

# Green Public Procurement and Eco-labels

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Tiivistelmä: Tutkielma käsittelee ympäristönäkökohtien käyttöä julkisten hankintojen ohjaamisessa EU-oikeuden näkökulmasta. Erityisenä tarkastelun kohteena ovat erilaiset EU-lainsäädäntöön perustuvat ympäristömerkit ja miten niitä voidaan hyödyntää hankittavien tavaroiden määrittelyssä.

Tutkielman lähtökohta on Euroopan unionista tehdyn sopimuksen (SEU) artikla 3, jonka mukaan Unionin tavoitteisiin kuuluvat sekä sisämarkkinoiden toteuttaminen että ympäristönsuojelu. Ympäristönsuojelulliset kriteerit hankittavien tavaroiden määrittelyssä voivat olla vastoin tavaroiden vapaan liikkuvuuden periaatetta, jolloin toimivat sisämarkkinat ja ympäristönsuojelu osoittautuvat vastakkaisiksi tavoitteiksi. Tutkielmassa tarkastellaan miten hyvin Euroopan unionin toiminnasta tehdyn sopimuksen (SEUT) 11 artiklassa määritelty läpäisyperiaate toteutuu käytännössä julkisten hankintojen osalta. Tutkielman tavoitteena on selvittää miten hankintadirektiivi (2004/18/EY) suhtautuu ympäristönäkökohtien, erityisesti ympäristömerkkien, käyttöön määriteltäessä hankittavia tavaroita. Tarkastelun kohteena on myös 20.12.2011 julkaistu komission esitys (COM(2011) 896) hankintadirektiivin muuttamisesta.

Tutkielman johtopäätös on, että Unionin oikeus sisältää monia sisäisiä ristiriitoja ja epäjohtonmukaisuuksia joiden takia läpäisyperiaate ei toteudu julkisissa hankinnoissa parhaalla mahdollisella tavalla. Tunnistetut ongelmat vaikuttavat myös sisämarkkinoiden toimivuuteen.

Avainsanat: eurooppaoikeus, läpäisyperiaate, ympäristönsuojelu, tavaroiden vapaa liikkuvuus, ympäristömerkki, hankintadirektiivi, julkiset hankinnat

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Suostun tutkielman luovuttamiseen Lapin maakuntakirjastossa käytettäväksi

(vain Lappia koskevat)

## Contents

Abbreviations: .....	III
Bibliography: .....	IV
1. Introduction .....	1
1.1 Scope and aims of the thesis .....	1
1.2 Free movement of goods and restrictions on environmental grounds.....	3
1.2.1 Treaty exceptions and mandatory requirements .....	3
1.2.2 Environmental protection as a justification .....	6
1.3 Free movement of goods and WTO law .....	9
1.3.1 Public procurement .....	9
1.3.2 Eco-labelling.....	11
2. Public procurement in EU .....	13
2.1 Directive 2004/18/EC .....	13
2.1.1 Legislative basis of the directive.....	13
2.1.2 The aims and objectives of the directive .....	15
2.1.3 Principles governing the award of public contracts .....	16
2.2 Environmental issues and public procurement.....	19
2.2.1 Public procurement and secondary policies .....	20
2.2.2 Possibilities to utilise GPP.....	22
2.2.3 Technical specifications and NPR PPMs .....	23
2.2.4 Eco-labels under directive 2004/18/EC.....	28
2.3 Proposal for amending the public procurement directive .....	29
2.3.1 Policy context .....	29
2.3.2 Proposed amendments .....	33
2.3.3 Analysis .....	35
2.4 Conclusions .....	36
3. The EU eco-labelling regime.....	39
3.1 Product labelling and standardisation.....	39
3.2 Objectives and development of the eco-labelling regime.....	41
3.3 Analysis of specific labels.....	43
3.3.1 Energy Star Regulation .....	44
3.3.2 Energy Label Directive .....	45

3.3.3 Ecolabel Regulation .....	46
3.3.4 Eco-design Directive .....	47
3.3.5 EMAS Regulation .....	48
3.4 Conclusions .....	50
4. Integrating environmental protection into public procurement .....	53
4.1 Current legislative standpoint.....	53
4.2 The effects of the integration principle.....	54
4.2.1 Greening EU procurement law and policy .....	54
4.2.2 Integrating environmental protection into procurement law .....	64
4.3 Integration and coherence .....	70
5. Discussion.....	72

**Abbreviations:**

DG	Directorates-General of the Commission
ECJ	Court of Justice of the European Union
EMAS	European Eco-Management and Audit Scheme
GATT	General Agreement on Tariffs and Trade (WTO)
GPA	The Agreement on Government Procurement (WTO)
GPP	Green Public Procurement
LCA	Life-cycle assessment
LCC	Life-cycle costing
MEQRs	Measures having equivalent effect to quantitative restrictions
NPR PPM	Non-product related production and process method
SCP Policy	Sustainable Consumption and Production policy
TBT	Agreement on Technical Barriers to Trade (WTO)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
WTO	World Trade Organization

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## 1. Introduction

### 1.1 Scope and aims of the thesis

The European Union is an economic and political union of 27 member states. Just as diverse as the individual member states of the Union are the different policy goals that the Union is trying to pursue. It is inevitable that sometimes these different goals are contrary to each other and some might even be mutually excluding, at least on the face of it. The first and still primary objective of the Union, its 'economic rationale', is a functioning internal market between the member states.<sup>1</sup> Protection of the environment has gradually increased its importance as a Union policy.<sup>2</sup> What is beneficial to the economy might be detrimental to the environment. The primary goal of free movement of goods can be limited with various reasons, out of which environmental protection is one. In a broad scope, the topic of this thesis is situated under the capital of restrictions on the free movement of goods on environmental protection grounds.

Public procurement amounts to about 18% of the combined GDP of the member states.<sup>3</sup> We can say that public authorities are one of the biggest purchasers of different types of products. Because of this, what the public authorities buy has many effects both on the market and for the environment as well. Since protection of the environment has become increasingly more important as a union policy the effects of public purchasing on the environment have risen to the stand. The Union wants to limit the environmental impact caused by public spending.<sup>4</sup> 'Green public procurement' (GPP) is used to refer to the procurement of environmentally friendly products. The Union has identified GPP as a preferred tool to combat the environmental effects caused by public procurement.<sup>5</sup>

The aims of a functioning internal market and a high level of environmental protection cannot be completely consolidated with each other. This contradiction between these two objectives of the Union is the underlying tension beneath the topic of my thesis.

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<sup>1</sup> Craig 2011, p. 581.

<sup>2</sup> Krämer 2007, p. 1-5.

<sup>3</sup> COM(2011) 896, p. 2.

<sup>4</sup> Sixth Community Environment Action Programme, Decision No 1600/2002/EC, article 3 (6).

<sup>5</sup> See COM(2008) 400 Public Procurement for a better environment. The Commission website on GPP offers a good outlook on the issue also, see [http://ec.europa.eu/environment/gpp/index\\_en.htm](http://ec.europa.eu/environment/gpp/index_en.htm), sourced 15.3.2012.

How to reconcile these contrary objectives and will either one of them take precedence over the other in a given situation?

My main research question is in general i) what is the current legal status of GPP and ii) how should the law be interpreted regarding GPP, taking into consideration the integration principle and coherence of the legal system. In particular, I will look at how eco-labels can be used as tools for GPP. The method used is the systemic analysis of the relevant legal sources. These include primary and secondary union law as well as ECJ case-law.

Article 3 TEU lists the main aims and objectives of the Union.<sup>6</sup> The internal market and environmental protection are both present in it. Article 3 (3) TEU serves as a starting point for my interpretation. Finding out how can these two policies be integrated together, or should either one of them be left as secondary or even withdrawing policy is an intriguing question per se, but it is also important if goals such as the 2020 –strategy are actually to be reached.<sup>7</sup> In essence, this study is trying to find out how well the objectives of article 3 (3) TEU are transmitted into Union law by the application of the integration principle in article 11 TFEU.

The outline of the thesis is as follows. The underlying tension between free movement of goods and environmental protection is dealt with as a preliminary issue. The relevant EU-law and WTO-law on the subject are presented in the next two parts of this first chapter. They are supposed to clear way for the preceding arguments and to make sure that no boilerplate counterarguments are left unnoticed. The second chapter deals with directive 2004/18/EC on public procurement. Basic principles related to procurement are presented since they affect the interpretation law. The directives legal status towards GPP is then explored and finally a critical overview of a Commission proposal to amend the procurement directive is presented. Chapter three gives an outline of a selection of different product labels issued by the EU. The point of the chapter is to analyse the

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<sup>6</sup> I understand objectives and policies in the way that Schumacher defines them: ‘the purpose of policies is the pursuit of objectives’, Schumacher 2001, p. 37. The general objectives of the Union stem from article 3 TEU. The policies that are used to pursue these are then formulated in the secondary legislation, of which this study focuses on the public procurement directive and the eco-labelling regime.

I have decided to talk about the Union’s labelling ‘regime’ in lack of a better word. In this context regime is to be understood according to the meaning attributed to it by the Oxford English Dictionary (online version, sourced 21.3.2012): ‘A method or system of rule, governance, or control; a system of organization; a way of doing things, esp. one having widespread influence or prevalence.’ For a student of law, and not social sciences, the word is devoid of any political or value judgment associations. I considered using the word ‘framework’ instead of regime, but since framework has an established meaning in EU law (framework law and framework decisions) it did not seem as a plausible alternative.

<sup>7</sup> [http://ec.europa.eu/europe2020/index\\_en.htm](http://ec.europa.eu/europe2020/index_en.htm), sourced 15.3.2012.

labels' relevance for GPP. The fourth chapter examines the coherence of the legislation relating to GPP and eco-labels. Various types of arguments are deployed with the intension of trying to figure out what effect should the integration principle of article 11 TFEU have concerning GPP and eco-labels. The fifth chapter contains discussion on my findings.

## **1.2 Free movement of goods and restrictions on environmental grounds**

### **1.2.1 Treaty exceptions and mandatory requirements**

This chapter deals with environmental reasons as 'mandatory requirements' in the *Cassis de Dijon* sense of the word.<sup>8</sup> This is the basis for the perennial tension that lies under the whole topic of this thesis; how can environmental reasons be used to limit the free movement of goods in EU-law? One aspect of public procurement rules is to assure the free movement of goods by allowing producers from different countries to submit tenders. Incorporating environmental aims to public procurement rules might be an obstacle to the free movement of goods. How does primary Union law react to this? An outline of the current state of law will be presented through the relevant cases and academic opinions on this matter.

Article 3 TEU states that the Union shall establish an internal market. Article 26 TFEU clarifies that this means an area without internal frontiers in which the free movement of goods is ensured in accordance with the Treaties. The actual rights and obligations are set in articles 34 to 36 TFEU. According to article 34 TFEU all restrictions on imports are prohibited. Article 35 TFEU prescribes the same for measures affecting exports. Article 36 TFEU lays down the rules on how restrictions to the free movement of goods can be set. The article lists a number of public interest grounds that are allowed as restrictions and also states that the restrictions cannot constitute arbitrary discrimination or disguised trade barriers. Protection of the environment is not mentioned in article 36 TFEU. Out of the listed reasons 'protection of health and life of humans, animals or

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<sup>8</sup> Case 120/78 *Rewe Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (*Cassis de Dijon*).

plants' comes closest, but the ECJ has stated that it does not equate or encompass environmental protection.<sup>9</sup>

What does this all mean? Essentially, that the free movement of goods from one member state to another is ensured within the internal market, but that member states can take national measures to restrict it if they have a valid legal reason for it. From a legal perspective this seem to be enough clear and precise, but because the European Union is a union of supreme states policy and politics plays a role in everything that the Union does.

The scope of article 34 TFEU was defined in *Dassonville*.<sup>10</sup> It was established that along with pure quantitative restrictions on imports also other measures that have the 'equivalent effect' (MEQRs) are prohibited under Union law. Simply put, a quantitative restriction would be to allow only a certain amount of products to be imported. An MEQR is trickier to define, but basically all measures which impede the importation of products from one member state to another, 'in law, or in fact' are MEQRs.<sup>11</sup>

*Cassis de Dijon* further strengthened the free movement side by providing the 'mutual recognition' principle.<sup>12</sup> The ECJ ruled that if a product has been lawfully produced and marketed in one member state then there is no valid reason why it should not be introduced into the markets of any other member state.<sup>13</sup> This means that no double standards for products can exist. It is enough that a product complies with the legislation of the country it originated from or into which it was first imported from outside the Union.

Some academics have implied that because *Dassonville* and *Cassis de Dijon* purported the free movement of goods so strongly that the ECJ needed to reply with a ruling that would reinstate the balance between the free movement rights and the interests of the member states.<sup>14</sup> This view presupposes that the member states want to preserve national protectionist measures rather than fully participate in the strengthening of the internal market. The way that the scope of article 36 TFEU is defined and how it is used by the ECJ affects the division of competence between the member states and the

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<sup>9</sup> C-2/90 *Walloon Waste* [1992] ECR I-04431 and C-203/96 *Dusseldorp* [1998] ECR I-04075.

<sup>10</sup> Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837.

<sup>11</sup> Case 8/74 *Dassonville*, para 11.

<sup>12</sup> *Chalmers* 2010, p. 760.

<sup>13</sup> Case 120/78 *Cassis de Dijon*, para 14.

<sup>14</sup> *Chalmers* 2010, p. 874; *Dashwood* 2011, p. 407; *Snell* 2002, p. 185.

Union.<sup>15</sup> In this sense it is understandable that member states have an interest on the issue. Whatever the underlying reasons, Cassis de Dijon has also another crucial part that broadened the possibility for member states to restrict the free movement of goods.

The ECJ first stated that the member states are free to legislate on all matters that the Union has not yet acted on (supposing that it is an area of shared competence under article 4 TFEU). The court then continued that national laws can set restrictions on the free movement of goods if they are justifiable under some ‘mandatory requirement’. The court gave examples of possible reasons: ‘the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer’.<sup>16</sup> This list has subsequently been complemented with various other reasons.<sup>17</sup> Environmental protection was added to the list in Danish Bottles and reaffirmed in Wallon Waste.<sup>18</sup>

This means that there are two possible ways of restricting the free movement of goods, either according to the exceptions in article 36 TFEU or by recourse to the ‘mandatory requirements’ doctrine based on Cassis de Dijon. These two instruments operate likewise but they apply to different situations.<sup>19</sup> First, national measures restricting the free movement of goods are only justifiable in areas of law that the member states have competence to legislate on. If the Union has harmonized a certain area of law, then the member states are pre-empted from taking national measure in that field. In these situations restrictions to the free movement of goods are only possible according to what the harmonisation measure has enacted. In situations of minimum harmonisation, which is the mainstream Union policy currently, the member states can regulate on that area that is not covered by the Union measure. In this area that exceeds the minimum harmonisation measure member states have recourse to both the treaty based justifications and the mandatory requirements. So, the area where the member states can operate falls between the minimum level of the harmonisation measure and the maximums set by the principles of the Treaties.

Secondly, the two instruments differ in relation to what sort of situations they are applicable to. Article 36 TFEU exceptions can be used to justify national measures that

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<sup>15</sup> On this issue see, Maduro 1997.

<sup>16</sup> Case 120/78 Cassis de Dijon, para 8.

