which is the internal market (1999)[17].

The GPP has been developed within the framework of the community strategy for the integration of the environmental considerations in the EU's policy on the internal market. In 2001 the European Commission stated that sustainable development involves "that the legislative framework [of public procurement] should facilitate the taking into account of environmental concerns alongside its primary economic purpose"[18].

Due to the effects of the principle of integration, public procurement incorporated additional objectives to contribute to the goals of EU environmental policy; it assumes the status of a market-based instrument at the service of environmental sustainability[19]. This not only undermines their objective of guaranteeing the principle of free competition in access to public procurement[20], but, rather, redefines it in light of the EU's objective of sustainable development.

The first steps taken, in this sense, at the EU level were produced from the last years of the nineties, with various documents and statements of the European Commission[21]. However, the possibility of using clauses or environmental criteria in public procurement procedures has been initially interpreted in a very restrictive way.

In 2001, the Commission took, albeit with certain caution, the first step. They published the interpretative communication on the possibilities for integrating environmental considerations into public procurement[22]. In 2003, the Commission encouraged the

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[17] Communication from the Commission to the European Parliament and the Council, "Single Market and Environment", COM (1999) 263 final, Brussels 8.6.1999.

[18] Commission interpretative communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, COM (2001) 274, final, Brussels 4.7.2001, 5.

[19] GIMENO FELIÚ, J. M., *Novedades de la Ley de contratos del sector público de 30 de octubre de 2007 en la regulación de la adjudicación de los contratos públicos* (Civitas, 2010) 21.

[20] GONZÁLEZ GARCÍA, J., "Sustainability and public procurement in the Spanish legal system", in CARANTA, Roberto, TRYBUS, Martin, *The Law of green and social procurement in Europe*, (DJÆF, 2010) 248.

[21] Communication from the Commission "Public procurement in the European Union" (COM (1998) 143 final, Brussels 11.3.1998); and "Single Market and Environment", (COM (1999) 263 final, Brussels 8.6.1999).

[22] COM (2001) 274, final, Brussels 4.7.2001.

Member States to adopt an action plan for "greener public procurement"[23]. Despite these guidelines, until 2004, European public procurement law hasn't incorporated any reference to the environment. This happened with the approval of the new directives in 2004.

During the adoption of the Directive 2004/18/EC one of the most controversial issues was the integration of social and environmental objectives in public procurement law[24]. It was finally allowed, although with a greater margin for the consideration of the environmental concerns against the social considerations. The directive justifies the integration of environmental requirements and defines the objectives that, in this sense, it seeks to achieve:

> "*Under Article 6 of the Treaty, environmental protection requirements are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of that Treaty, in particular with a view to promoting sustainable development. This Directive therefore clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts*" (recital 5).

After the adoption of the Directives in 2004, the Commission has contributed in the promotion of the GPP by developing tools to facilitate the implementation of the GPP by the contracting authorities of Member States. In this sense, the *Handbook on environmental public procurement* to facilitate the implementation of GPP is particularly interesting to the contracting authorities of the Member States (2005, 2011)[25], along with other tools to guide and to inform the public authorities[26].

The EU strategy of GPP, "Public Procurement for a Better Environment" (2008)[27], has been developed in the framework of the EU Strategy of Sustainable Development and the Action Plan on Sustainable Consumption and Production (2008)[28]. This strategy is based on the adoption of a package of measures to support recommendations and uniform criteria to increase and improve the GPP in the EU. The strategy considers it a priority that environmental criteria used by States are compatible, to avoid distortions in

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

[24] ARNOULD, Jöel, "Secondary policies in public procurement: the innovations of the new directives", *Public Procurement Law Review*, No. 13, 2003, 188.

[25] EUROPEAN COMMISSION, *Buying Green! A Handbook on environmental public procurement*, 2005. On 25th October 2011 the European Commission has published a fully revised version of this handbook on green public procurement.

[26] See Web *Green Public Procurement* de la Comisión Europea: http://ec.europa.eu/environment/gpp/index_en.htm [accessed November 10, 2011]

[27] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Public procurement for a better environment" (COM (2008) 400, 16.7.2008).

[28] See Council Conclusions of 4th December 2008 "Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan" (ref. 16914/08); Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan (COM (2008) 397 final, Brussels 16.7.2008).

the market and competition. For this purpose, the Commission is launching a process of determination of voluntary common criteria in certain priority sectors. The European Commission are adopting types of criteria, “core” and “comprehensive”, for the purpose that contracting authorities are able to choose a more or less intense integration of the environmental considerations.

The European Commission has rejected, for the time being, using binding legal instruments to impose the GPP on the states. It has been estimated that this strategic option is the most effective in dealing with the problems related to the lack of information on costs and benefits, the lack of legal clarity and a widespread lack of harmonized information and tools for GPP[29].

The potential of public procurement for the achievement of environmental objectives has been reflected also in policies and rules of different fields, such as in the fight against illegal deforestation[30], or sustainable mobility where we highlight Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles. Furthermore, we must mention the Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services, which require the Member States to adopt measures to integrate the energetic efficiency in the tenders[31].

Public procurement has gained strength as a market tool so as to reinforce the goals not only of the EU’s environmental policy, but also of other public policies (industrial, innovation). This is particularly evident in the EU strategy for socio-economic development for the next decade, "Europe 2020 ", as well as in the actions aimed at the

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[29] Commission staff working document (2008), 5 and 6.

[30] The European Commission has recommended the inclusion of technical specifications in the supply contracts and special performance conditions for work contracts, to ensure that the timber products have been produced in a legal and sustainable manner. It also recommends that contracting authorities define award criteria on sustainable management of forests, such as a form of gradual introduction of the goals for the protection of forests in public procurement (*Commission staff working document…,* op. cit., 8 and 9).