<sup>17</sup> Over twenty different reasons can be distinguished from the case-law, see Snell 2002 p. 192.

<sup>18</sup> Case 302/86 Commission v Kingdom of Denmark [1988] ECR 4607 (Danish Bottles); C-2/90 Commission v Belgium [1992] ECR I-4431 (Wallon Waste).

<sup>19</sup> Snell 2002, p. 172.

treat national and foreign products differently. Put bluntly, they can discriminate against foreign products.<sup>20</sup> The mandatory requirements can only be used to justify measures that treat all products alike. This was established early on in *Gilli and Andres*.<sup>21</sup>

So far we have established that environmental protection does not fall under article 36 TFEU but that it is recognised by the ECJ as a mandatory requirement. These mandatory requirements can only be used to justify national measures that are non-discriminatory. Thus the scope of using environmental reasons to justify restrictions on the free movement of goods is much more limited than the treaty based reasons listed in article 36 TFEU.

### **1.2.2 Environmental protection as a justification**

Advocates general and academics alike have asked why are there two separate classes of justifications for restrictions on the free movement of goods.<sup>22</sup> Classifying the measures into two separate classes that have different legal outcomes, based on what their aim or objective is, seems strange. Surely, it does not purport legal certainty and coherence of the legal system. To muddy up the waters even more, the ECJ has in a number of cases accepted discriminatory measures based on environmental protection even though under the original doctrine this is not possible.<sup>23</sup>

Advocate General Jacobs has proposed that the ECJ should clarify the current state of law.<sup>24</sup> In the *PreussenElektra* case he took the view that the ECJ's earlier reasoning is flawed. He presented two arguments for why the distinction between article 36 TFEU based exceptions and the mandatory requirements should be eroded. Firstly, the Treaty of Amsterdam, signed in 1997, elevated environmental protection into the mainstream of Union policies. The integration principle of article 11 TFEU was amended. In the light of that principle the Treaties should be interpreted in a way that better supports environmental goals. In practice this argument would mean to interpret the phrase 'protection of health and life of humans, animals or plants' in article 36 TFEU to

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<sup>20</sup> Chalmers 2010, p. 877.

<sup>21</sup> Case 788/79 *Herbert Gilli and Paul Andres* [1980] ECR 2071, para 6.

<sup>22</sup> C-379/98 *PreussenElektra AG v Schlesweg AG* [2001] ECR I-2099, para 225; Snell 2002, p. 218; Chalmers 2010, p. 878; Arnall 2006, p. 438; Craig 2011, p. 678. See especially Notaro 2000, p. 490, whose arguments for dismantling the distinction are very persuasive.

<sup>23</sup> For a list of cases see Dashwood 2011, p. 442.

<sup>24</sup> C-379/98 *PreussenElektra*, para 225-233.



encompass the protection of the environment also. Secondly, measures aimed at environmental protection are usually discriminatory because they are local responses to local problems. The established principle of union environmental law of rectifying environmental damage at its source also means that measures need to be taken where the problem is. This is the only way that environmental protection measures can be effective.

Chalmers has stated that it is up to the ECJ to protect the divergent values existing within the Union and to deal with the challenges brought up by shifting policy opinions.<sup>25</sup> Why then, has the ECJ not dealt with this problem unequivocally? Article TFEU 36 has remained unchanged since The Treaty of Rome in 1957 while Union policies and objectives have changed significantly. The functioning of the internal market is no longer the sole purpose of the Union.<sup>26</sup>

In a few cases the ECJ has accepted protection of the environment to be used as a reason to justify discriminatory national measures.<sup>27</sup> *PreussenElektra* is one of them, but even though the court accepted environmental protection as a justification it did not follow the opinion of AG Jacobs. The court did not expressly state whether it saw environmental protection as a treaty based exception (article 36 TFEU) or a mandatory requirement (*Cassis*) that was just allowed to be discriminatory. Dashwood prompts that it is the right decision from the ECJ to keep the two classes of justifications separate and distinct, but he does not back up his opinion with any arguments.<sup>28</sup> Jans on the other hand, is calling for the ECJ to give a clear ruling to end this dispute.<sup>29</sup> He compares the situation of environmental protection to other mandatory reasons and concludes that for the other reasons this distinction is clearer.

The ECJ has in earlier cases declared that article 36 TFEU should be interpreted strictly and that the reasons listed are exhaustive.<sup>30</sup> Without analysing the nature of precedents in ECJ jurisprudence, in light of these prior judgements it seems appropriate to argue that the court should not eradicate the differences between the two justifications. In addition, I think that there is a simple, yet logical explanation to the two separate justifications.

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<sup>25</sup> Chalmers 2010, p. 873.

<sup>26</sup> Rosas 2010, p. 180.

<sup>27</sup> See Notaro 2000, for an analysis of these cases and their implications on the ECJs stance on this issue.

<sup>28</sup> Dashwood 2011, p. 442.

<sup>29</sup> Jans 2008, p. 249.

<sup>30</sup> Case 46/76 *Bauhuis v The Netherlands State* [1977] ECR 0005 and Case 95/81 *Commission v Italian Republic* [1982] ECR 2187.

Article 36 TFEU derogations are part of the primary law of the Union, the Treaties. These can be amended only by a unanimous decision of the member states.<sup>31</sup> The principles of non-discrimination and the free movement of goods are pivotal parts to the whole idea of the Union. A violation of both of these principles should only be made by the express decision of all the member states. The mandatory requirements innovated by the ECJ allow for it to play its part as the mediator between the national interests of the member states and the common goal of the internal market. The mandatory requirements are needed but it should not be up to the ECJ to decide to alter the division of competences between the member states and the Union.<sup>32</sup>

Article 36 TFEU can also be seen as a norm that defines competence between the Union and the member states and effects the level of environmental protection that the member states can pursue. In an area of law that the Union has legislated on, but chose not to adopt a specific measure that protects the environment, the member states are not capable of doing anything since the union measure pre-empts national measures. In the area that is left to the member states to legislate only environmental protection measures that are non-discriminatory can be adopted (assumed that the measure is an obstacle to the free movement of goods). In this sense article 36 TFEU limits the possibilities that member states have when pursuing environmental protection goals. Because of this I have to agree with what AG Jacobs argued in *PreussenElektra*, that from the environmental protection point of view the current state of law is not as effective as it should be. But I maintain my opinion that it should be the member states that solve this issue and not the ECJ. On the same issue, Kingston has come to the conclusion that the ECJ is clearly unwilling to 'attempt Treaty change by judicial means', but has been forced to accept discriminatory environmental measures as mandatory reasons to give effect to the integration principle of article 11 TFEU.<sup>33</sup>

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<sup>31</sup> See article 48 TEU. The ordinary revision procedure requires that the changes are ratified in every member state according to their constitution and the simplified revision procedure requires a unanimous decision by the European Council.

<sup>32</sup> See Spaventa 2000, who analyses an alternative solution to the problem: considering mandatory requirements as internal to the definition of MEQRs.

<sup>33</sup> Kingston 2012, p. 138.

### **1.3 Free movement of goods and WTO law**

The European Union is a member of the World Trade Organization. All 27 member states of the Union are also members of the WTO in their own right. The different agreements concluded among the members of the WTO, which are generally referred to as 'WTO law', regulate public procurement and technical product standards. WTO law affects both the content and the extent that Union and member state legal measures can reach. European Union law has to conform to WTO law since the Union is a member of the organisation. Amendments to the public procurement directive have to comply with the relevant WTO agreements. In areas of law that the Union has only applied minimum harmonisation, or that fall under the exclusive competence of the member states, member states may take measures that go further than the union measures. These have to still comply with WTO law, since all member states are also individually affiliated to the WTO. In this sense WTO law draws a secondary outer limit to the legislative choices that member states of the EU can take.

WTO law touches on both of the specific areas of this study. The Agreement on Government Procurement (GPA) contains articles on non-discrimination and technical specifications. These affect the possibilities to utilize GPP under the procurement directive. Both the Agreement on Technical Barriers to Trade (TBT) and the General Agreement on Tariffs and Trade (GATT) include articles that affect the Union's eco-labelling regime.

#### **1.3.1 Public procurement**

This first instruments on public procurement in WTO law date back to the 1970s. The current GPA was signed in 1994 and it entered into force two years later. Not all WTO members have acceded to the agreement, which makes it a plurilateral agreement.<sup>34</sup> The question is, how does WTO law limit Union public procurement law and more specifically, would it allow requiring an eco-label from the products being procured?

The GPA is aimed at free trade on the public supply markets, so most of its articles focus on ensuring this. The two elements deployed are actual rules banning

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<sup>34</sup> [http://www.wto.org/english/tratop\\_e/gproc\\_e/gpa\\_overview\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gpa_overview_e.htm), sourced 13.2.2012.

discrimination and procedural rules to facilitate this. Although the GPA also regulates on other matters, the non-discrimination clauses have been seen as the most important ones.<sup>35</sup>

Article III regulates that the same treatment must be assured for foreign products as domestic ones, and that foreign companies shall not be discriminated. Article VI on technical specifications starts by stating that they should be formulated in a way that does not set obstacles to trade and it then specifies that they should rather be defined in terms of performance than technical characteristics. The technical requirements should be based on international standards whenever possible. The GPA has no specific rules on environmental issues or eco-labels. The same content as in article III and VI is found in the public procurement directive also.

The directive on public procurement implements the rules of the GPA into Union law, or rather, it complies with them.<sup>36</sup> There have been no major disputes between Union law and WTO law on public procurement. No relevant case law exists on this matter.<sup>37</sup> This does not mean that conflicts will not arise in the future. As discussed later in this study, Union public procurement law is evolving and the impetus is a strong policy for environmental issues. This might entail possible conflicts with WTO law, although the different WTO agreements do contain environmental exception clauses. On the other hand, Matsushita argues that actually WTO law can well accommodate for environmental measures as trade restrictions.<sup>38</sup>

As a conclusion, WTO law does affect the way that Union law on public procurement can be developed and it might limit the meaning that the current law can be given through interpretation.

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<sup>35</sup> Matsushita 2006, p. 746.

<sup>36</sup> Council decision 94/800/EC incorporated the GAP into Union law, along with the other treaties establishing the WTO after the Uruguay Round. The versions of the directives in force at that time already complied with the GPA. See, Review of National Implementing Legislation, European Community, World Trade Organization, GPA32, 12 January 2000.

<sup>37</sup> See Matsushita 2006b, 'Major WTO dispute case concerning government procurement'. None of the discussed cases concern the EU. Up to date there are only four disputes concerning the GPA: DS163, DS95, DS88 and DS73 and no Appellate Body Reports.

<sup>38</sup> Matsushita 2006, p. 786.

### 1.3.2 Eco-labelling

The TBT and the GATT both have articles concerning product rules and technical specifications. Their main aim is of course to abolish trade barriers. The way that these two agreements interrelate and are applied depends on the matter at hand. Since this falls outside the topic of this thesis I will only present a short summary of academic opinions relevant for our case. As a general note, the TBT is a primary instrument. If the question is not covered by it then the problem is assessed under the GATT. The main question is does WTO law allow eco-labels? More specifically, are NPR PPM based labels allowed and are voluntary and mandatory labels treated alike by WTO law?

A preliminary issue is production and process methods (PPMs).<sup>39</sup> PPMs that affect the end characteristics of a product are allowed under WTO law. The issue on non-product related (NPR) PPMs is not that clear. Neither WTO member states nor academics agree on are NPR PPMs allowed under the TBT or the GATT.<sup>40</sup> Vranes argues that systematic-teleological interpretation of the TBT and its negotiating history leads to the conclusion that NPR PPM measures might fall under the TBT agreement, and if so, that they are permissible according to it.<sup>41</sup> According to Charmovitz, NPR PPMs can conflict with GATT articles I, III and XI but they can be justified with the exceptions listed in article XX, of which environmental protection is one. His view is based on an analysis of the relevant WTO case-law.<sup>42</sup> On the same lines, Joshi argues that NPR PPM based voluntary labels are not covered by the TBT or the GATT and that they are not inconsistent with the WTO rules.<sup>43</sup>

Labels that employ a life-cycle analysis are essentially NPR PPMs. Some of the labels studied in this thesis are voluntary and some mandatory. Vranes argues that at least voluntary labels based on NPR PPMs are allowed under WTO law.<sup>44</sup> Matsushita goes further and argues that even mandatory labels applying NPR PPM requirements are

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<sup>39</sup> See chapter 2.2.3 where NPR PPMs are dealt with and explained in context.

<sup>40</sup> Matsushita 2006, p. 808; Vranes 2011, p. 3; Charmovitz 2002, p. 62;  
[http://www.wto.org/english/tratop\\_e/envir\\_e/labelling\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/labelling_e.htm), sourced 14.2.2012.

<sup>41</sup> Vranes 2011, p. 7.

<sup>42</sup> Charmovitz 2002, p. 101.

<sup>43</sup> Joshi 2004, p. 90.

<sup>44</sup> Vranes 2011, p. 9.

allowed, if they are non-discriminatory and comply with the most favoured nation clause and national treatment requirements.<sup>45</sup>

The conclusion is that WTO law does not seem to set any restrictions on the further development of the EU eco-labelling regime. The principle of non-discrimination is one of the leading principles of Union law. As long as it is applied to also products coming from outside the internal market the labelling schemes seem to be legal. The only possible conflict is, if the Union decided to impose restrictions on goods coming from outside the single market.

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<sup>45</sup> Matsushita 2006, p. 818.

## **2. Public procurement in EU**

The Treaties have never contained any provision on public procurement, whereas for example competition law is regulated in the TFEU. Before secondary legislation on public procurement existed the only sources of EU-law affecting this field were the general principles of law and treaty article that might have had an effect on interstate actions of companies. The current public procurement directives 2004/17/EC and 2004/18/EC are part of a long continuation of evolving Union legislation. The EU took public procurement as part of its legislative agenda after it shifted from creating the internal market by eliminating tariff barriers to enhancing the functioning of the internal market by removing non-tariff barriers, such as public monopolies.<sup>46</sup> The first directives on public procurement were Directive 66/683 and Directive 70/32. They had as their objective to create an internal market for public supplies. The directives prohibited measures which either required to use domestic products in public procurement or effectively set restrictions for imported products to be used as public supplies.<sup>47</sup> Protecting the suppliers' rights, based on the four freedoms, was the core of the legislation.<sup>48</sup>

### **2.1 Directive 2004/18/EC**

#### **2.1.1 Legislative basis of the directive**

The legal basis's for directive 2004/18/EC are articles 53 (1), 62 and 114 TFEU. Article 114 can be considered as the primary basis, at least if looking at the stated aims and objectives of the directive, and the fact that it in essence also covers the specified areas of services listed in article 62. According to article 114 TFEU the Union may adopt measures for the approximation of national laws if it is necessary for the functioning of the internal market. This means that the objective of the directive is the creation or functioning of the internal market.

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<sup>46</sup> Bovis 1998, p. 222.

<sup>47</sup> Bovis 2007, p. 17.

<sup>48</sup> Kotsonis 2011, p. 56.