[31] The Directive 2006/32 obliges States to adopt two measures to choose amongst the group of measures provided for in annex VI, entitled “List of eligible energy efficient public procurement measures”. The Directive establishes these measures “in the context of the exemplary role of the public sector” (Annex VI). The eligible measurements are the following ones: (a) requirements concerning the use of financial instruments for energy savings, including energy performance contracting, that stipulate the delivery of measurable and pre-determined energy savings (including whenever public administrations have outsourced responsibilities); (b) requirements to purchase equipment and vehicles based on lists of energy-efficient product specifications of different categories of equipment and vehicles to be drawn up by the authorities or agencies referred to in Article 4(4), using, where applicable, minimised life-cycle cost analysis or comparable methods to ensure cost-effectiveness; (c) requirements to purchase equipment that has efficient energy consumption in all modes, including in standby mode, using, where applicable, minimised life-cycle cost analysis or comparable methods to ensure cost-effectiveness; (d) requirements to replace or retrofit existing equipment and vehicles with the equipment listed in points (b) and (c); (e) requirements to use energy audits and implement the resulting cost-effective recommendations; (f) requirements to purchase or rent energy-efficient buildings or parts thereof, or requirements to replace or retrofit purchased or rented buildings or parts thereof in order to render them more energy-efficient. Member States shall facilitate this process by publishing guidelines on energy efficiency and energy savings as a possible assessment criterion in competitive tendering for public contracts (article 5.1).

modernization of the public procurement policy in Europe[32]. The GPP is a central tool for the EU to achieve a more efficient use of resources in order to influence trends in production and consumption and, accordingly, to contribute to the construction of a European model of sustainable socio-economic development in the long term.

III. Environmental integration in international and European law of public procurement

A. Overview

The principle of free competition should not be understood in an absolute way. It may be limited on the basis of an overriding reason relating to public interest, such as environmental protection or public health, provided that these constraints are proportionate and do not break the principle of equal treatment. In this sense, Directive 2004/18 establishes that "*nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life or the preservation of plant life, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty*" (Recital 6).

To ensure that the incorporation of the environment into the public contract award procedures do not negatively impact on the implementation of the principles and rules of EU law in public contracts, Directive 2004/18 "*clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development*" (Recital 5). For this purpose, the European Union has adopted harmonized criteria and common recommendations within the Member States, to promote and ensure an adequate implementation of the GPP, so that it does not violate the principles of EU law on public contracts.

Beyond the content of the Directive 2004/18, the integration of public considerations can be reinforced by environmental law, which is currently focused on the implementation of policies and objectives of the fight against climate change. This is the case, for instance, of the Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles. Since December 4, 2010, contracting authorities and other entities are obliged to take into account the energy and environmental impact of vehicles during their useful life, including energy consumption and CO_2 and other pollutant (NOx, NMHC and particles) emissions, when they purchase vehicles for transport on road (Article 5, Directive 2009/33).

B. Preparation of the contract

1. Definition of the subject of the contract

The pre-tendering phase is the moment that offers the greatest possibilities to incorporate environmental considerations. Moreover, later phases of public contract procedure (award and execution) are based on the pre-tendering phase[33], which

[32] See Green Paper on the modernisation of EU public procurement policy. "Towards a more Efficient European Procurement Market", COM (2011) 15 final, 27.1.2011.

[33] On the integration of the social aspects in public procurement, the European Commission has stated that "[t]he preparatory stage is also the best opportunity to identify which social

determine the level of effective integration of environmental considerations in a specific procedure.

The object refers to the product, service or work that the contracting authorities want to procure. Contracting authorities enjoy a wide margin for the determination and, consequently, the definition of their own needs. The determination of the object of the contract is the key element for an adequate and viable incorporation of environmental considerations. Environmental legislation may constrain this freedom of choice, as is the case with the rules of environmental impact assessment[34].

When it comes to defining the subject of the contract, the contracting authorities will have to respect the principles of the Treaty, particularly the principles of non-discrimination, freedom to provide services and free movement of goods, with the aim of avoiding distortions in competition. The contract's subject-matter can't prevent access to national public markets to economic operators.

2. Technical specifications. Special reference to eco-labels as a tool to identify environmental technical specifications

2.1. Overview

After the determination of the contract subject-matter, the contracting authority shall specify their content by defining technical specifications. At that moment, the technical characteristics of the service, supply or the work, which are to be put out to tender, are required.

The GAP doesn't refer to the possibility of defining environmental technical specifications in its article VI.1. However, it contains an illustrative list of technical specifications, allowing a margin of appreciation for the States to determine the characteristics of the products or services, which are limited by the principle of non-discrimination. The review of the Agreement (2012), not yet in force, expressly declares the possibility of setting technical specifications intended to achieve environmental objectives:

> *"For greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment"* (article X.6).

From the perspective of EU law, technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition (article 23.2, Directive 2004/18).). It must be therefore linked to the contract subject-matter, be transparent and non-discriminatory. To achieve this result, how must it be defined within such technical specifications?

Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such references shall be permitted on an

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considerations are relevant and appropriate to be taken into account in that particular procedure" (EUROPEAN COMMISSION, *Buying Social. A Guide to Taking Account of Social Considerations in Public Procurement*, 2011, 20).

[34] Commission interpretative Communications, COM (2001) 274, final, Brussels 4.7.2001.

exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to articles 23.3 (ways to formulate technical specifications) and 23.4 (ban of rejection of bids that comply in an equivalent manner to the requirements defined by reference of technical standards). As in any case, such references shall be accompanied by the words "or equivalent" (article 23.8, Directive 2004/18)[35].

In order to reduce the possibility that environmental technical specifications are used as a means of discrimination and, consequently, of distortion of competition, the Commission has developed, and is developing, criteria at EU level. This process takes place on the basis of instruments and regulations of the EU, such as eco-labels in the EU, the requirements of the *Energy Star*[36] regulation or directives on eco-design of products[37].

All of them are objectives, accessible and transparent references for the determination of common technical specifications that limit the risks of discrimination and favouritism in the award procedures. The determination of common criteria gives response also to one of the current problems of the GPP: the uncertainties about how to probe compliance with the technical specifications, which the tenderers must demonstrate.

The Directive defines two concepts of technical specification in Annex VI, one for public works contracts, and the other is for public supply contracts or public services contracts. Both concepts establish that the technical specifications define the characteristics required of the material, product, supply or service. Among these features both include “levels of environmental performance” (Anexo VI, lettters A and B).

Contracting authorities can define technical specifications “in terms of performance or functional requirements; the latter may include environmental characteristics” (article 23.3, letter b, LCSP). The European Commission considers that the use of technical specifications based on the performance or functional requirements allows a wider margin of creativity in the market and, in some cases, it will be a challenge for innovative solutions. In addition, the contracting authority doesn’t need to go into too many details in determining technical specifications[38].

Environmental technical specifications defined in terms of performance or functional requirements must be sufficiently precise to allow tenderers to determine the subject-

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[35] Commission interpretative Communications, COM (2001) 274, final, Brussels 4.7.2001, 9. The CJEU declared clearly on this issue in the judgement *Comission/Irland* (C-45/87), [22.9.1988], 22. It was a case in which a contracting authority had been included in a tender dossier, on a public works contract, a clause which imposed that the materials to be used would have to have obtained the certificate of conformity with a national technical standard. The CJEU considered that a clause of this type impeded imports. The economic operators, which used materials equivalent to certificates, refrained from submitting bids. See also in this regard, the judgment of the CJEU *Commission/Spain* (C-71/1992) [17.11.1993], 62 and 63.

[36] Regulation (EC) 106/2008 of the European Parliament and of the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment. This regulation requires the community institutions and the authorities of the member States to acquire office equipment that meet certain energy efficiency requirements.

[37] Communication from the Commission “Public procurement for a better environment” (COM (2008) 400, 16.7.2008), 6 y 7.

[38] EUROPEAN COMMISSION, *Buying Social. A Guide to Taking Account of Social Considerations in Public Procurement*, 2011, 30.

matter of the contract and to allow contracting authorities to award the contract (Article 23.3, Letter b), Directive 2004/18). The introduction of concepts which are vague or difficult to define must be avoided, which puts the fulfilment of the environmental objectives of the contracting authority at risk. Thus, tenderers could have serious difficulties in applying and probing the respect for technical specifications. The European Commission declared that these functional specifications must be, in first place, *"(…) specific about the outcomes and output required and encourage bidders to use their skills and experience to devise solutions". Secondly, they have to be "(…) sufficiently broad to allow bidders to add value, but not so broad that they feel exposed to risks that are difficult to quantify and therefore inflate their prices*"[39].

Contracting authorities can establish greater requirements than those laid down in European and national environmental law, provided that the required level doesn't limit participation in the contract and it doesn't cause any discrimination.[40]. In this sense we can highlight the EU regulation which establishes the requirement of prescribed eco-design conditions for energy-using products[41]. The EU has adopted these requirements for different types of products. These mandatory design requirements can serve as a reference for the determination of more demanding technical specifications. In addition, in some cases these standards set out non-compulsory criteria for certain products (e.g., products intended to be used in the illumination of offices and lighting of public roads in regulation 244/2009). These parameters indicate the products and technologies of better performance available on the market at the time of adoption of the regulations. These non-compulsory criteria may serve as a reference for the determination of technical specifications, which are more demanding than the legal requirements established for each product.

Moreover, Directive 2009/33 provides that the contracting authorities, contracting entities and operators, at the time of purchasing road transport vehicles, must apply at least one of the following options: set technical specifications for energy and environmental performance in the documentation for the purchase of road transport vehicles on each of the impacts considered, as well as any additional environmental impacts; or include energy and environmental impacts in the purchasing decision (article 5.3). Directive 2009/33/CE encourages contracting entities to set specifications of a higher level of energy and environmental performance than laid down in EU legislation, taking into account, for example, Euro norms which are already adopted but have not yet become obligatory (recital 21).

2.2. The public and private systems of eco-labelling schemes as a reference for the determination of the technical specifications

Contracting authorities may use eco-labels to define specifications in terms of performance or functional requirements in the conditions of tender. Article 23.6 of Directive 2004/18 provides that, in these cases, they may use the detailed specifications,

[39] *Ibid*.

[40] Commission interpretative Communications (2001), 10.

[41] Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-using products.

or, if necessary, parts thereof, as defined by European or (multi-) national eco-labels, or by any other eco-label[42]. To make this possible the directive lays down some conditions.

First, the specifications of the eco-labels must be appropriate in defining the characteristics of the supplies or services that are the object of the contract. Technical specifications governing the awarding of the label should therefore contribute in defining the characteristics of the provision. Only those that are linked to the subject of the contract may be used. It is not possible to use those linked to behaviour or environmental commitment by the producer, which are part of some eco-labels.

The second condition for the use of eco-labels as a reference is that the requirements for the label have been drawn up on the basis of scientific information. This might reflect the view that the EU suspects the States of setting up eco-labelling with the sole purpose of protecting or benefitting their production sectors. Directive 2004/18 does not say how a contracting authority can check compliance with this requirement, a task that does not seem easy to implement[43]. In this regard, public eco-labelling systems and those that offer a transparent procedure to define technical specifications seem to offer greater security.

In third place, the eco-labels should be adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations, can participate. The participation of different social actors and the open development of the criteria for granting labels ensure that the eco-labelling system is not used as a means of protecting the national economy, and integrates the environmental technical standards at a supranational level[44]. In some cases it will not be easy for contracting authorities to assess if there has been real and active participation in the procedure for defining criteria for granting environmental labels, and if this procedure takes into account all the interests and avoids giving preference to local production sectors[45].

According to the fourth condition, eco-labels have to be accessible to all interested parties. In this way it is essential that the rules for the granting of the eco-label are published. The rules should be easy to interpret and apply, as well as employing understandable scientific and technical concepts by economic operators in the European Union[46].

These provisions of the directive are intended to ensure a double objective. Firstly, the Commission was interested in preventing states from using eco-labels as a way of favouring national operators. Secondly, the European Parliament wanted to clarify the use of labels in the awarding procedures and, accordingly, increase the confidence of the contracting authorities[47].