Based on the treaty system of competences the Union may adopt so called minimum harmonisation measures in areas of shared competence. A minimum harmonisation measure means that the Union only regulates a certain minimum rate of level playing field, above which the member states can then take action. Most of the minimum harmonisation measures are based on the general minimum harmonisation clauses of policy specific articles of the TFEU, for example social policy (153), consumer protection (169) and protection of the environment (192). Article 114 can also be used for minimum harmonisation as a general clause.<sup>49</sup>

Directive 2004/18/EC is a minimum harmonisation directive. One specific example of this is the so-called dynamic purchasing system. Article 33 of the directive leaves it up to each member state to decide whether or not they want to regulate on this matter. Recital 16 mentions this option on various different purchasing procedures. The actual procedures for the award of public contracts are listed exhaustively in article 28 of the directive.<sup>50</sup> There are differences in the way that member states have implemented them.<sup>51</sup>

According to recital three of directive 2004/18/EC the coordinating provisions laid down by the directive should comply as far as possible with the procedures and practices already in force in each of the member states. This is in line with the conception that out of the different possible legal acts that the Union can adopt according to Article 288 TFEU, directives are best suited for situations where there already exists convoluted national legislation on the matter.<sup>52</sup> Directives allow for respect of national legislative and administrative measures. Harmonizing the existing legislation through directives can be more effective than re-regulating the whole matter with regulations.

As with many other fields of law related to the functioning of the internal market, the Union has decided that directives are the most suitable form of legislation for assuring that public procurement is harnessed to promote it. Harmonizing existing laws and administrative practices was seen as a more efficient way than uniform regulation of the

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<sup>49</sup> Dougan 2000, p. 878.

<sup>50</sup> C-299/08 *European Commission v French Republic* [2009] ECR I-11587, para. 28.

<sup>51</sup> See for example the Finnish implementing law *Laki julkisista hankinnoista* (2007/348) article 27, which stipulates a “direct purchase” procedure (*suorahankinta*). The directive does not contain a corresponding procedure, instead the national measure is based on the negotiated procedure.

<sup>52</sup> Prechal 2005, p. 3.



whole field with regulations.<sup>53</sup> This approach chosen for the public markets is the complete opposite than that of the private markets. EU competition law is based on regulations and full harmonisation.<sup>54</sup>

### **2.1.2 The aims and objectives of the directive**

The main aim of the 2004 directives is an economical one. Simply put, to make the internal market function more effectively. In the Commission proposal the aims were categorized as threefold: modernizing, simplifying and rendering more flexibility.<sup>55</sup> The means to achieve this were codification, modernisation and simplification.<sup>56</sup> What had previously been regulated in numerous directives was now codified into just two directives. New forms for the procurement procedure were introduced and the procedural rules governing the whole process were simplified.

In addition to this economical aim, the directive also aims at enabling the contracting authorities to take into consideration environmental and social needs in the procurement process. According to recital one of directive 2004/18/EC this is done by clarifying the possibilities of using contract award criteria to purport environmental or social goals that stem from the 'needs of the public concerned'. This amendment is based on ECJ case-law, namely the Concordia case.<sup>57</sup> Furthermore, according to recital five of the directive, it is also supposed to implement Union environmental policy into practice, as the integration principle in article 11 TFEU requires.

Bovis has categorized three effects that a properly functioning market for public supplies would have.<sup>58</sup> The trade effect would cut down prices and result in savings for the purchasing authorities. The competition effect would force national companies to compete with companies from other member states, thus aggravating the trade effect. These would lead to the restructuring effect, meaning the dynamic development of the companies offering goods and supplies to public authorities. This short categorisation points out why regulation of public procurement is essential for the proper functioning

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<sup>53</sup> Bovis 2007, p. 8.

<sup>54</sup> TFEU TITLE VII Chapter 1 Rules on competition and Council Regulation 1/2003/EC.

<sup>55</sup> COM(2002) 236 final, p. 210.

<sup>56</sup> Bovis 2007, s. 50.

<sup>57</sup> Case C-513/99 Concordia Bus Finland Oy [2000] ECR I-7213.

<sup>58</sup> Bovis 1998, p. 229.

of the internal market in an economic sense. The regulation of public procurement also effects the free movement of goods and the rights of individual companies.

The problem that this thesis focuses on is exemplified in the above mentioned aims. The recitals of the directive also point towards the integration principle in article 11 TFEU which is supposed to solve this problem. Chapter four focuses on this issue.

### **2.1.3 Principles governing the award of public contracts**

One way to categorize the principles affecting the award of public contracts is according to the hierarchy of norms. In EU-law the Treaties are above all and thus the principles stemming from them are the most important ones.<sup>59</sup> The general rule of interpretation in EU law according to the hierarchy of norms is that a norm must be interpreted to comply with the Treaties and general principles of law.<sup>60</sup> Put differently, norms have to be interpreted so that they do not breach specific Treaty articles or the general rules of law, for example equal treatment and non-discrimination.

Recital two of the directive states that the award of public contracts is subject to the principles recognised in the Treaty. The components of the four fundamental freedoms are mentioned as principles, (for example ‘the principle of free movement of goods’) but the recital then continues to list actual legal principles that are to be given due consideration when applying the directive. Listed are the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. According to the recital these principles are derived from the four fundamental freedoms. Article 2, titled ‘Principles of awarding contracts’, states that contracting authorities shall act according to the principles of equality, non-discrimination and transparency. Recital 46 of the directive clarifies what these principles mean in practice. It also states, that by acting according to these principles effective competition is guaranteed.

The general principles of law that are derived from the Treaties are hierarchically ranked at the same level with the Treaties themselves. According to Tridimas these

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<sup>59</sup> The ‘general principles’ of EU law stem from either the Treaties or from the case-law of the ECJ. Hierarchially the Treaties are the highest source of law, second are the general principles and after that all other forms of legal acts. See Craig 2011, p. 108.

<sup>60</sup> Tridimas 2006, p.29.

principles are: fundamental rights, equality, proportionality and legal certainty.<sup>61</sup> The principle of equality, prohibition of discrimination on grounds of nationality, is the most basic component of the four fundamental freedoms.<sup>62</sup> It is materialised in the individual Treaty provisions that comprise the four freedoms.

The principles of equal treatment and non-discrimination can be seen as the opposite sides of the same coin. They are umbrella concepts that are not based on just one norm or precedent. According to article 18 TFEU discrimination based on nationality is prohibited. The same idea can be read from article 56 TFEU which states that restrictions on the freedom to provide services within the Union are prohibited, or article 34 TFEU which prohibits restrictions on the free movement of goods between member states. It is discrimination if products or services originating from one member state are not allowed into another. Products and services originating from different member states have to be treated equally. GPP based product requirements can be discriminatory if they can only be fulfilled by certain undertakings. An example would be to require that the products be made of wood grown in a specific place. This would discriminate against all producers coming from other regions. An acceptable requirement would be just to require that the wood is grown in a 'sustainable' way and then have this defined in a non-discriminatory manner.

The principle of mutual recognition is based on the so called Cassis de Dijon case.<sup>63</sup> Regarding the free movement of goods, the principle of mutual recognition is best described as the country of origin principle. If a product is lawfully produced in one member state then it can be exported to all the other member states. The country of import cannot require the product to fill its own national requirements. It is enough that the product is produced according to the requirements of the country of origin. This principle is in line with the minimum harmonisation practice that the Union has adopted for matters relating to the functioning of the internal market.<sup>64</sup> This principle affects the procurement processes as well, with the effect that if the products being purchased are defined according to their functional characteristics it is enough that they perform in that way and are produced according to the laws of their country of origin. A completely different issue is that if the technical specifications used to define the product are

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<sup>61</sup> Tridimas 2006, p. 51.

<sup>62</sup> Tridimas 2006, p. 60.

<sup>63</sup> Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein [1979] ECR 649.

<sup>64</sup> Chalmers 2011, p. 696.

different than the normal standards of production used for that type of products in a different country. This is a problem of standardisation not mutual recognition.

Proportionality in this context does not mean the same as it does when referred to as a general principle of EU-law applicable to judicial review.<sup>65</sup> Proportionality in the procurement context can mean for example that the conditions defined for the products being purchased are proportionate to the content of the procurement process. It is not proportionate to require very strict technical dossiers from the producers if the purchased product is a simple bulk item. More specifically related to GPP, when the products are defined according to a specific standards and a tenderer's product has not registered under that label, it is allowed to use other means to proof compliance to that standard.<sup>66</sup> The level of reliability set for this proof has to be proportionate to the products being purchased and the overall aims of the procurement process. Considering a fairly simple product, only the information given by the producer might suffice, whereas with a more complex product a test report from an independent testing laboratory might be a proportionate requirement.

The Principle of transparency in the purchasing process serves two aims.<sup>67</sup> Transparency creates accountability and eliminates the possibility to discriminate a potential supplier on basis of nationality. It also enables the suppliers to determine what the purchaser actually needs and thus helping them to develop their products. Transparency is achieved by publishing the invitations to tender and the contract award notices. Transparency should ultimately lead to more companies participating and thus resulting in lower prices.

Legal certainty is a basic component of our legal system. People subject to the law should be able to know their rights and obligations. This will enable them to plan their actions accordingly. This is especially true for companies since they aim for economic profits. Because the aim of the procurement directive is to get as many companies as possible to participate to the calls for tenders, procurement law should also be predictable. Companies will not participate into dealings if they are not aware of the

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<sup>65</sup> Chalmers 2011, p. 367.

<sup>66</sup> This situation is explained in more detail in the next chapter, 2.2.

<sup>67</sup> Bovis 2007, p. 63.

possible risks. In a modern legal system rules often need to be interpreted, but this does not mean that interpretation should be done on the expense of legal certainty.<sup>68</sup>

Bovis also lists the principle of fairness.<sup>69</sup> It should eliminate arbitrariness and discrimination in the procurement process. In practice, fairness is secured during the process when selecting the technical specifications that the products must comply with and deciding the factors according to which the tenders are evaluated. These decisions have to be based on legal, technical or economic factors. The articles of the directive that deal with these issues are directly effective in the vertical relationship between the contracting authority and the supplier. I think that what Bovis is talking about is just another expression of the principles of non-discrimination and equality. Fairness means taking care that no one is discriminated and that everybody is treated equally. Bovis's idea of the principle of fairness is just a practical way to ensure non-discrimination and equality.

In conclusions, the different principles affect the way that public procurement plays out and what is possible in the realm of public procurement. These principles are needed to settle disputes that controversial issues such as GPP and eco-labels might bring about.

## **2.2 Environmental issues and public procurement**

Forty years has passed since the introduction of the first directives on public procurement. Yet, cross-border procurement amounts to only about 1,6% of the total amount of procurement contracts awarded annually.<sup>70</sup> The amendments made in the current directives had as one of their goals to enable contracting authorities to meet environmental and social needs of the public concerned more effectively. The amendments are based on the case-law of the ECJ. The directives are also supposed to implement Union environmental policy into practice, as the integration principle in article 11 TFEU requires.<sup>71</sup> If the aims of the original directives have been so poorly

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<sup>68</sup> Dashwood 2011, p. 328; See also Paunio 2011 for a complete presentation on the issue of assuring legal certainty when interpreting EU law.

<sup>69</sup> Bovis 2007, p. 63.

<sup>70</sup> COM(2010) 608 final/2, page 3 and also in COM(2011) 15 final, page 4.

<sup>71</sup> Directive 2004/18/EC recital (1) and (5).

met – an internal market for public supplies - what chances do the current directives have of effectively purporting the environmental goals that they are supposed to?<sup>72</sup>

### 2.2.1 Public procurement and secondary policies

The current standpoint is, and has always been, that the primary function of public procurement is to ensure a proper public market for goods with competition and cross-border activity.<sup>73</sup> Because of its volume public procurement is a strong policy tool.<sup>74</sup> What the state buys has a bigger impact on the producers than the actions of conscious private individuals. For this reason public procurement has often been used to advocate secondary policies. These secondary policies can range from local issues to protecting the environment and all the way to international politics.<sup>75</sup>

The key legal issue concerning these secondary policies is do they have to be related to the subject-matter of the contract? This chapter analyses the position of environmental protection as such a secondary policy. The reasons for why a link has to exist between the secondary policies and the subject-matter of the contract are contested.<sup>76</sup>

The first case that dealt with the legality of these secondary policies was *Beentjes*.<sup>77</sup> The case concerned a public works contract in connection with a land consolidation operation. The purchasing authority had issued a contract performance clause that long-term unemployed persons were to be hired by the contracting company. *Beentjes*'s tender was rejected, even though it was the cheapest one, because they were unable to fulfil the term of employing the unemployed. The ECJ concluded that such requirements are valid if 'it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community'.<sup>78</sup> This rule has then been codified into

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<sup>72</sup> See Boyle 2011, on the same lines. She goes a step further and argues that the only purpose of Union procurement law is to facilitate inter-state tendering. Considering other goals for procurement should not be relevant before this has been achieved.

<sup>73</sup> Arrowsmith 2010, p 150; Arnould 2004, p. 187; Bovis 2005, p. 608.

<sup>74</sup> COM(2011) 896, p. 2.

<sup>75</sup> Arnould 2004, p. 187.

<sup>76</sup> Arrowsmith has argued that a more suitable term would be 'horizontal policies'. She thinks that the term 'secondary policies' implies that they are somehow 'illegitimate or subservient to commercial aspects'. I agree with her argument but because of the general scheme of my thesis and the underlying problem, calling environment a secondary policy seems more plausible. It makes the starting point of my argumentation more visible. See Arrowsmith 2010, p. 150.

<sup>77</sup> Case 31/87 *Gebroeders Beentjes BV v State of the Netherlands* [1988] ECR 4635.

<sup>78</sup> *Ibid.*, para 37.

law. The only condition that article 26 of the current public procurement directive submits on them is that they have to comply with community law, which refers to the comment of the ECJ in the previous citation. The article also mentions that they can particularly concern social or environmental considerations. Recital 33 lists examples of different possible contract performance conditions: vocational training, different goals associated with employment and protection of the environment.

The contract performance clauses do not have to have a link to the subject-matter of the contract. Neither case-law nor legislation requires this. Arnould thinks that this is self-evident, since the whole point of contract performance clauses is to pursue secondary aims. He also notes that by their very nature they are restrictive. This restriction on the four freedoms is to be balanced vis-à-vis the objectives pursued by the conditions through the proportionality principle. The fact that is the measure discriminatory needs to be evaluated on a case-by-case basis.<sup>79</sup>

Environmental secondary policies were first considered in *Concordia*.<sup>80</sup> The purchasing authority used nitrogen oxide emissions and noise levels as award criteria in a public service contract on bus transport. The appellant claimed that only criteria which had direct economic value for the purchasing authority could be included under the economically most advantageous tender –criteria. After analysing the relevant article of the directive (in force back then) and the integration principle of article 11 TFEU, the ECJ interpreted the directive to allow the use of environmental award criteria, even though they were not mentioned in the list of possible criteria in the directive. The court then specified that the environmental award criteria, like all award criteria, have to be linked to the subject-matter of the contract. Furthermore, it listed terms that the criteria have to fulfil. The key ones being, that they have to comply with the principles of the Treaties and in particular with the principle of non-discrimination.<sup>81</sup>

Environmental secondary policies were again considered in *Wienstrom*.<sup>82</sup> Essentially, the ECJ was asked, in a public supply contract on electricity, is it legal to require the electricity to be produced from renewable energy sources? The ECJ based its answer on the *Concordia* case and the criteria defined there. It came to the conclusion that requiring renewable energy is allowed if the requirements set in *Concordia* are met. It

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<sup>79</sup> Arnould 2004, p. 192.