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[42] WILSHER, Dan, "Reconciling national autonomy and trade integration in the context of eco-labeling", in ARROWSMITH, S., KUNZLIK, P., *Social and environmental policies in EC procurement Law* (Cambridge University Press, 2009) 424.

[43] WILSHER, Dan, op. cit., 427.

[44] WILSHER believes that supranational interest groups will have difficulties in participating in the process of definition of national eco-labelling schemes (Ibid., 428 and 434).

[45] Ibid., 428 and 429.

[46] Ibid., 429.

[47] Ibid., 422 and 423.

Given the possible difficulties arising from the implementation and verification of the fulfilment of the four above-described conditions, the Commission helps the contracting authorities with this task. In their view, the Commission considers that public eco-labels (such as the Blue Angel or the EU eco-label) guarantee requirements of adequacy, transparency, equal access, as well as the superior standards of scientific rigor in establishing criteria[48].

The GPP is an incentive to meet the environmental objectives of eco-labels and, indirectly, to its greater implantation in the market, due to the fact that having an eco-label is perhaps the easiest way to comply with technical requirements needed fort he awarding of the tender. This effect is reinforced by the adoption of common criteria for GPP by the Commission, which are based precisely on the requirements of the public eco-labelling systems already existing at EU level.

There are some limits to the use of eco-labels as a reference for the determination of the technical specifications. Firstly, contracting authorities may not require companies to be attached to any particular system of eco-labelling, a reasonable requirement to ensure respect for the principle of non-discrimination. Secondly, the Commission goes further. It declares that there might not to be a requirement "*to meet (all) the criteria for a specific label*". This exigency is not clear[49], and, in my opinion, is excessively restrictive. This approach does not seem to be justified according to the provisions of Directive 2004/18.

The principle of non-discrimination precludes the contracting authority from requiring a particular label and also from demanding the opening of the possibility of testing compliance with the detailed specifications (derived from an eco-label) by equivalent means of proof. However, it does not appear that the directive is opposed to the requirement of all the award criteria of a specific eco-label, provided that there isn't the intention of favouring a tenderer in a specific case and that all technical specifications are linked to the subject of the contract.

The criteria for granting multi-criteria public labels may not always integrate the technical requirements of a public contract. Some labels include criteria that are linked to the general management of the company that manufactures the product or that offers the service, and that relate to ethical aspects or similar. These criteria may not be included in contracts covered by the scope of these Directives, because they are not linked to the subject-matter of the contract[50].

Contracting authorities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents. Nevertheless, they must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body (article 23.6 *in fine*, Directive 2004/18). This requirement was envisaged in order that a

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[48] EUROPEAN COMMISSION, *Buying Green! A Handbook on environmental public procurement*, 2005, 13 y 20. Also look at ARROWSMITH, S., *The Law of public…*, op. cit., p. 1278.

[49] WILSHER, Dan, op. cit., 426.

[50] EUROPEAN COMMISSION, *Buying Green! A Handbook on environmental public procurement*, 2005, 21.

reference to national or private eco-labels doesn't assume a reservation of contract with national or local companies[51].

Eco-labels not expressly identified as means of proof by the contracting authorities may be used as alternative forms of proof. The diversity of environmental labels can generate confusion among contracting authorities, who might encounter difficulties in verifying the equivalence between them[52].

To facilitate use of EU eco-label criteria in public procurement procedures, Regulation 66/2010, November 25, 2009, provided that the criteria adopted for each category of product must be accompanied by a "manual for authorities awarding public contracts" (Article 7.1, Letter F, Annex I, Part A, Section 5)[53]. Member States shall encourage the use of this manual. For this purpose, Member States shall consider, for example, the setting of targets for the purchasing of products meeting the criteria specified in that Manual (article 12.3, Regulation 66/2010).

2.3. The possible content of environmental functional requirements

Contracting authorities may define technical specifications "in terms of performance or functional requirements; the latter may include environmental characteristics". However, Directive 2004/18 does not specify what the content may be of these environmental functional requirements. However, Recital 29 of Directive 2004/18 gives us some clues as to its content: "*a given production method, and/or specific environmental effects of product groups or services*".

The margins for the use of technical specifications relating to the consumption stage, that is to say, the visible characteristics and physical products, are clearer and less controversial than those for the imposition of conditions at the stage of production[54].

The Commission has pointed out that the concept of "technical specification" includes the possibility of requiring a type of basic materials or raw materials, demanding that the products contain a minimum percentage of material which has been recycled or reused or prohibiting the use of specific substances, which the national authorities consider harmful for the environment[55], provided that the principles of free competition, transparency and non-discrimination are respected.

The GAP does not distinguish between demands relating to products and processes. In fact, it establishes that the definition of technical specifications may integrate requirements relating to "the processes and methods for their production" (Article VI.1). However, it "shall not be prepared, adopted or applied with a view to, or with the effect

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[51] Commission interpretative Communications (2001), 11.

[52] Some authors demand the development of an objective analysis methodology for the comparison of the equivalences between eco-labels (PALIS, M., "Vers une intégration globale du développement durable?", *Contrats Publics*, No. 72, 2007, p. 41).

[53] The Commission will provide templates translated into all official Community languages for the manual for potential users and competent bodies and for the manual for authorities awarding public contracts (annex I. A.5, Regulation 66/2010).

[54] TREPTE, Peter, *Public procurement in the European Union* (Oxford, 2007) 290.

[55] Commission interpretative Communications (2001), p.10.

of, creating unnecessary obstacles to international trade" (Article VI.1)[56]. At the same time, the definition of technical specifications for the Directive 2004/18 refers explicitly to the "procedures and methods of production" (Annex VI). The Directive allows the definition of technical specifications to refer to the phase of production of the products.

Contracting authorities may require the use of a procedure or specific method of production if this contributes to determining the (visible or invisible[57]) characteristics of the performance of the product or service. The Commission has pointed out that the production process covers all the requirements and aspects of the manufacture of the product, which helps to determine the characteristics of the products, which are not necessarily visible in the finished product[58]. Each product is different to other identical ones from the point of view of their manufacture, as a result of a method or production process that is respectful to the environment having been used[59]. This is the case with timber from forests managed within sustainability criteria, food from organic farming and energy derived from renewable sources or recycled paper.

It is necessary to avoid the introduction of vague concepts, those which are difficult to define and without a legal or technical base, in the object and in technical specifications. This puts the fulfilment of the environmental preferences of the contracting authority at risk and may give rise to difficulties in trying to apply these clauses. The method of proof of production procedures assumes importance, given the identical nature of products developed through different production methods.

C. Selection of candidates to participate in the award: exclusion criteria and technical capacity

Directive 2004/18 establishes that any economic operator may be excluded from participation in a contract where that economic operator has been convicted by a judgment which has the force of res judicata in accordance with the legal provisions of the country of any offence concerning his professional conduct (45.2, c); or has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate (Article 45.2, Letter d). The Directive leaves in the hands of member states to specify, in accordance with their national law and having regard for

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[56] ARROWSMITH consider that GAP "(…) *it does not rule out measures limited to performance of the contract* (…), *including those on the production*" "Application of the EC Treaty and Directives to horizontal policies: a critical view", En ARROWSMITH, S., KUNZLIK, P., *Social and environmental policies in EC procurement Law*, Cambridge University Press, 2009, 177).

[57] See TREPTE, Peter, op. cit., 290 y 291.

[58] Commission interpretative Communications (2001), 11; *Commission staff working document…*, op. cit., 4.

[59] Some authors are critical of this open approach of the Commission. ARROWSMITH deem that "(…) the Commission's approach is conceptually incoherent, since the example given of "green" electricity does not actually meet the Commission's own test of affecting the product's performance characteristics" (2009), op. cit., 219). See also, KUNZLIK who considers it absurd and confusing. "The procurement of green energy" in ARROWSMITH, S., KUNZLIK, P., *Social and environmental policies in EC procurement Law* (Cambridge University Press, 2009), 394, 995 and 406).

EU law, the implementing conditions of implementation for the exclusion criteria[60] (Article 45.2, *in fine*). States may prohibit contracts being awarded to economic operators that have been sanctioned by breaches of environmental law, as it did for example the Kingdom of Spain in 2007.

Moreover, this Directive foresees specific provisions relating to the requirements of assessment and verification of the technical standing and ability of the tenderers at the contractor selection phase (article 48). The technical or professional solvency in environmental matter will be proven by the provision of documents to be determined by the contracting authority under article 48.2 of Directive 2004/18.

Some of the general references specifically listed in the Directive are in some cases related to the environmental aspects, such as experience and professional qualifications of the staff. However, we will focus on those aspects of the Directive which allude to the technical capacity in environmental management.

Recital 44 of the Directive 2004/18 declares that *"(…) environmental management schemes, whether or not they are registered under Community instruments such as Regulation (EC) No 761/2001(17) (EMAS), can demonstrate that the economic operator has the technical capability to perform the contract"*. The interrelationship between the regime of public procurement and the Community eco-management and audit scheme (EMAS) has been highlighted in the same way in the Regulation (EC) No 1221/2009 of the European Parliament and the Council of 25 November 2009 on the voluntary participation of organisations in a Community eco-management and audit scheme (EMAS):

> *"They [the Commission and the member states] should also, in order to raise the appeal of EMAS for organisations, take account of EMAS in their procurement policies and, where appropriate, refer to EMAS or equivalent environmental management systems as contract performance conditions for works and service"* (recital 5).

Directive 2004/18 establishes that technical solvency may be proven "only in appropriate cases "*by the indication of the environmental management measures that the company* "*will be able to apply when performing the contract*" in the public contracts of works or services (48.2, f). Required management measures will have to be directly linked to the subject-matter of the contract; in other words, they must be necessary to perform the contract. They will neither demand measures that don't observe the subject-matter of the contract, nor go beyond its duration[61]. If it is not necessary for the performance of the contract a specific environmental management capacity may not be excluded from candidates or tenderers by the lack of accreditation of its overall capacity for environmental management or by non-compliance with certain environmental objectives pre-established by the contracting authority[62].

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[60] ARROWSMITH argues that it is not clear that these wide provisions of the directive are compatible with the current text of the GAP (2009), op. cit., 248).

[61] EUROPEAN COMMISSION, *Buying Green! A Handbook on environmental public procurement*, 2005, 31.

[62] KUNZLIK point out that the article VIII, b, GAP supports, in his view, the requirement of environmental management capacities for the performance of the contract. However, in line with what was suggested in the main text, KUNZLIK says: "*if the contract does not itself*

The recital 44 of Directive 2004/18 highlights that *“[i]n appropriate cases, in which the nature of the works and/or services justifies applying environmental management measures or schemes during the performance of a public contract, the application of such measures or schemes may be required”*. It could be required in the case of contracts with an impact on the environment and that therefore need protection measures during the execution[63]. In those situations the implementation of measures or an environmental management system has an impact on the quality of the supply or the company's capacity (for example, equipment and technical) to execute a contract with environmental requirements - for example, a works contract in which a contractor will have to deal with the waste at the place of construction-[64].

The possible requirement of technical or professional solvency to implement environmental management measures in the performance of the contract is provided in article 50 of the Directive 2004/18, that specifies the means of accrediting the aforementioned capacity:

> *“Should contracting authorities, in the cases referred to in Article 48(2)(f), require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain environmental management standards, they shall refer to the Community Eco-Management and Audit Scheme (EMAS) or to environmental management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures from economic operators.”*

The contracting authorities may require the presentation of certificates issued by independent bodies to demonstrate that the employer meets certain environmental management standards. However, the Directive does not require economic operators that have a specific environmental management system in accordance with a particular public (such as the EMAS regulation) or private norm (such as ISO 14000). The European Commission has declared that as well as not being able to require registration with EMAS, it can neither demand their full exigengys[65].