<sup>80</sup> C-513/99 *Concordia Bus Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* [2002] I-072123.

<sup>81</sup> *Ibid.*, para 57-64.

<sup>82</sup> Case C-448/01 *EVN AG and Wienstrom GmbH v Republic of Austria* [2003] I-14527.

reiterated that a link to the subject-matter of the contract has to exist.<sup>83</sup> In this case the link was obvious since the object of procurement was electricity. Wienstrom is not only an important case as a precedent on GPP but also because of the consequences it had to the Commission interpretation on the law. This side will be discussed in chapter 2.2.3.

The conclusions from these cases are striking. Secondary policies can be pursued through public procurement. Protection of the environment has been recognised as a plausible secondary policy. Contract performance conditions do not have to bare a link to the subject-matter of the contract, whereas award criteria have to. Environmental policies can be driven through both instruments. Both situations are ultimately limited by the principles of the Treaties and especially the principle of non-discrimination. Why is it possible to pursue environmental goals that are not linked to the subject-matter of the contract through contract performance clauses, while the same is not possible through award criteria or technical specifications? What is the reason for this difference? If there is none, then the difference should be removed by flexing the possibility to use environmental criteria that are not linked to the subject-matter of the contract. A possible reason is that contract performance conditions, even though not related to the subject matter, are non-discriminatory by their nature.

### **2.2.2 Possibilities to utilise GPP**

Kunzlik has plotted out different stages of the procurement procedure in which the contracting authorities can utilise green public procurement. His list comprises of five stages.<sup>84</sup> When making the initial decision, that the authority has a need to procure something, it can at the same time decide that it wants to incorporate environmental aims to the process. This decision is governed by national policies and budgetary constraints. Next the authority needs to formulate the contract performance conditions. These can be clauses which state that, for example, the work has to be done in a specific way that is least detrimental to the environment. These conditions have to be set according to recital 33 and article 26 of the procurement directive.

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<sup>83</sup> Ibid., para 34.

<sup>84</sup> Kunzlik 2005, p. 121.



The third step is the most important one from the view point of this study. What exactly is to be purchased and how are the technical specifications of the product defined. This means how the product functions, how is it made and from what materials. Externalities relating to the production, use and disposing stages of the product can also be considered. The legal requirements and limits for technical specifications are listed in recital 29. I will address this topic more closely in chapter 2.2.3.

The next step is the selection or exclusion of suppliers. According to article 50, suppliers can be expected to fulfil certain environmental standards in their business. This can mean for example that they are registered under the EMAS-scheme.<sup>85</sup> A company that is not registered might then be excluded from the competition. According to recital 43 of the directive, non-compliance with environmental legislation, which has been subject to final judgement, can also be a reason for exclusion.

The last step is framing the contract award criteria. In order for a contracting authority to use GPP the contract has to be concluded on the basis of ‘the most economically advantageous’ offer. In practice, this means that the authority must define how much relevance is given to the environmental aspects defined in step three.

Beentjes concerned the second stage while Concordia and Wienstrom the fifth. The third and fifth stages (technical specifications and award criteria) offer the best possibilities to affect the environmental impacts that the products will ultimately cause. The following chapter focuses on the third step of defining the products. Links to the other stages are discussed if they provide interesting points of comparison or possibilities for analogy in interpretation or development of the law.

### **2.2.3 Technical specifications and NPR PPMs**

The products to be purchased have to be defined in some way. According to article 23 of directive 2004/18/EC there are two options for this. The first is to define the technical specifications of the product, for example what shape, size or form the product is. The product can also be defined by its performance or function, what the product actually does in practice.

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<sup>85</sup> The European Eco-Management and Audit Scheme, based on Regulation (EC) No 1221/2009.

Recital 29 and article 23 govern what sort of technical specifications may be used. They both start off by stating that technical specifications should not create obstacles to trade and should allow for all interested parties to participate. This is because the main aim of the directive is to create an internal market for public supplies and wrongly formulated technical specifications can, on purpose or by accident, repel possible tenderers. Technical specifications are an easy way to favour certain suppliers, based on location or an already existing product.

Kunzlik has categorized the environmental impact that a product has in the following way.<sup>86</sup> A distinction can be made between the production and consumption stages of the products life cycle. Two different criteria can be analysed in these two stages. The first are the actual environmental effects caused during the products life cycle. The second are the externalities, the detrimental environmental effect of the production or use of the product. Either the producer or the purchaser needs to internalize these into his costs.

The life cycle of a chair made out of wood will suffice as an example to elucidate this categorisation. The production stage starts off by growing the wood. Wood can be grown in a sustainable way or harvested from endangered rainforests. The factory which makes the actual chair can be energy efficient or waste a lot of resources. The different stages of transportation can be of varying lengths and produce different amounts of emissions. If the chair is of good quality it will last for a long time and a replacing product does not need to be produced. When the chair comes to the end of its life cycle it can be recycled and the material used again, it can be burned and turned into energy, or in the worst case just thrown away to produce more waste. A more complex product, say a computer, uses energy during its operation. This causes emissions and also costs for the purchasing authority. These too have to be taken into account when considering how environmentally friendly a product is during its life cycle. Different ways to internalize externalities are for example environmental taxes effecting the purchase price and special fees that have to be paid when disposing of a product.

The question of how and from what the product is made is of pinnacle importance when evaluating its total environmental burden. For public procurement to have an effective way of affecting environmental impacts caused by the purchased products, it needs to be able to impact the whole life cycle of the product. The so called 'production processes and methods' (PPMs) are paramount.

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<sup>86</sup> Kunzlik 2005, p. 126.

There are two types of PPMs. Ones that have a visible result to the end product and others that do not. Whether a product is made out of plastic or wood is a visible effect. Whether the wood is sustainably grown or not, does not have a visible effect to the end product. The PPMs can also affect the way in which the product functions or what performance characteristics it has. PPMs that do not affect the end product in any visible way are called non-product related (in short NPR).

It can be clearly seen, that visible and invisible PPMs can both have effects on the environmental footprint of a product. Because of this NPR PPMs are a key issue when trying to purchase as environmentally friendly products as possible. The directive, the ECJ and the Commission all seem to have a different stance on the legality of technical specifications relating to NPR PPMs.

Both recital 29 and article 1 (a) of Annex VI of the directive state that technical specifications can include production processes and methods.<sup>87</sup> The directive does not say anything on the relevance of the PPM requirements to the subject-matter of the contract. All it does is say that the specifications cannot be discriminatory and that they must ensure free competition. This seems to imply that NPR PPMs are allowed, since they are not directly forbidden, especially considering that it is a minimum harmonisation directive and it is also supposed to purport environmental goals.<sup>88</sup>

The ECJ has not directly considered the issue of NPR PPMs but the two leading cases on green public procurement offer some insight to what their stance towards them might be. Both *Concordia* and *Wienstrom* dealt with award criteria, which is a different thing than technical specifications. In both cases it was stressed that the award criteria must be linked to the subject-matter of the contract. Is this to be interpreted that the technical specifications are also to be linked to the subject-matter of the contract and that NPR PPMs are not allowed? Kunzlik argues that since the ECJ has accepted the requirement of renewable energy as a contract award criteria it would be awkward not to accept a

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<sup>87</sup> Recital 29 of the directive states that ‘... Contracting authorities that wish to define environmental requirements for the technical specifications of a given contract may lay down the environmental characteristics, *such as a given production method*, and/or specific environmental effects of product groups or services.’ (Italics added). Annex VI of the directive on the definition of technical specifications states in article 1 (a) that ‘These characteristics shall include ... and production processes and methods.’

<sup>88</sup> See also Hilson 2008, p. 200. He thinks that the directive is ambiguous on this issue, mainly based on the differences between recital 29 and article 23 (8), although he does not further analyse the directive or give any other arguments for his view.

similar requirement as a technical specification since they have the same effect in the end.<sup>89</sup>

The Commission has released two handbooks on GPP which give guidance in practical matters. These are not official legal statements from the Commission, but they do include legal opinions. In the first handbook, released in 2004, the Commission has the opinion that PPM requirements should be related to the subject-matter of the contract, and that they have to somehow contribute to its end characteristics.<sup>90</sup> The Commission adds that this contribution can be ‘invisible’ and uses as an example electricity made from renewable sources. This is because requiring electricity made from renewable sources was ruled by the ECJ to be legal in its *Wienstrom* judgement a year earlier. Apparently for some reason, the Commission wanted to hold on to the opinion that the PPM requirements have to somehow relate to the end product, but at the same time they had to accommodate to the *Wienstrom* ruling so they came up with this ‘invisible’ characteristic of a product.<sup>91</sup> According to the Commission, electricity made from renewable sources is different than electricity made from non-renewable sources even though this difference is not visible in the end product. The newer handbook published in 2011 is on the same stance.<sup>92</sup> In addition, it states that the PPM requirements must contribute to the environmental objectives pursued, they have to be non-discriminatory and the principle of proportionality has to be observed.

Non-discrimination in this case means that the required PPM has to be generally available to all producers. Requiring that a food product is made in a certain area is not permissible, but requiring that it is made according to organic standards is. The PPM requirement has to be proportionate vis-à-vis the environmental objective pursued. An adequate tool for defining this is doing a life-cycle assessment (LCA) of the products environmental impacts. According to the Commission the most cost-effective and easiest way of doing this is to define the technical specifications based on an existing eco-label because they already employ an LCA-analysis in their admission criteria.

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<sup>89</sup> Kunzlik 2005, p. 137.

<sup>90</sup> *Buying green! A handbook on environmental public procurement* (European Communities, 2004), p. 23.

<sup>91</sup> Kunzlik 2005, p. 134.

<sup>92</sup> *Buying green! A handbook on green public procurement 2<sup>nd</sup> Edition* (European Commission, 2011), p. 29.

Kunzlik takes a more permissible view than the Commission and presents various arguments to back it up.<sup>93</sup> He thinks that NPR PPMs should be allowed and presents six arguments in favour of this. Firstly, because of the integration principle of article 11 TFEU the definition of ‘environmental performance’, in Annex VI of directive 2004/18/EC should be understood broadly, so that it would include the whole lifecycle, and thus NPR PPMs, of a product. Secondly, the Commission’s interpretation of ‘invisible’ effects should be abandoned, because it is not based on a coherent formation of law, but on an ad hoc situation of adapting a desired policy to an ECJ ruling. Thirdly, the wording in Annex VI of the directive is open and does not restrict the use of NPR PPMs, so why should it be interpreted to do so? Fourth, the wording of recital 29 seems to allow PPMs without any reference to them being related to the end characteristics of the product. The ECJ case-law, that the directive is based on, has the same view. Fifth, environmental characteristics are presented as an independent award criterion in article 53 without any reference or relation to functional characteristics. And finally, there is ambiguity between how the technical specifications are defined in different parts of the directive.

A conclusion from Kunzlik’s arguments is that NPR PPMs should be allowed, if they are sufficiently clearly defined and if they are not discriminatory. As the examples in the beginning of this chapter point out, NPR PPM requirements are the most effective way of taking environmental issues into consideration in public procurement. Using eco-labels is the most cost-effective and also uniform way for the purchasing authorities to utilise GPP. Combining the use of eco-labels and NPR PPM’s would thus be the best way to put article 11 TFEU into practice in public procurement. A conclusion with the opposite effect would be to categorize eco-labels as NPR PPMs and retaining the Commission restrictive view on them.

AG Jacobs’ second argument is especially true in the case of GPP and eco-labels.<sup>94</sup> If environmental protection measures were allowed to be discriminatory the use of life cycle costing and NPR PPMs would not be limited in any way. The down side of this would be, that it would also enable setting requirements that would seem to be aimed at environmental protection, but they would constitute de facto arbitrary discrimination. For example, it can always be argued that locally produced wood is environmentally

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<sup>93</sup> Kunzlik 2005, p. 136.

<sup>94</sup> C-379/98 PreussenElektra, para 225-233, see chapter 1.2.3 of this thesis.

superior than wood from some third world country, but is this actually true in every case is another question.

#### **2.2.4 Eco-labels under directive 2004/18/EC**

Eco-labels can be used in two stages of the procurement process, either when defining the technical specifications or the award criteria. Technical specifications are the minimum requirements that a product has to comply with while award criteria are used to define which of the complying products is best.

According to recital 29 and article 23 (6) of the directive contracting authorities can define the technical specifications with reference to specifications in eco-labels. In practice this means that the requirements for the award of an eco-label are copy-pasted to the section for technical specifications in the contract award notice. Along with the specifications based on the label the notice must also include the phrase ‘or equivalent’. This means that products that have the actual label automatically fulfil the set criteria while products not bearing the label can use other means to proof their compliance. This can be done for example by presenting a technical dossier from the manufacturer or a test report from a recognised body.

Article 23 (6) gives four conditions which the eco-label has to fulfil so that it can be used to define the technical specifications: i) the specifications are appropriate to define the product, ii) the label is based on scientific information, iii) all stakeholders can participate in drafting the criteria for the labels and iv) the label is accessible to everybody.<sup>95</sup>

Eco-labels can also be used to define the award criteria. The directive itself does not mention this option but the Commission guidance does.<sup>96</sup> This is done by dividing the different requirements of the label into individual award criteria. The products will then be given points from each of the criteria that they meet. A single label can be used at both stages. Some of its requirements are used to define the minimum requirements as technical specifications and the rest then to award extra points as award criteria. The

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<sup>95</sup> These requirements can of course be circumvented by just not mentioning in the notice that the specifications are based on any label!

<sup>96</sup> Buying green! A handbook on green public procurement 2<sup>nd</sup> Edition (European Commission, 2011), p. 41.

Commission assumes that the same requirements apply at this stage; the label has to comply with the four criteria in article 23 (6) in order for it to be used to define the award criteria and that other means of proof can be used by producers who do not have the label. It seems an acceptable solution to apply the same criteria for both stages. This is also in line with the spirit of the directive.

### **2.3 Proposal for amending the public procurement directive**

The current legislation on public procurement is already eight years old. Union policies have developed since and the current economic situation also begs legal change that would facilitate economic growth. On a wider backdrop, the Commission proposal on 20.12.2011 facilitates two policy papers<sup>97</sup>, the Europe 2020 –strategy and the new Single Market Act proposal.<sup>98 99</sup> This chapter will first present an outlook on two Commission initiatives directly related to the proposal and then an overview of the relevant parts of the proposal. A critical analysis of the proposal, contrasted to the underlying policy objectives, will then be delivered.

#### **2.3.1 Policy context**

The proposal has two complementary goals: to increase the efficiency of public procurement and to better facilitate the use of public procurement for furthering other societal policy goals.<sup>100</sup> Efficiency means better value money in the way of savings or better products. The auxiliary policy goals can be related for example to employment, innovation or environmental protection. These goals, while supposedly making single procurement contracts more expensive, will on the long run complement the goal of a more efficient procurement regime and cutting down public expenditure. Although not explicitly stated in the proposal, the other societal goals seem to also have independent

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<sup>97</sup> Proposal for a directive of the European Parliament and of the Council on public procurement, COM(2011) 896 final.

<sup>98</sup> EUROPE 2020 S strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final.