Economic operators must be able to prove the environmental management capacity for "equivalent means", which can ensure the same level of environmental protection. Directive 2004/18 points out, in Recital 44, that *“(…) a description of the measures implemented by the economic operator to ensure the same level of environmental protection should be accepted as an alternative to environmental management registration schemes as a form of evidence”*. In addition, the independent bodies supporting the equivalent environmental management capacity do not have to be a body recognized by the community legislation in the EMAS or by any certification body accredited[66].

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require a specified level of environmental performance, then it would not appear permissible to exclude contactors on the basis of their lack of environmental credentials” (1998) op. cit., 205).

[63] EUROPEAN COMISIÓN (2005), op. cit., 30.
[64] Commission Interpretative Communications (2001), 7.

[65] EUROPEAN COMISIÓN (2005), op. cit., 31.
[66] ÁLVAREZ GARCÍA, Vicente, *Industria. Derecho de la regulación económica. Tomo VII,* (Lustel, Madrid, 2010) 750.

In the case *Evropaïki,* which was resolved by General Court of the European Union,[67] the issue of proof was raised. In practice it may be difficult to establish the technical capacity for environmental management by "equivalent means". Although the contracting authorities may not require registration in the EMAS scheme or in another specific system of environmental management, joining one of them could come to be perceived by economic operators as being absolutely necessary to prove their solvency in implementing environmental management measures in the performance of the contracts as required.

D. The use of environmental characteristics as criteria for awarding contracts

Prior to Directive 2004/18/EC, Directives 92/50, 93/36 and 93/37 of public procurement did not explicitly include environmental characteristics as criteria for assessing the bids. When the contract was awarded to the most economically advantageous offer, the Directives reflected this in an “illustrative”, but not exhaustive, list [68] of assessment criteria for the awarding of contracts, which did not include the environmental characteristics. The CJEU stated that these provisions left it to the contracting authority to choose the award criteria. However such a choice could only lie in criteria aimed at identifying the most economically advantageous offer[69]. Starting from this premise, it was necessary to clarify whether it was possible to use environmental criteria for awarding public contracts.

The Court accepted this possibility in their judgement of September 17, 2002, in the *Concordia* case[70]. This case refers to a service contract for public transport. The evaluation criteria specified in the tender notice were the overall price of the exploitation, the quality of the buses and the operator's quality and environmental management. Notably in this case, the CJEU replied to a prejudicial question regarding the possibility of using environmental criteria in the awarding of a public contract, in the framework of Directive 92/50 on the coordination of procedures for the award of public contracts for services. In particular, it wondered whether the criteria to assess the most economically advantageous offer, the reduction of nitrogen oxide emissions, noise level and consumption of vehicles could be included. In this case, the contracting authority had already established that if emissions were lower than a certain level, they would be assigned additional points for the offers with these environmental characteristics.

The CJEU decided that the contracting authorities, within their freedom of choice, can use environmental criteria in the award of the contract:

> *“54. In order to determine whether and under what conditions the contracting authority may, in accordance with Article 36(1)(a), take into consideration criteria of an ecological nature, it must be noted, first, that, as is clear from the wording of that provision, in particular the use of the expression ‘for example’, the criteria which may be used as criteria for the award of a public contract to the economically most advantageous tender are not listed exhaustively (…).*

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[67] CJEU *Evropaïki* (T-331/06) [8.7.2010].

[68] CJEU, *SIAC Construction* (case C-19/00) [18.10.2001], Paragraph 35.

[69] CJEU, *Beentjes* (case C-31/87) [20.9.1988], Paragraph 19.

[70] CJEU, *Concordia Bus Finland Oy Ab* (case C-513/99) [10.9.2002].

55. Second, Article 36(1)(a) cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature. It cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority. That conclusion is also supported by the wording of the provision, which expressly refers to the criterion of the aesthetic characteristics of a tender.

(…)

57. In the light of that objective and also of the wording of the third sentence of the first subparagraph of Article 130r(2) of the EC Treaty, transferred by the Treaty of Amsterdam in slightly amended form to Article 6 EC, which lays down that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities, it must be concluded that Article 36(1)(a) of Directive 92/50 does not exclude the possibility for the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender.

58. However, that does not mean that any criterion of that nature may be taken into consideration by the contracting authority."

The CJEU supports the use of environmental criteria to assess the offers, but under certain conditions:

""69. *(…) Article 36(1)(a) of Directive 92/50 is to be interpreted as meaning that where, in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination*."[71]

The Court requires, among other conditions, that the award criterion is linked to the subject-matter of the contract and not with any subjective conditions or characteristics of the economic operator:

"*59. While Article 36(1)(a) of Directive 92/50 leaves it to the contracting authority to choose the criteria on which it proposes to base the award of the contract, that choice may, however, relate only to criteria aimed at identifying the economically most advantageous tender (…). Since a tender necessarily relates to the subject-matter of the contract, it follows that the award criteria which may be applied in accordance with that provision must themselves also be linked to the subject-matter of the contract.*

(…)

65. With respect to the main proceedings, it must be stated, first, that criteria relating to the level of nitrogen oxide emissions and the noise level of the buses,

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[71] See also paragraph 64.

such as those at issue in those proceedings, must be regarded as linked to the subject-matter of a contract for the provision of urban bus transport services".

Maintenance of linkage with the object of the contract guarantees a proper balance between the objectives of public policy, and the efficient use of public money to acquire benefits with a good quality/price ratio. It also reduces the risks of a breach of the non-discrimination principle.

In the case of Concordia, CJEU ruled that *"(…) criteria whereby additional points are awarded to tenders which meet certain specific and objectively quantifiable environmental requirements are not such as to confer an unrestricted freedom of choice on the contracting authority."*[72]. Therefore, in order to fulfil this condition, the environmental criteria must be "sufficiently specific and quantifiable objectively", in a way that restricts the scope of action of the contracting authority.

The Court also pronounced on whether the principle of equality can be violated if only one company is able to offer a provision that complies with the environmental criteria established, and consequently benefits from a better assessment of its tender. In this particular case the winning company was the only one that had vehicles that complied with the maximum emission levels set down as an award criterion. One of the parties argued that, in establishing these emission levels, the procuring entity intended to award the contract to a company of its own, who eventually won the contract, which already had the appropriate vehicles to reach these levels.

The CJEU decided the following:

> *"83. In the present case, it should be noted, first, that, as is apparent from the order for reference, the award criteria at issue in the main proceedings were objective and applied without distinction to all tenders. Next, the criteria were directly linked to the fleet offered and were an integral part of a system of awarding points. Finally, under that system, additional points could be awarded on the basis of other criteria linked to the fleet, such as the use of low-floor buses, the number of seats and tip-up seats and the age of the buses.*
>
> *84. Moreover, as Concordia acknowledged at the hearing, it won the tender for route 15 of the Helsinki urban bus network, even though that invitation to tender specifically required the operation of gas-powered vehicles.*
>
> *85. It must therefore be held that, in such a factual context, the fact that one of the criteria adopted by the contracting entity to identify the economically most advantageous tender could be satisfied only by a small number of undertakings, one of which was an undertaking belonging to the contracting entity, is not in itself such as to constitute a breach of the principle of equal treatment.*
>
> *86. In those circumstances, the answer to the third question must be that the principle of equal treatment does not preclude the taking into consideration of criteria connected with protection of the environment, such as those at issue in the main proceedings, solely because the contracting entity's own transport undertaking is one of the few undertakings able to offer a bus fleet satisfying those criteria."*

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[72] CJEU *Concordia Bus Finland Oy Ab* (C-513/99) [19.9..2002], paragraph 66.

The possibility of using environmental criteria in the awarding of contracts is also considered in the case *Wienstrom GmbH*, which was adjudicated by the CJEU in its judgment of December 4, 2003[73]. The preliminary questions were raised in the framework of a dispute between a group of companies and a contracting entity from Austria, regarding the environmental criteria used in the award procedure of an energy supply contract.

In this case, the supplier had to undertake to supply the federal services, to the extent that it would be technically possible, energy generated from renewable energy sources. The procuring entity manifested in the conditions of the tender that no supplier could effectively guarantee that the electricity supplied could come from renewable energy sources. However, the contracting authority was required that tenderers could supply at least 22.5 GWh per year of electricity generated in this this way, a quantity that was consistent with the estimated consumption of federal services. The award criteria were net price per kWh, with a weighting of 55 %, and the energy generated from renewable energy sources, with a weighting of 45 %. On the latter criteria, it was said that "only the amount of energy that can be supplied from renewable energy sources in excess of 22.5 GWh per annum will be taken into account".

The CJUE resolved that:

> *"(…) the Community legislation on public procurement does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, an award criterion with a weighting of 45% which requires that the electricity supplied be produced from renewable energy sources. The fact that that criterion does not necessarily serve to achieve the objective pursued is irrelevant in that regard."*[74].

The CJEU reiterates the conditions and requirements for the admission of the environmental criteria. However, it is interesting that the Court accepts an award criterion not referring to the physical characteristics or materials of a product, but to the method or process of production of that product.

Directive 2004/18/EC incorporates the jurisprudence of the Court of Justice concerning the use of environmental characteristics as award criteria. This regulation provides, for the first time, this possibility (Article 53.1 (a), provided that there is a guarantee of the principle of equal treatment and, consequently, to compare and evaluate the bids in an objective manner[75].

Moreover, the GAP establishes that awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation (Article XIII.4, Letter c), but does not indicate the assessment criteria that should or could be used by the procuring entity. Thus, the Agreement does not restrict the possibility of using technical characteristics as award criteria, provided that they respect the principles of non-

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[73] CJEU *Wienstrom GmbH* (Case C-448/01) [4.12.2003].

[74] Ibid., paragraph 72.

[75] As to the different ways of integration of environmental considerations in the phases of contracting procedure, ARROWSMITH considers that "(…) *award criteria may have a less restrictive effect on trade, and provide a more proportionate and effective approach, than other mechanisms, especially for policies directed at promoting long-term economic development of certain group*" (2009) op. cit., 199).

discrimination and transparency. In addition, the contract will be awarded to the lowest bidder or one that is considered the "most advantageous". It makes no reference to the “most economically advantageous offer”, which is the concept used in the Directive 2004/18. It would seem that the Agreement is open to the possibility of using non-economic assessment criteria. In line with this reasoning, the contracting authority would not be obliged to demonstrate an economic benefit derived from the application of environmental assessment criteria[76]. The review of the Agreement (2012), not yet in force, adds something more in terms of clarity to this issue, specifically, the use of environmental characteristics as award criteria:

> *“The evaluation criteria set out in the notice of intended procurement or tender documentation may include, among others, price and other cost factors, quality, technical merit, environmental characteristics and terms of delivery”* (article X.9)

Directive 2004/18 does not define what is meant by environmental characteristics, nor in what types of contracts they can be used; a question that national legislation can specify. In any case, the conditions must be measurable. There must be ways and methodologies that allow an objective assessment of these environmental conditions to be carried out, otherwise the principle of equality and the principle of transparency would be at risk. The contracting authority must be in a position to verify if the tenders submitted satisfy the award criteria[77]. In order to clarify this question, the contracting authority can specify the procedures and technical methods that must be used to assess the offers[78].