<sup>99</sup> Single Market Act, 'Working together to create new growth', COM(2011) 206 final.

<sup>100</sup> COM(2011) 896 final, p. 2.

value as such, since these ideas are mentioned in the Treaties and a vast array of different policy papers.

In 2008 the Commission issued a communication entitled Public procurement for a better environment.<sup>101</sup> The communication identifies obstacles to the use of GPP and presents the Commissions views on tackling them. The main obstacle is the lack of common GPP criteria and policy which results in disparities in the internal market.<sup>102</sup> The distinguished specific obstacles that the communication is supposed to tackle are i) lack of common GPP criteria, ii) lack of information on LCA, iii) uncertainty on legal possibilities to utilise GPP and practical issues related to the procurement process and iv) no political support for GPP. The first and the third problems are relevant for this study.

According to the accompanying Commission staff working document stakeholders want clarification on the possibility to introduce NPR PPM requirements to the technical specifications.<sup>103</sup> The Commission's reply is that under the current directive they can only be used if 'those criteria are relevant for characterising the product'.<sup>104</sup> In other words, they cannot be used solely for environmental reasons.

The divergence between national GPP policies and the lack of a common Union policy raises administrative costs and also creates obstacles to the free movement of goods.<sup>105</sup> The Commission thinks that the administrative costs of GPP to companies, proving compliance to the technical specifications, might be too high. National divergence can also be created by the fact that the Concordia ruling effectively provides an exception under which member states can derogate from the mutual recognition principle of Cassis. Environmental reasons can be used to disqualify a tender, which in practice can lead to favouring companies from certain areas.<sup>106</sup>

The document then discusses the different options for solving these problems. The Commissions view on the effect of guidance on GPP seems rather optimistic. Mere guidance would not solve the legal issues if the state of law is unclear. Guidance would help in the uptake of GPP for example in the form of ready-made technical standards for environmentally friendly products. The EU Ecolabel and the 26 incorporated product

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<sup>101</sup> COM(2008) 400 final.

<sup>102</sup> Ibid., p. 3.

<sup>103</sup> SEC(2008) 2124, p. 10.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid., p. 12.

<sup>106</sup> Ibid.



groups are an example of this. Bolder options would be to introduce mandatory targets for the use of GPP or to make GPP mandatory for certain product groups. Using necessity would remove both of the problems since rules on what has to be done, in all member states, would be introduced. The conclusion of the Commission communication is that voluntary measures should be endorsed and common criteria for GPP created and guidance provided by the Commission to facilitate the chosen approach.<sup>107</sup>

The actual amendment process was started with a green paper in 2011.<sup>108</sup> The paper analyses both ‘how to buy’ and ‘what to buy’ reform possibilities in the light of the 2020 strategy and the new Single Market Act. ‘How to buy’ are the procedural rules of the procurement process that define what is possible and what not. ‘What to buy’ is the policy side of the issue; should the uptake of GPP be based on incentives or should it be made mandatory? I will cover the central issues of both approaches.

The paper reiterates that the PPM requirements have to be linked to the subject matter of the contract and somehow contribute to the end characteristics of the product, either visible or invisible.<sup>109</sup> It acknowledges that relaxing this criterion would allow utilising public procurement more effectively to support other societal goals. The down-sides of this change are also analysed.<sup>110</sup>

The main focus of the procurement process might switch from buying the best product to pursuing a specific policy and thus leading astray from the original purpose of using public funds efficiently. Public procurement rules might also be entangled with the rules on state aid. The current system of purchasing the best product with the cheapest price assures that no indirect state aid is generated through public procurement. The societal goals might enable discrimination. For example requiring solar power discriminates against northern regions where producing it is not cost-effective. A link to the subject-matter also guarantees some degree of certainty and predictability; purchasing the cheapest product that fulfils the set criteria or every authority having their own set of societal goals. Ultimately economic growth might be affected if companies started to base their actions on corporate policies instead of trying to develop the best possible products to increase their market shares and profits.

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<sup>107</sup> COM(2008) 400, p. 11.

<sup>108</sup> Green paper on the modernisation of EU public procurement policy, Towards a more efficient European Procurement Market, COM(2011) 15 final.

<sup>109</sup> *Ibid.*, p. 35.

<sup>110</sup> *Ibid.*, p. 39.

A number of member states already have local policies on what to buy.<sup>111</sup> These are policies that govern mandatory requirements of the purchased products or targets on the amount of products purchased that have to be 'green'. The problem with this is that it creates divergence since the local policies are not based on uniform standards. This does not facilitate the free movement of goods. Some legislation already exists on this matter, for example the energy star regulation and the clean vehicles directive.<sup>112</sup>

The paper recognises that the 'what to buy' instruments are effective for both pursuing the societal goals and also harmonising the markets for the sake of free movement of goods. Possible risks of this approach are discrimination and ineffectiveness. The decision on what to buy will strongly influence the markets and it might discriminate some companies. At the same time, the local purchasing authorities have the best knowledge about their needs, not the Brussels bureaucrats. Possible solutions for these problems are also presented. Imposing obligations only on the characteristics of the products would not limit the free movement of goods as much as strict requirements on their technical specifications. Financial incentives to purchase greener would not create such administrative burdens as direct obligations might.<sup>113</sup>

Kotsonis presents strong criticism against the ideas of the green paper.<sup>114</sup> His main point of argument is that the current directive allows for sufficient regard to different societal policies while still keeping the functioning of the internal market as its starting point. The possibilities presented in the green paper would turn this stance on its head; a switch from protecting the rights of the suppliers to fostering local policies, since purchasing authorities are mainly local. He specifically notes that the presented ideas would reduce legal certainty and make the award of contracts arbitrary and discriminatory. The 'what to buy' obligations represent an outdated centrally lead economy and they would actually make it harder for local purchasing authorities to act according to the law. In addition, some of the proposals might be against the World Trade Organisations Agreement on Government Procurement, which the Union is a signatory to.

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<sup>111</sup> For an overview of member states' actions, [http://ec.europa.eu/environment/gpp/action\\_plan\\_en.htm](http://ec.europa.eu/environment/gpp/action_plan_en.htm), sourced 13.3.2012.

<sup>112</sup> Regulation (EC) No 106/2008 and Directive 2009/33/EC.

<sup>113</sup> COM(2011) 15 final, pp. 42.

<sup>114</sup> Kotsonis 2011, pp 51.

### 2.3.2 Proposed amendments

The actual proposal is not as radical as one might have anticipated based on the different policy papers.<sup>115</sup> The proposal has the same legal basis as the current directive: articles 53 (1), 62 and 114 TFEU. The last one indicates that it is still foremost an internal market harmonisations measure and that the environmental goals are just auxiliary. The proposal states that it complies with the principle of subsidiarity because prior experiences have shown that Union procurement legislation has been effective and that divergent national policies would set obstacles to the free movement of goods. The statement on compliance with the proportionality principle bluntly reads that the proposal does comply ‘since it does not go beyond what is necessary in order to achieve the objective’. This argument is rather circular. Since the proposal does not extrapolated more on this issue I have to assume that it refers to the fact that the proposal is a minimum harmonisation measure.

There are three specific propositions targeted at enabling the strategic use of public procurement to purport environmental goals.<sup>116</sup> The possibility to use life-cycle costs as award criteria. These costs would include everything from the production to the disposal as well as externalities, if they can be monetised. The possibility to create technical specifications and award criteria that ‘refer to all factors directly linked to the production processes’. These have to be related to the subject matter of the contract. The possibility that purchasing authorities may require that the product bears a specific eco-label. Equivalent labels or other means of proof of compliance with the specified label have to be accepted also.

Article 66 of the proposal specifies that life-cycle costing can be taken into account on both award criteria: the most economically advantageous tender and the lowest cost. Article 67 then defines what can be included into life-cycle costs. The articles go into detail on what life-cycle costs are and how can they be used as award criteria but the end result is not that different then under article 53 of the current directive. The current directive allows for the award criteria for the most economically advantageous offer to include price, environmental characteristics, running costs and cost-effectiveness. The proposal only clarifies what is already possible according to the law. Of course clear

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<sup>115</sup> COM(2011) 896, p. 6.

<sup>116</sup> Ibid., p. 9.

and precise norms are always welcome but the proposed change is not that significant in practice.

Technical specifications are regulated in article 40 of the proposal. The first two paragraphs state in general terms that technical specifications may refer to a specific process of production but that the specifications shall not create obstacles to free movement and competition. The current division into performance or functional requirements and technical specifications is maintained in paragraph three. Paragraph four specifies that the technical specifications shall not refer to a particular process or origin of production with the effect of eliminating certain products from the tender competition. As an exception, such references are only possible if the technical specifications cannot be defined in any other way and if they are 'justified by the subject-matter of the contract'. This means that NPR PPM requirements are not allowed. The exception only concerns a reference to a specific product in situations where this is the only way of defining the wanted product. In this case the idea is that the offering companies would produce their own version of the mentioned product. The content of the article is effectively the same as of article 23 of the current directive.

Article 41 regulates that contracting authorities can require an eco-label from the purchased product. This will be either in the form of a performance or a functional requirement as defined in article 40. Article 41 specifies what criteria the eco-label has to fulfil so that it can be used as a requirement. The article also states that other equivalent labels and other means of proof of compliance with the specified eco-label have to be accepted. Article 23 (6) of the current directive only allows for the performance or functional requirements to be drafted on the basis of an eco-label. The practical outcome of the proposed directive is still the same as of the current directive since the products don't actually have to have the specified label, it is enough that they comply with it. The conditions that the label has to conform to in order to be used in the procurement process are the same in the proposal and the current directive.

Article 41 (2) of the proposal specifies that if some requirements for the award of an eco-label do not conform to the first condition set to the use of labels in the procurement process, that it has to concern 'characteristics which are linked to the subject-matter of the contract', that the remaining requirements can still be used when drafting the call for tenders. This second paragraph makes it even clearer that it is not allowed to set NPR PPM requirements to the products being procured.

### 2.3.3 Analysis

To sum up the above said, the proposed changes have little or no actual effect compared to the current state of law. Considering the hype presented in the policy papers one would have expected more. Still, there is something good in the proposition. In general, it clarifies many issues related to GPP. Bringing life-cycle costing onto the stage is a welcomed change. Although not a legally powerful tool, highlighting what it is and how it is used will probably affect the actions of purchasing authorities and stimulate the uptake of GPP throughout the Union.

The standing of NPR PPM requirements is clarified. Even though still not completely explicitly stated, their use as technical requirements would not be allowed. Kunzlik's hope that the ECJ would give a ruling on this issue is still relevant because the possibility to require them is important in the light of the environmental aims of the proposal.<sup>117</sup> Kunzlik's first two arguments would still be valid if the proposal would be enacted: i) allowing NPR PPM requirements would be in favour of the integration principle in article 11 TFEU, and ii) the problem with the 'invisible' characteristics of a product stemming from the Wienstrom decision is still not solved.

The proposition would not strengthen the possibility to use eco-labels in public procurement. They would still be left as administrative tools for the purchasing authorities when defining technical specification since no absolute mandatory requirements could be set. My earlier conclusions on this issue still apply.<sup>118</sup>

The proposed changes do not diminish national divergences in procurement practices and thus competition and free movement conditions are not maximised. Since no 'what to buy' obligations would be set differences in national environmental policies (or the lack of) will favour different products. Furthermore, because the use of European standards, or European eco-labels, to define technical specifications is only a recommendation national purchasing authorities will continue to use local variants. According the article 40 (3) (b) of the proposal and article 23 (3) (a) of the current directive state that preference should be given the European standards when defining technical specifications, but this is not an obligation. 'What to buy' rules would maximize integration of environmental protection into procurement policy and they

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<sup>117</sup> Kunzlik 2005, p. 136.

<sup>118</sup> See chapter 2.2.3 above.

would also deal with the problems related to diversification as a barrier to trade. On the other hand, it has been argued that such obligations would only make the procurement regime ineffective and that it should be the member states that make the decision of integrating secondary policies since they are the ones paying for it.<sup>119</sup> This view presupposes that integration of secondary policies will bring more costs, but as the discussion on life-cycle costing shows this is not certainly true.

Overall, it seems that the Commission retains the stance that the primary purpose of the Union and public procurement is an economic one. With this mind-set, basing the changes on article 114 TFEU and taking the functioning of the internal market as its primary objectives the proposed changes are justified. From the environmentalists view point they are not the most effective ones but this is as far as the Union can go while still retaining the four freedoms and the rights of the economic operators at peak.

## **2.4 Conclusions**

The current public procurement directive is based on the assumption that the primary aim of the Union and public procurement is the functioning of the internal market. The principle of non-discrimination is central in guaranteeing the rights of economic operators inside the common market. Public procurement is a strong tool for pursuing environmental goals. Secondary environmental goals are recognized by the Commission and the ECJ as legitimate but still they are not allowed to reach their maximum potential. The biggest obstacle is the requirement that technical specifications and award criteria have to be linked to the subject matter of the contract. In particular the prohibition of NPR PPM requirements is withholding GPP from reaching its full effectiveness. The reasons for this are not coherent and do not hold up to critical analysis.

Minimum harmonisation is meant to allow national diversification and to counter balance the economic aims of the Union with national social aims. The side effect of this is that union measures are not as effective as they could be, since they stop at the minimum level. This problem is evident in the area of my thesis. The problem is enhanced by the fact that even if stricter national measures were allowed, they would

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<sup>119</sup> Boyle 2011, p. 177.

only impact a small percentage of the whole public supply market. They would only effect procurement at the state employing the stricter rules. For the full potential of GPP to be exploited the Union should make it a mandatory policy. The integration principle of article 11 TFEU is calling for this to take place.

The Commission proposal for amending the procurement directive offers a few positive, but rather minor changes. It could have taken a bolder approach to issues that would enable more efficient use of GPP or it could have even made it mandatory in some respects. The Commission does not have to worry about how far it can go when trying to purport secondary policies since the ECJ can always be called to assess the legality of secondary legislation under article 263 TFEU. This would of course require that the Commission wanted to adopt a more pro-environment approach. In spite of what is written in the different policy papers this seems not to be the case, or either the Commission is just stuck with its view of retaining the old approach to secondary policies.

Eco-labels have been given a supporting role in public procurement. They function well in that respect but they could be used more efficiently. Especially the problems related to divergent national measures and also to procedural issues and cost-effectiveness of the process itself could be resolved by allowing to require that the products bare a specific label. The EU Ecolabel would be most suitable for this.

A further point to consider is the divergence that exists between the different legal acts affecting GPP. The approach adopted by the clean vehicles directive differs from that of the public procurement directive.<sup>120</sup> The legal basis of the clean vehicles directive is article 192 TEFU so it is aimed at protecting the environment. It can be considered as complementary to directive 2004/18/EC since it regulates specifically what purchasing authorities have to take into consideration when purchasing vehicles. The directive also applies to contracts signed under the public service regulation.<sup>121</sup>

According to the clean vehicles directive environmental issues have to be considered in the award procedure. This can be done by either setting technical specifications or award criteria that take into consideration the operational environmental impacts of the

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<sup>120</sup> 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.