Could a contracting authority use environmental characteristics that make reference to "ecological production methods"? The European Parliament proposed to specify this possibility in the procedure for approval of the Directives 2004/18, but this proposal was rejected. However, the reason for this rejection was that the European Commission considered it pointless to the extent that the term "production methods" was included in the definitions of technical specifications contained in Annex VI:

> *“production methods play a part in the broader definition of the "environmental characteristics" that are explicitly mentioned among the criteria given as examples. Since the production methods are recognised in Annex VI as possible technical specifications, there is nothing to prevent these same specifications from constituting award criteria. It would therefore be otiose to mention them explicitly among the examples of criteria, which are anyway not an exhaustive*

[76] See MCCRUDDEN, C. (2007), op. cit., 486-488. KUNZLIK suggests on the provisions of the GAP: “*This means that in applying such environmental criteria it is not necessary for a contracting body to demonstrate any economic advantage in the application of the criteria, still less any economic advantage of direct benefit to itself. It is submitted that this is an appropriate approach since the principles underlying the GPA –transparency and no-discrimination- are not threatened by allowing contracting bodies to apply published award criteria which reflect values such as environmental values, which though objectively verifiable may not always be easily expressed in terms of economic benefits to the bodies concerned*” (KUNZLIK, P. (1999), op. cit., 206 and 207).

[77] CJEU, *Wienstrom GMBH* (Case C-448/01) [4.12.2003], paragraph 50.

[78] *Commission staff working document accompanying…*, op. cit., 5.

list."[79].

The obligation to take into consideration environmental characteristics on the part of the contracting authority has recently been introduced in the Community laws for the purchase of vehicles. To comply with this requirement Directive 2009/33/EC, of April 23, 2009, relating to the promotion of clean and energy-efficient road transport vehicles, provides the possibility of including environmental and energy impacts in the purchase decision. In cases where a public procurement procedure is carried out, these impacts will be applied as award criteria (article 5.3 (b)). This standard shows us that the advance of GPP can be seen reinforced notably from now on, more than through the general system of public procurement, through environmental standards or other sectors which require the consideration of the environmental variables in the purchasing decisions of certain provisions. This approach can allow for extra emphasis to be put on priority sectors for the development of the GPP, offering greater environmental performance and a good cost-benefit ratio.

E. The question of contract performance clauses

Contracting authorities may lay down conditions relating to the performance of a contract[80], provided that these are compatible with EU law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern environmental considerations (Article 26, Directive 2004/18). However, it must be borne in mind that the definition of the object of the contract and the requirements of implementation can come predetermined by the environmental conditions arising from the procedure for the assessment of environmental impact, particularly in relation to work contracts or public works concession.

Tenderers must accept the performance conditions contained in the tender conditions, as otherwise their offers may not be accepted[81]. But what happens in the case that the tenderer accepts the performance conditions, but the contracting authority considers that there is a risk of non-compliance with this commitment? Can you also exclude the tenderer? Arrowsmith considers, in the line marked by the Commission, that we must differentiate between technical specifications and performance conditions. In the first

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[79] Opinion of the Commission pursuant to Article 251 (2), third subparagraph, point (c) of the EC Treaty, on the European Parliament's amendments to the Council's common position regarding the proposal for a Directive of the European Parliament and of the Council coordinating the procedures for the award of public works contracts, public supply contracts and public service contracts amending the proposal of the Commission pursuant to Article 250 (2) of the EC Treaty (COM (2003) 503 final, 14.8.2003).

[80] ARROWSMITH expresses her doubts about this way to integrate environment in the award procedure of public contracts: "*As with any regulatory through procurement a disadvantage of this approach is that it may result in less competitive tenders if some providers choose not to, or cannot, participate because of the conditions, and it may be difficult to asses what the costs are, thus to balance costs and benefits*" (2005), op. cit., 1249). The author considers that get a better cost-benefit ratio by using award criteria relating to environmental characteristics than if you define conditions for the performance of the contract (Ibid., p. 1289).

[81] ARROWSMITH, S. (2009), op. cit., 207 and 208; COMISIÓN EUROPEA, *Buying Social. A Guide to Taking Account of Social Considerations in Public Procurement* (2011) 43.

case, the exclusion is possible[82], while in the second case, it is not, to the extent that the Directive 2004/18 does not envisage this cause of exclusion[83].

The performance clauses should be linked to the implementation of the contract, that is to say, linked to the tasks necessary to produce the goods, to provide the services or to carry out the works that are the subject-matter of a tender award[84]. For example, environmental considerations relating to the implementation of another contract or actions linked to the environmental performance of the company, without any relation to the execution of the contract, cannot be required to the contractor.

Environmental integration through special performance conditions tends to promote the creativity of the market and, sometimes, favours the development of innovative technical solutions. This approach avoids having to reveal the technical specifications of the provision in a detailed manner.

IV. Conclusions

Green public procurement is an instrument of the environmental market, to the extent that it is an effective means of reducing the environmental impact of public consumption, and also of managing the conduct of the economic operators towards environmental protection standards, which go beyond the minimum levels set by the legal system.

The contracting authorities must respect the EU principles of equal treatment and transparency. Environmental clauses or criteria should not impede the access of enterprises to public tendering in conditions of equality. They cannot serve to create unjustified obstacles to the opening of public procurement to competition. These clauses or criteria must be linked to the subject-matter of the contract, so as to avoid being used as a covert way to justify discriminatory treatment. Also, they have to be properly defined and be verifiable, as well as offering a limited decision-making power to the contracting authorities.

Public procurement law can be an element of support to strengthen the legal instruments for environmental protection, the objectives of environmental policies and an effective implementation of environmental law. Firstly, it can boost the implementation of certain environmental market instruments as eco-labels or environmental management systems. Secondly, national bans on hiring companies that have committed crimes or environmental offences, is an incentive to comply with environmental obligations. Thirdly, the environmental criteria or clauses can establish environmental standards which are more demanding than those established by environmental standards. Fourthly, exceptional reasons of environmental protection can justify an appeal to a more flexible procedure, the negotiated procedure, which will allow us to achieve the environmental objectives in a speedier or more effective way. Therefore, feedback with positive effects for public goals in both systems can be established between environmental law and public procurement law.

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[82] See CARANTA, R., "Sustainable public procurement in the UE", in CARANTA, Roberto, TRYBUS, Martin, *The Law of green and social procurement in Europe*, DJÆF, 2010, 48 and 49.

[83] ARROWSMITH, S. (2009), op. cit., 208.

[84] EUROPEAN COMMISSION, *Buying Social. A Guide to Taking Account of Social Considerations in Public Procurement* (2011), 43.