<sup>121</sup> Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70.

used vehicles (article 5). The directive stipulates that at least energy consumption and different types of emissions have to be considered. In addition, it leaves the contracting authorities the possibility to employ other environmental criteria in their decision also. The aim of the directive is to reduce emissions and also to increase the innovation and supply of environmentally friendly vehicles to the markets. The directive effectively makes GPP a mandatory policy in the area of vehicle procurement and public transport. The directive does not set specific 'what to buy' obligations for purchasing authorities, but it does force them to buy the most environmentally friendly alternative. Why is GPP given such status only in a small and specific fields of procurement law?



### 3. The EU eco-labelling regime

#### 3.1 Product labelling and standardisation

Standardisation of products has long been one of the ways that the EU has used to construct the internal market and support the free movement of goods. The former policy was to introduce legislation that would standardise products throughout the Union. In the 1980's the Union started to shift from this full harmonisation approach to the current way of minimum harmonisation of product standards, often referred to as 'the new approach'.<sup>122</sup> Product labelling is one element of this standardisation of products. The new approach also includes using incentive based instruments rather than direct control when pursuing environmental goals.<sup>123</sup> Eco-labels are one example of this.

Product labels can roughly be divided into three categories: i) mandatory labels that imply that the product complies with mandatory legal standards, ii) voluntary labels that specify that the product is in some way superior to non-labelled products, eco-labels being one example of this group, and iii) labels that indicate that the product is hazardous or detrimental in some way, these labels are usually mandatory.

The CE-mark serves as a good example of the first group. In brief, the CE-mark is based on regulation (EC) 765/2008 and other product specific legislation. The mark is mandatory for some products groups. It indicates that the product bearing the mark complies with mandatory Union standards set for those products. A product that has obtained the CE-mark can be freely circulated within the internal market. The aim of the CE-mark, and other similar labels, is to set the minimum standards for products to ensure that they are safe and to facilitate the free movement of goods in the internal market.

Voluntary labelling that indicates that the product is in some way superior to other products of the same product group is one expression of the new approach that the Union has adopted. The new approach focuses on minimum standards and introduces

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<sup>122</sup> Chalmers 2010, p. 696.

<sup>123</sup> Kingston 2012, p. 41.

economic incentives for companies to push further on the desired policy are.<sup>124</sup> In the case of eco-labels the policy area is the protection of the environment. Eco-labels are meant to inform the consumer about the environmental aspects of the product and thus help her to make an informed decision on which product to purchase. In this way they serve as an incentive for companies to develop their products to a more environmentally sustainable direction while still trying to pursue economic profits. The EU has adopted various labels that function along this pattern.

The third group of labels concerns the protection of the consumer or the environment in some way. The tobacco directive 2001/37/EC suffices as an example. According to article five of the directive tobacco products have to indicate how much tar, nicotine and carbon monoxide they yield and they must carry a warning sign that indicates that the product is hazardous to health. The aim of the directive is to approximate certain measures in member states (namely the labelling of tobacco products) so that a high level of health protection can be assured.

Krämer categorizes specific environmental labels under the last two categories.<sup>125</sup> In my view, a strict division into these three categories is not fruitful. Even the term ‘eco-label’ is not unequivocally defined in the legal context. That said, the labels that this study focuses on are situated into the first and second category, based on their aims and whether or not they are voluntary or compulsory. All the so called ‘eco-labels’, a label that purports environmental goals, that the Union has adopted are also aimed at the functioning of the internal market and the free movement of goods, if not directly they at least incidentally have this effect also. I classify the aim of energy efficiency of article 194 TFEU, on which the energy label directive is based on, belonging under the wide umbrella on environmental protection.<sup>126</sup>

Different national product labels are excluded from this study. Just as a side note, these national measures fall under article 34 TFEU and the Cassis de Dijon interpretation of it. They are product rules which affect the free movement of products and have to be justified under article 36 TFEU or the mandatory requirements.<sup>127</sup>

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<sup>124</sup> Chalmers 2010, p. 696.

<sup>125</sup> Krämer 2007, p. 259.

<sup>126</sup> See Vedder 2010, p. 291 on how the Union energy policy might be restricted because it is linked to the internal market, which entails free movement of goods and undistorted conditions of competition.

<sup>127</sup> Chalmers 2010, p. 770. See also chapter 1.2.

### 3.2 Objectives and development of the eco-labelling regime

The European Union has adopted an integrated product policy (IPP) which means that measures aimed at lowering the environmental impact of products are integrated into other product policies.<sup>128</sup> The IPP is based on a life-cycle analysis (LCA) that observes the production, use and disposal stages of a products life. According to it the most effective way to impact products is when they are designed. Informing the consumer about the effects of products is also a key element of the Union's approach. The informed consumer is supposed to contribute to the reduction of energy consumption and waste production.

The Green Paper acknowledges public procurement as a powerful tool for affecting the environmental goals since the total amount of products purchased by public authorities is so vast. The paper noted that for this to take place the law and administrative practices need to be developed and knowledge spread out.<sup>129</sup> Since then the Concordia case and the amendment of the public procurement directive have allowed for environmental criteria to be considered in the procurement process. The Commission has also published two handbooks on GPP which give out practical advice on how to implement the policy. Altogether 26 product groups have been included to the EU Ecolabel which the purchasing authorities can easily use to specify technical criteria for products being acquired. The paper also identified the need to develop environmental standards along with other product standards. As the next chapter of this study will point out, this development too has come about.

The Union has had environmental action programmes since the 1970s. They are policy papers which plot out future perspectives and legislation in the field of environmental policy.<sup>130</sup> <sup>131</sup> Currently in action is the 6<sup>th</sup> programme.<sup>132</sup> It was initiated in 2002. It took IPP and LCA as major components in the work for improving environmental performance and sustainable production. Another key factor in the programme is involving the enterprises and consumers in reaching the above mentioned goals. Incentives and information are supposed to be used to effect production and

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<sup>128</sup> Green Paper on Integrated Product Policy, COM(2001) 68.

<sup>129</sup> Ibid., p. 15.

<sup>130</sup> <http://www.ieep.eu/work-areas/governance/environmental-action-programmes>, sourced 2.2.1012

<sup>131</sup> See Scheuer 2005 Chapter III for a review on all of the six environmental programmes.

<sup>132</sup> The 6<sup>th</sup> community environment action programme, Decision No 1600/2002/EC.

consumption.<sup>133</sup> The different labels introduced by the Union provide a possibility for this.<sup>134</sup> Article 3 (6) of the programme states that Union GPP policy should ‘allow integration of environmental life cycle, including the production phase, concerns in the procurement procedures while respecting Community competition rules and the internal market’. This wish has not been granted. As pointed out in the previous chapter the possibility to use NPR PPMs is not possible according to the current procurement directive or even the new proposal.

The Union has continued to develop the IPP and LCA approaches.<sup>135</sup> In the 2003 policy paper the main issue regarding GPP was to ensure that the existing legal possibilities to utilise it are used. A list of practical measures was drawn up which the Commission has carried out since. The paper also stated that the scope of labels still needs to be expanded. Enforcement of the misleading advertising directive would root out advertising of environmental characteristics of products that did not have a scientific basis and thus give more visibility to the products with registered eco-labels.<sup>136</sup> Finally, the paper also notified that IPP needs to be considered in other policy areas than just the environment. This is in line with the integration principle of article 11 TFEU.

The development of the eco-labelling regime has been goal oriented and a link to public procurement has existed throughout. This development can be seen as one implication of the integration principle of article 11 TFEU. Krämer thinks that the new approach does not effectively enough drive the environmental goals but only the health and safety of consumers.<sup>137</sup> One reason for this might be that the policy internalizes external costs.<sup>138</sup> The incentive and information based approach is countered by the fact that the environmentally friendly products are more expensive to the end consumer, be it a private or public body. Economic criteria often go before ecological.

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<sup>133</sup> Ibid., article 3 (5).

<sup>134</sup> Studies have shown that eco-labels do effect consumer choices, see Thøgersen 2002. The number of registrations under the EU Ecolabel has grown every year since its introduction in 1992, see [http://ec.europa.eu/environment/ecolabel/about\\_ecolabel/facts\\_and\\_figures\\_en.htm](http://ec.europa.eu/environment/ecolabel/about_ecolabel/facts_and_figures_en.htm), sourced 13.3.2012.

<sup>135</sup> Integrated Product Policy – Building on Environmental Life-Cycle Thinking, COM(2003) 302 final.

<sup>136</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, the current version of the directive is usually referred to as the Unfair Commercial Practices Directive.

<sup>137</sup> Krämer 2007, p. 225.

<sup>138</sup> Jans 2008, p. 336.

### 3.3 Analysis of specific labels

The EU has issued various product labels that focus on the environmental performance of the product. Other labels, or common standards for a specific industry, also exist, such as the ones for buildings, renewable energy and services.<sup>139</sup> Because of the limited scope of a thesis I have had to limit the study to only a few of them. I have chosen the pieces of legislation that produce actual labels, in the sense that consumers are used to seeing labels on products. These are also products that public bodies purchase through the procurement processes. The chosen product groups are also simpler, both in the factual sense but also the legislation concerning them, than the other possible groups. This helps to keep the focus of the study together. In addition to these labels I will briefly discuss the EMAS regulation and compare its legal standing in the procurement process to those of the eco-labels.<sup>140</sup>

A common aspect to these norms is framework regulation.<sup>141</sup> The eco-design directive and the energy label directive are both framework directives. They have been adopted by the Council and the Parliament according to the ordinary legislative procedure set out in article 294 TFEU. The directives set out the aims, functions and common principles but the specific details are then enacted by the Commission through delegated regulations. In both of the examples when a new product group is added to the scope of the directive it is done through a Commission regulation defining the relevant matters for those products. This seems to be a solid practice since the drawing up of the criteria is left to specialist bodies.

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<sup>139</sup> See for example Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings, and Directive 2009/28/EC on the promotion of the use of energy from renewable sources.

<sup>140</sup> Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS).

<sup>141</sup> Preschal 2006, p. 15.

### 3.3.1 Energy Star Regulation

The regulation is based on an agreement between the Government of the United States of America and the European Union.<sup>142</sup> The Energy Star label was originally introduced by the US government Department of Energy in 1992. The label defines energy efficiency standards for office equipment. It was taken as a mandatory requirement for public purchasing of office equipment and thus quickly gained status as an international standard for these products.<sup>143</sup> The EU joined the agreement in 2001 and enacted the original regulation that was then amended by the current regulation.<sup>144</sup>

The aims of the regulation are energy efficiency (recital 2), functioning of the internal market (recital 4) and minimising the impacts of energy efficiency requirements on the free movement of goods (recital 5). The legal basis of the regulation is article 192 (1) TFEU which means that it is primarily aimed at pursuing an environmental goal. Participation to the programme is voluntary according to article 4 (3). Companies that want to apply for the label can do so but products are not obliged to carry the label.

According to article 6 of the regulation Union institutions and member states central government authorities have to purchase office equipment that comply with the minimum energy efficiency requirements of the regulation. This requirement only applies if the minimum threshold for the value of the contract exceeds that defined in article 7 of the public procurement directive. What is classified as a central government authority is also defined according to that directive.

What this means is, when purchasing authorities procure office equipment that's value exceeds the set threshold they have to define the technical specifications according to the minimum requirements set by the Energy Star label. Products that carry the Energy Star label automatically fulfil the specified criteria but other products can also be purchased. These products have the possibility of providing other proof that they fulfil the specified efficiency criteria. This is in line with the norm in the public procurement directive that specifies that technical specifications that refer to a certain standard, label or mark have to be accompanied by the words 'or equivalent'.

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<sup>142</sup> Regulation (EC) No 106/2008 of the European Parliament and of the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment.

<sup>143</sup> [www.eu-energystar.org/en/203.shtml](http://www.eu-energystar.org/en/203.shtml), sourced 27.1.2012.

<sup>144</sup> Regulation (EC) No 2422/2001 of the European Parliament and of the Council of 6 November 2001 on a Community energy efficiency labelling programme for office equipment.

### 3.3.2 Energy Label Directive

The directive is based on the EU's agenda to fight climate change and to cut down carbon dioxide emissions.<sup>145</sup> <sup>146</sup> The first version of the directive was adopted already in 1979.<sup>147</sup> It was based on various policy papers adopted in the 1970s that aimed at rationalising the use of energy but still enabling social and economic growth. The current directive is one of the tools used for pursuing the Union's goals of the 2020 strategy.<sup>148</sup>

The aims of the directive are to achieve energy savings and environmental gains (recital 2). This is to be achieved by labelling products and thus enabling the informed consumer to make decision that cut down energy consumption and also benefits the economy overall (recitals 4, 5 and 8). The legal basis of the directive is article 194 (2) TFEU which means that it is aimed at improving the functioning of the internal market and also to promote energy efficiency and energy saving. The original proposal of the directive was based on article 114 TFEU which meant that it was aimed purely at the functioning of the internal market.<sup>149</sup> During the process of adapting the directive the Treaty of Lisbon was passed, which introduced a new legal basis, article 194 TFEU. The legal basis of the directive was then switched to this.

Under article 5 of the directive suppliers of products covered by the directive have to provide their products with a label that indicates how much energy the product consumes and how energy efficient it is compared to other products. Equally, article 6 obliges the dealers of such products to keep these labels visible. Labelling the products covered by the directive is mandatory but the directive does not set any technical specifications for the products or their energy efficiency.

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<sup>145</sup> Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products.

<sup>146</sup> Climate change was added to the Union's objectives in the Lisbon Treaty, see article 191 (1) TFEU. After this a separate DG has been established to combat climate change, DG Clima. The 2020 –strategy is one policy paper which focuses on combatting climate change.

<sup>147</sup> Council Directive 79/530/EEC of 14 May 1979 on the indication by labelling of the energy consumption of household appliances. See also the various policy papers referred to in the preamble of the directive.

<sup>148</sup> EUROPE 2020 A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final. See also the Commission website for more information on the strategy: [http://ec.europa.eu/europe2020/index\\_en.htm](http://ec.europa.eu/europe2020/index_en.htm).

<sup>149</sup> Proposal of the Commission COM(2008) 778 final.

As part of the holistic approach that the Union has adopted towards protecting the environment and reducing CO<sub>2</sub> emissions, this directive also recognises the potential that public procurement has on impacting this development. First off, recital 16 recognises the possibilities that using the energy labels and defined energy efficiency classes to guide public procurement in the member states can be an effective way of impacting the environmental goals. On the other hand, recital 18 declares that promoting procurement of energy efficient products should not be to the detriment of the overall environmental performance and functioning of such products. Article 9 regulates that contracting authorities ‘shall endeavour’ to procure only products belonging to the highest energy performance class, or equivalent. This is not an obligation, only a recommendation. For that reason, for example in Finland no obligations relating to this issue were taken to the national law implementing the directive.<sup>150</sup>

### 3.3.3 Ecolabel Regulation

The original version of the Ecolabel regulation was given in 1992.<sup>151</sup> The regulation was aimed at reducing the environmental impact of products throughout their lifecycle by informing consumers of the environmental effects of products and indicating by labelling which products are less detrimental. The current regulation continues on the same path and advocates the Sustainable Consumption and Product policy framework of the Commission, emphasised for example in the 6<sup>th</sup> Environmental Action Programme.

The aim of the directive is to promote the use of products with a reduced environmental impact during their life cycle (recitals 1 and 5). The legal basis of the regulation is article 192 (1) TFEU which means that it is primarily aimed at pursuing an environmental goal. The label is supposed to comply especially with the precautionary principle in article 191 (2) TFEU.

The regulation sets out a voluntary labelling scheme to which interested companies can apply to register. The accepted products are allowed to bear the label. Currently 26

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<sup>150</sup> HE 109/2010 vp, p. 5. The government proposal on the implementing law states, ‘Since it is not a mandatory obligation, article 9 of the directive will be implemented with various recommendations relating to public procurement.’ (Translated by TT)

<sup>151</sup> Council Regulation (EEC) No 880/92 of 23 March 1992 on a Community eco-label award scheme.



different product groups have been taken into the scheme of the label. These include for example dishwashing detergents, lubricants, light sources and notebook computers. New product groups are established by a decision of the Commission.<sup>152</sup> The regulation entails specific rules on defining specifications for product groups and the awarding of the label. Recital 4 necessitates that the specifications of this regulation are to comply with the ones of the Eco-design directive. This means that for a product that has to comply with the eco-design directive the Ecolabel serves as a 'label of excellence'. The label indicates that that product is better in environmental terms than products that just bear the mandatory eco-design label.

Recital 14 of the regulation states that member states should consider guidelines and targets for their national GPP action plans. Apparently it is meant that the label's criteria could be used as guidelines when defining technical specifications for products being procured.<sup>153</sup> The directive on public procurement also mentions that this is possible.

### 3.3.4 Eco-design Directive

The directive was first introduced in 2005.<sup>154</sup> Prior to this there already existed product specific legislation on different electricity and gas consuming household appliances.<sup>155</sup> The directive is linked to the Union's 2020 strategy and specifically The Action Plan for Energy Efficiency.<sup>156</sup> The Eco-design directive introduces a different approach to reducing energy consumption than the EU Ecolabel directive. Labels aim at consumers choosing products which use little energy during their operation while the eco-design directive effects the whole life cycle of the product. The directive affects the production, use and disposal stages of the products life-cycle.

The aim of the directive is to ensure the free movement of goods within the internal market by harmonising national measures related to the design of energy consuming products (recital 2 and article 1). The directive also aims at reducing energy consumption and contributes to the aim of sustainable development (recital 3). Products

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<sup>152</sup> The newest being Commission Decision of 28 June 2011 on establishing the ecological criteria for the award of the EU Ecolabel to all-purpose cleaners and sanitary cleaners.

<sup>153</sup> This is stated in the proposal of the regulation. See COM(2008) 401 final, p. 3.

<sup>154</sup> Directive 2005/32/EC of the European Parliament and of the Council of 6 July 2005 establishing a framework for the setting of ecodesign requirements for energy-using products.

<sup>155</sup> Directives 92/42/EEC, 96/57/EC and 2000/55/EC.

<sup>156</sup> COM(2006) 545 final.

that comply with the directive should be able to move freely inside the internal market (recital 8). The legal basis of the directive is article 114 TFEU which means that it is an internal market harmonisation measure. If the directive were enacted post Lisbon its legal basis might have been article 194 TFEU, as with the Energy Label directive, since it is primarily an internal market measure and secondarily an environmental measure.

The directive sets minimum requirements that products have to fulfil in order to be granted the CE-mark and access to the internal market. It is a framework directive and the Commission gives out regulations about the technical specification related to each product group. Compliance with the directive is mandatory.

The directive does not have any direct relevance for public procurement. The Commission proposal for the directive mentions that the framework created by it 'will also be the essential building block for an integrated sustainable environmental product policy, as complemented by initiatives on labelling and incentives relating to public procurement and taxation'.<sup>157</sup> This comment is not dealt with in more detail in the proposal and the directive itself does not have any mention of public procurement. This comment in the proposal just emphasises the holistic approach the Commission has adopted towards environmental protection, it wants to utilise all possible tools for this goal. Since the requirements set by the directive are mandatory purchasing authorities can only purchase products which comply with the set criteria.

### **3.3.5 EMAS Regulation**

The eco-management and audit scheme (EMAS) was established in 1993.<sup>158</sup> The aims of the scheme have remained the same in the latest amended version of the regulation.<sup>159</sup> In its newest environmental action plan the Union recognises that in order for it to reach its environmental and sustainable development goals it has to get the

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<sup>157</sup> Commission proposal COM(2008) 399 final, p. 2.

<sup>158</sup> Council Regulation (EEC) No 1836/93 of 29 June 1993 allowing voluntary participation by companies in the industrial sector in a Community eco-management and audit scheme.

<sup>159</sup> Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS).

industry involved also.<sup>160</sup> Article 3 (5) of the program recognises the EMAS as a tool for this.

According to the first article the main aim of the EMAS regulation is to ‘promote continuous improvements in the environmental performance of organisations’. The legal basis of the regulation is article 192 (1) TFEU which means that it is aimed towards environmental protection.

Participation to the scheme is voluntary. Requirements for registration are set out in article 4. The company must have an environmental management system that comprises of policy, objectives and targets. The company will be audited and it must give out a statement about the actions it has taken. In practice the requirements mean that the company takes care of environmental issues throughout its functions. Admitted companies can use the EMAS-logo on their materials, such as official documents and advertisements. According to article 10 (4) the company cannot use the logo on its products since the EMAS is not a product standard.

The way that the EMAS can be utilised in public procurement differs a bit from the different eco-labels but the practical outcome is the same in both cases. According to article 48 (2) (f) of the public procurement directive the purchasing authority can require evidence from the tendering companies of their abilities to apply environmental management measures when fulfilling the contract. This possibility only applies to public work and service contracts and not to the supply of public goods. Article 50 specifies that the purchasing authority can require that the company is registered under the EMAS scheme. Registration under other similar schemes can also be required. If the tendering company is not registered under the required scheme they can use other means of proving compliance with the criteria defined in the scheme.

If compared to article 23 about the technical specifications defining the products being purchased, there seems to be a slight difference in degree. According to article 23 (6) the specification can only be based on eco-labels but the direct requiring of the label is not allowed. This means that in both situations companies that are not registered, or whose products do not bare the label, can be admitted if they can give evidence that they fulfil the set criteria. Thus, in neither situation nobody is discriminated and everybody has an equal chance of participating into the tendering process.

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<sup>160</sup> 6th Community Environment Action Programme, decision no 1600/2002/EC.

### 3.4 Conclusions

Even though all of the addressed labels have been reformed since, Krämer's conclusion on the state of the whole labelling regime is still relevant. He thinks that the different labels that the Union has adopted do not form a coherent system that would advance the desired aims in the most efficient way possible.<sup>161</sup>

One aspect is the legal basis of the acts. They are based on three different articles: 114, 192 (1) and 194 (2) TFEU. According to settled case law the legal basis for a measure must be chosen according to the aim and content of the measure. If a measure pursues two objectives the primary objective should be used to define the legal basis. If the measure has two objectives, out of which neither one is subordinate nor incidental to the other, the measure has to be founded on both of these legal bases.<sup>162</sup> Furthermore, the fact that whether or not the labelling scheme is mandatory or not does not affect what is the correct legal basis.<sup>163</sup> Considering Union competence on this issue, it does not matter which one of the three articles is chosen as the legal basis for the measure, since all three of the policy areas fall under the area of shared competence according to article 4 TFEU. However, there is a difference in what is the primary objective of the measure. Is it the functioning of the internal market or protection of the environment?

Out of the four instruments the eco-design directive is the only one which has compulsory effects on the products, even though the energy label directive is also mandatory. The eco-design directive based on article 114 TFEU is the only 'pure' internal market harmonisation measure and its environmental effects can be considered incidental. It is a minimum harmonisation measure and clearly part of the 'new approach', but when compared to the three other instruments it most closely resembles the old approach of direct control, whereas the other instruments the new way of establishing voluntary incentive based instruments. The old approach was more effective. One possibility would be to assimilate all the different labels under the CE-mark.<sup>164</sup> This, or some other measure, would be a return to the old approach. It would surely be more effective but it would require a political retreat from the member states.

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<sup>161</sup> Krämer 2007, p. 259.

<sup>162</sup> Case C-281/01 Commission v Council [2002] ECR I-12049, para. 33-35.

<sup>163</sup> Ibid., para. 44.

<sup>164</sup> See more in Cetik 2011, p. 48. He concludes that he does not support this assimilation but that he would rather make all the labels mandatory.

The Energy Star regulation is the only instrument that has actual impact on public procurement. Purchasing authorities cannot purchase products that are less energy efficient than the requirements set by the label, although the products purchased do not have to bare the label. The Eco-design directive also affects the products being purchased, but since all products on the market have to comply with it, it really does not impact public procurement in any special way. The approach adopted in the Energy Star regulation seems plausible. It does not hinder the free movement of goods and it is not discriminatory. Many member states have GPP policies that define what sort of products authorities have to purchase. The end result of the regulation is the same, but it just applies as a Union wide policy. Adopting the same approach for all the labels would not be such a drastic measure as adopting environmentally friendly maximum harmonisation measures for product standards (the old approach), but it would still have a relevant effect on the overall consumption because public procurement accounts to such a large amount of the total GDP. This approach would also be in line with the integration principle of article 11 TFEU and coherent in relation to the simultaneous objectives of the internal market and the environment.

The reasons for this diversity among the labels are not obvious or even rational. The labels that are mandatory are based on internal market harmonisation measures. Since they are mandatory they actually also have the biggest effect on the environment, while the environmentally targeted labels are just guidelines that do not need to be followed.

<b>Instrument</b>	<b>Legal basis</b>	<b>Aim</b>	<b>Content</b>	<b>Relevance for GPP</b>
<b>Energy Star Regulation</b>	192 (1) TFEU, environment	Energy efficiency, internal market	Voluntary	Obliges purchasing authorities.
<b>Energy Label Directive</b>	194 (2) TFEU, internal market and energy efficiency	Internal market, energy efficiency	Mandatory	Encourages purchasing of efficient products, but not mandatory.
<b>Ecolabel Regulation</b>	192 (1) TFEU, environment	Reduced environmental impact of products	Voluntary	Helps in defining technical specifications when purchasing products.
<b>Eco-design Directive</b>	114 TFEU, internal market	Internal market, environment	Mandatory	No specific relevance, but applies to all products on the market.
<b>EMAS Regulation</b>	192 (1) TFEU, environment	Environmental performance of companies	Voluntary	Registration can be required, but companies can use other means to proof compliance with the standard.

**Table 1: summary of the differences between the studied labels.**

## 4. Integrating environmental protection into public procurement

This chapter focuses on assessing the extent to which the integration principle of article 11 TFEU has been deployed in the legal context of my topic. First a short summary on the findings of this study is presented. It is supposed to answer my first research question; what is the current legal status of GPP and eco-labels? Then two different approaches on why and how should the integration principle be applied regarding GPP are discussed. In the third part I will try to find an answer to second research question; how should the law be interpreted regarding GPP and eco-labels, taking into consideration the integration principle and coherence of the legal system?

### 4.1 Current legislative standpoint

Green public procurement is currently just a policy purported by the Union. Its application depends on national action or just the whim of an individual purchasing authority. There are a few exceptions to this, mainly the clean vehicles directive and the energy star regulation. Considering the principle of conferral and subsidiarity, it can be argued that this is the way that it should be. On the other hand, the integration principle of article 11 TFEU is not given any real meaning in public procurement as long as the Union does not issue binding requirements for the uptake of GPP.

Currently directive 2004/18/EC on public procurement regards eco-labels as auxiliary tools for implementing green public procurement. This view is based on the stance adopted by the Commission in its Handbook designated to promote GPP and the factual work done by the Commission in publishing exemplary criteria for greener products.<sup>165</sup> Even though these are only the Commissions interpretations of the law<sup>166</sup>, and a more permissible interpretation of the directive would be possible<sup>167</sup>, since the ECJ has not addressed the issue a literal interpretation of the meaning of the directive is the soundest bet. This stance is further backed up by the Commission proposal for amending the

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<sup>165</sup> See [http://ec.europa.eu/environment/gpp/eu\\_gpp\\_criteria\\_en.htm](http://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm) for the full list of criteria for different product groups (accessed 28.2.2012). Currently the Commission has published criteria for 19 product groups.

<sup>166</sup> *Buying green! –handbook* (2011), p. 2. The handbook contains a legal disclaimer.

<sup>167</sup> Kunzlik 2005, p. 137.

current directive. Since this issue is well known and the proposal does not intend to change it<sup>168</sup>, then it must be considered as a valid interpretation.

In general and for most products and procurement processes, eco-labels can only be used to define the technical specifications desired from the products being purchased. The products cannot be required to have the EU Ecolabel or any other similar label. Some of the labels are mandatory but this does not affect their position as tools utilised by GPP. Mandatory labels and procurement practices, such as the energy label directive and the energy star regulation, allow using eco-labels as mandatory requirements in public procurement.

## **4.2 The effects of the integration principle**

This chapter presents two different approaches to my topic. Both of them are built around the integration principle and interpretation of secondary Union law. The first looks at different reasons for why the integration principle should be given effect and how its outcome should be assessed according to the proportionality principle. The second looks at what integration should mean in theory and also what are its practical outcomes.

### **4.2.1 Greening EU procurement law and policy**

#### **Introduction**

Suzanne Kingston's book *Greening EU Competition Law and Policy* analyses the interaction between EU competition law and environmental protection. Her main line of argument is that efficiency is not the sole purpose of competition law and that environmental protection measures have to be considered in all specific policy fields of Union law in order for them to be effective.

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<sup>168</sup> See chapter 2.3.3.



Competition law regulates private markets whereas public procurement regulates the markets for public supplies. They both aim for efficiency and benefit for the consumer. The former aims for the benefit of the private consumer and the latter for the benefit of the tax payer whose money is being used to purchase the public goods. In essence, they are both internal market harmonisation measures aimed at the functioning of the common market. They both have as one of their goals to purport interstate trade.<sup>169</sup>

Pursuing secondary policy goals with internal market harmonisation measures is the current reality. Both competition and public procurement law have been used to purport environmental goals. Because of this I consider it appropriate to analogously apply Kingston's arguments to my topic. Greening EU public procurement law is very much on the political agenda today. Since the perennial issue in both cases is the same, restricting the fundamental freedoms for environmental purposes, analogous application of the analysis is possible, even without deeper comparison between the substances of competition and public procurement law.

'Greening competition law' means introducing policy instruments that are supposed to have environmentally beneficial outcomes: environmental taxes, subsidies on environmentally friendly products, emission trading and corporate environmental initiatives. Greening public procurement would thus mean to pursue the purchasing of products with the lowest possible environmental footprint. Using eco-labels to define the purchased products is one example of this.

## **Application**

The book has two main parts. The first focuses on should environmental goals play a role in EU competition law and policy? The second analyses the practical role of environmental protection in EU competition law and policy. The conclusions are then presented in a third chapter. Alongside, the book has three aims: i) to present a theoretical framework for analysing the relevance of environmental factors to competition law and to make practical proposals based on that analysis, ii) to combine legal analysis with economics and political science, to better grasp the diversity of the

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<sup>169</sup> See Olykke 2011, on coherence between EU competition and procurement policies.

issue, and iii) bringing the academic and political debate on the issue together to better facilitate the realisation of the different aims.

The book begins with a comparison of three different economic theories: ordoliberal, Harvard school and Chicago school. Their views on the role of environmental factors in competition law policy are analysed. Kingston concludes that the EU does not employ a single competition theory, but uses elements distinguishable in all three.<sup>170</sup> A political decision about the role of competition and the structure of the economy precedes our choice for the preferred instruments on competition law. Kingston notes that the EU has explicitly made this decision in Article 3 (3) TEU, which states that:

‘The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.’

This should serve as a starting point when trying to define what sort of policy the EU should pursue in competition law.<sup>171</sup> The same applies to public procurement. The procurement regime needs to foster economic activity and at the same time ensure a high level of protection for the environment. What would be the actual legislative choices to pursue both of these aims? Would the general aim of facilitating GPP, or the specific aim of allowing an eco-label requirement, foster both of these possibly conflicting policies?

## MBIs

The EU uses a variety of different market based instruments (MBIs) to regulate environmental policy and intends to increase this approach in the future.<sup>172</sup> A shift from the old control based approach to the use of MBIs started in the 1980s in the neo-liberal wake of Reagan in the US and Thatcher in the UK.<sup>173</sup> This is part of the same evolution

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<sup>170</sup> Kingston 2012, p. 38.

<sup>171</sup> *Idib.*

<sup>172</sup> Green Paper on market-based instruments for environment and related policy purposes, COM(2007) 0140 final.

<sup>173</sup> Kingston 2012, p. 41. See Gunningham 2009, for an extensive presentation on the evolution of environmental law and its implications on regulation and governance.

that affected the way that directives are used, usually referred to as the ‘new approach’.<sup>174</sup>

The use of MBIs has broadened the scope of environmental issues in competition law.<sup>175</sup> Because MBIs are in essence voluntary, they can include environmental factors that might not be possible under obligatory legal rules since the four freedoms limit the possible usage of such secondary policies. The same applies to the current procurement regime of the Union. The only area of procurement where the purchasing authority is bound to follow the environmental legislation are the situations falling under the Energy Star regulation. In all other procurement situations, the vast majority of them, utilising GPP is possible but not mandatory. Eco-labels are just a tool for effective utilisation of GPP.

Kingston analyses three different MBIs: state subsidies, emission trading and voluntary environmental initiatives. Eco-labels fall under the third group. The benefits of voluntary instruments are that they might complement direct regulation and contribute to a higher level of environmental protection. Their disadvantage is that they are voluntary and thus not suitable for dealing with serious environmental risks.<sup>176</sup> As a conclusion, their success depends on their content and how widely they are eventually deployed. A specific problem to eco-labels is the fact that there exists many overlapping labels within the Union. This leads to the consumer (purchasing authority) and producer (supplier) being confused, which ultimately hinders the potential benefits of the labels.<sup>177</sup>

Member states have been keen to adopt GPP but since it is a voluntary instrument its application varies from one member state to the other.<sup>178</sup> Many member states have their own local eco-labels. A locally used label can be scientifically defined and have an effect on what products are purchased, but it will not be effective considering inter-state trade. Article 11 of the Ecolabel regulation addresses this problem of divergence, but as long as the different labelling schemes around Europe are not harmonized the problem

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<sup>174</sup> Chalmers 2010, p. 696.

<sup>175</sup> Kingston 2012, p. 41. See also Gunningham 2009, p. 187.

<sup>176</sup> Kingston 2012, p. 78.

<sup>177</sup> Kingston 2012, p. 92.

<sup>178</sup> See Assessment and Comparison of National Green and Sustainable Public Procurement Criteria and Underlying Schemes, Final Report, ENV.G.2/SER/2009/0059r (AEA Group, 26<sup>th</sup> November 2010, Didcot); Green Public Procurement in Europe 2006 – Conclusions and recommendations (Virage Milieu & Management bv, Korte Spaarne 31, 2011 AJ Haarlem, the Netherlands); Benefits of Green Public Procurement (Nordic Council of Ministers, TemaNord 2009:593, Copenhagen).

of double standards, or even more, is not resolved. A product has to conform to many standards if it wishes to have the most well know labels of each of the areas that it is being sold at.

Even voluntary initiatives such as MBIs can constitute entry barriers to markets.<sup>179</sup> A product that does not have a widely known eco-label will not be as alluring to the consumer as one bearing the label. This is a de facto entry barrier. The same effect can occur in public procurement even though no policy on favouring labelled products would be employed. This effect of an entry barrier is strengthened if eco-labels are given a strong weight in the evaluation stage of the procurement process. Requiring all purchased products to have a specific label would constitute a de jure entry barrier. Entry barriers eventually lead to centralisation of the markets which is just the opposite of what competition and procurement rules aim for.

Kingston states that the ECJ has not adopted a consistent approach to environmental policy issues in competition law cases, but that they are resolved in an ad-hoc manner with standard competition analysis and minimal regard for environmental policy.<sup>180</sup> The same is not true for public procurement. As discussed earlier, the current state of law has been developed based on the decisions of the ECJ in cases such as *Concordia* and *Wienstrom*, but there still seems to be a calling for more intellectual clarity and coherence in the rulings of the ECJ.<sup>181</sup>

The rest of Kingston's book presents legal, governance and economic arguments for why environmental protections goals should play a role in EU competition policy. Her aim is to provide tools to tackle the above mentioned shortcoming in the argumentation of the ECJ. I will shortly summarise these arguments and then apply them to Union procurement policy.

### Legal systematic arguments

Kingston's legal systematic arguments are divided into two groups, i) environmental goals in relation to other policies and ii) the systemic link between the free movement provisions and competition law. The Treaties along with secondary instruments should

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<sup>179</sup> Kingston 2012, p. 93.

<sup>180</sup> *Ibid.*, p. 96.

<sup>181</sup> See Kunzlik 2005.

be interpreted coherently as a whole.<sup>182</sup> This can be based on article 7 TFEU and the ‘effet utile’ doctrine.<sup>183</sup> Article 11 TFEU explicitly states this for environmental issues. The status of environmental law and policy has evolved from not being mentioned at all in the Treaty of Rome in 1957 to becoming the secondary target, after the functioning of the internal market, of the Union in the Treaty of Lisbon in 2009.<sup>184</sup> Kingston interprets the combined meaning of article 7 and 11 TFEU and comes to the conclusion that environmental goals must be given priority over other policies if they do not collide. In situations of conflict between the environmental measures and other policies the dispute should be subjected to a proportionality review.<sup>185</sup> The application of the proportionality principle is crucial so sustain coherence of the legal system.

Competition law rules should be interpreted consistently with the free movement rules. This is because they form a whole, which Kingston calls the ‘economic constitution’.<sup>186</sup> Since environmental measures can be used to restrict the free movement of goods it should also be possible to use them to restrict competition. Furthermore, she notes that there is convergence in competition and environmental rules in the case law of the ECJ. The first part should apply to procurement law it being adjacent to competition law. The second is also true for procurement law cases, as discussed earlier in this thesis.

### Governance argument

Good governance is essential in a system like the EU with multiple policies manifested in the TEU and the TFEU. Each part of the system should consider all the different policies in its functions. The debate on EU governance centres around two issues: i) to bring the EU closer to its citizens and ii) to enhance the impact of EU policies.<sup>187</sup> According to this argumentation, if environmental protection is what the people of Europe want then that is what the bureaucrats should give them. Basing the policies on

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<sup>182</sup> Kingston 2012, p. 97.

<sup>183</sup> Prechal 2005, p. 216; Chalmers 2010, p. 1015.

<sup>184</sup> Article 3 (3) TFEU lists ‘protection and improvement of the quality of the environment’ as an aim of the Union right after the functioning of the internal market. Also, the phrase ‘free and undistorted competition’ was removed from the article. Kingston thinks that this is more a symbolic change than a substantial one, but it must have some meaning, otherwise it would not have been made. See Kingston 2012, p. 101.

<sup>185</sup> Kingston 2012, p. 117.

<sup>186</sup> Kingston 2012, p. 120. See also Maduro 1997 on the EU’s ‘economic constitution’ and the effects of article 36 TFEU. Maduro presents an interesting taxonomy on the effects of article 36 on harmonisation and also on the legitimacy of the economic constitution.

<sup>187</sup> Kingston 2012, p. 126.

the general opinion surely brings the EU closer to its citizens, or at least legitimizes its actions in their sight. Increasing the possibilities to utilise GPP would enhance the output of the environmental policies of the Union, if we assume that GPP is an efficient tool for this purpose.<sup>188</sup>

So far only one policy paper has been issued on the importance of good governance for the EU.<sup>189</sup> It highlights five principles of good governance, out of which effectiveness and coherence are essential when trying to combine different policies. Combining these different, sometimes even contradicting, policies raises questions of legal certainty. Does predictability suffer when secondary policies such as the environment are introduced into procurement practices? Kingston thinks that maximising legal certainty would speak against the coherence argument and would support keeping the different policies apart.<sup>190</sup> In general, one solution would be to make the environmental considerations a priority issue in the primary areas of law, in our case procurement. Especially in the case of eco-labels, making it possible to require an eco-label would not be unpredictable or even discriminatory since the current EU Ecolabel is based on scientific data and open to all interested parties to apply. Issues on legal certainty can also be dealt with by relying on different forms of legal argumentation. Shortly put, introducing value decisions into judgements actually increases substantive legal certainty while formal legal certainty can always be ensured by procedural rules.<sup>191</sup>

A practical issue relating to governance is how the EU functions. The responsibility for the different policy areas is divided among the various sections of the Commission, the Directorates-Generals (DGs). Kingston notes that this creates obstacles for coherence and that the different DGs should co-operate for the sake of effectiveness of the different policies.<sup>192</sup> One example of this is that GPP issues are managed by DG Environment while public procurement in general is under DG Internal Market.<sup>193</sup>

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<sup>188</sup> See Lundberg 2009 on the effectiveness of GPP as a policy tool.

<sup>189</sup> European governance – A white paper, COM(2001) 428 final.

<sup>190</sup> Kingston 2012, p. 132.

<sup>191</sup> See Paunio 2011 on legal certainty in general and especially in the EU context.

<sup>192</sup> Kingston 2012, p. 139.

<sup>193</sup> For a list of the DGs [http://ec.europa.eu/about/ds\\_en.htm](http://ec.europa.eu/about/ds_en.htm), sourced 1.3.2012.

## Economic argument

The premise for the economic argument is; can article 11 TFEU be considered in competition economics? The possible answers to this are dependent again on the economic theory we assume. Without venturing into the different economic theories and the debate on environmental or ecologic economics, the conclusion that Kingston comes to is that it is possible to integrate environmental considerations into economic calculus of competitions decisions. In other words, environmental factors can be considered when making decision on EU competition policy while still retaining an economical approach to the issue.<sup>194</sup> <sup>195</sup> This should hold true for procurement also since it deals with the efficiency of the economy and GPP is trying to influence the producers. The LCA employed by the EU GPP scheme is one form of economic calculus.

The effectiveness of GPP from the perspective of economics has been studied.<sup>196</sup> It was found that it is not as effective as an economic tool as taxes, subsidies or emission trading for example. GPP was seen as an effective way to implement environmental policies and its status value might make it politically appealing. This effect of GPP on the market has been acknowledged also in a practical study.<sup>197</sup>

Concerning procurement, I draw the following conclusions from the above mentioned. Efficiency of environmental policy is only achieved through integration with other policies. Since environmental protection is mentioned as one of Union's goals in article 3 (3) TFEU it should be considered when interpreting other statutes. MBIs are an efficient way to promote environmental issues in other policy fields but being voluntary they are not enough. Interpreting article 7 and 11 in a coherent manner suggests giving precedence to environmental issues over procurement and free movement, as long as proportionality is respected. The 'economic constitution' allows for environmental factors being used to restrict procurement and the convergence of ECJ case law also suggests this. Further relaxing the possibilities for GPP would increase the efficiency of the Union's environmental policy. Introducing secondary policies to procurement is not a threat to legal certainty. On the contrary, it can contribute to substantial legal certainty, especially eco-labels might be useful for this. GPP should be moved from DG

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<sup>194</sup> Kingston 2012, p. 189.

<sup>195</sup> It has also been argued that the Coase theorem, the basic assumption of law and economics, does not apply to environmental law; the initial assignment of rights affects the final allocation of resources in the field of environmental policy. See Arcuri 2005.

<sup>196</sup> Lundberg 2009.

<sup>197</sup> Dahl 2007.

Environment to DG Internal market. Economic arguments can be used to analyse the benefits of GPP. It is questionable is GPP an effective tool in the light of economics theories but it is effective in putting environmental goals to practice.

In her conclusions Kingston brings out two interesting points related to integrating environmental protection into other policies.<sup>198</sup> The concept of conferral seems to limit the possibilities for integration. According to article 5 TEU the Union can only take action in matters that the member states have conferred power to it. This means that everything that the Union does has to be based on the Treaties. Internal market actions such as competition or procurement and environmental issues are given a different stance in the Treaties. According the article 3 TFEU competition law falls under exclusive competence while the internal market and environment are a matter of shared competence according to article 4 TFEU. This limits their interplay and the way that the Union can drive them forward on its own. The second issue is the tension between economic and environmental goals. Even though the economic goal is not anymore the sole purpose of the Union it is still its primary aim. An example of the perceived importance between these two is that the TFEU contains articles that prohibit distortions to the economic aims but none on damaging the environment.

Kingston proposes that the principle of proportionality is to be used to mitigate these two, and all the other problems related to the integration of environmental protection into competition policy. She has devised a five point test for the proportionality review in situations of conflict.<sup>199</sup> Translated to the context of procurement law and GPP the test reads:

1. Where environmental considerations could be relevant to a case, the question whether they should be taken into account must be considered in coming to a decision.
2. Where there is no scope at all for interpreting the procurement law provisions in a way that favours environmental protection, the integration principle is not relevant.
3. Where it is possible to interpret procurement law provision in a way that favours environmental protection, and there is no conflict with the goals of procurement

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<sup>198</sup> Kingston 2012, p. 437.

<sup>199</sup> Kingston 2012, p. 443.



policy, the procurement law provisions must always be interpreted in that manner.

4. Where it is possible to interpret the procurement law provisions in a way that favours environmental protection, and there is a conflict with the goals of procurement policy, then the proportionality principle applies. This means that, where the GPP measure is suitable to achieve the environmental policy objectives, and there is no less restricting way of achieving these objectives, the measure should be allowed under procurement law.
5. Where an economic analysis is employed, reasonably quantifiable environmental costs and benefits should be taken into account in assessing whether the efficient use of public funds is maximised by the use of GPP.

The first question is a policy issue to which the EU has answered in the affirmative; it tries to promote the uptake of GPP and encourage member states to set up national action plans and targets for the utilisation of GPP. All procurement decision cause environmental impacts so GPP should be considered in each case. The principles of non-discrimination and equality fall under the second question. Since they are of the highest priority in the Union they cannot be compromised by environmental considerations. There are other rules in the procurement directive that cannot be interpreted loosely, mainly procedural rules.

Especially points three and four raise questions relating to the use of GPP and eco-labels. Is it possible in all situations to interpret procurement law to allow the use of GPP and eco-labels? How does the answer to this question differ in relation to them being mandatory or just voluntary? Based on my prior analysis the answer is no. It is not possible to interpret the directive (or the proposal) in a way that would allow NPR PPM requirements. It does not matter are these requirements made in the form of eco-labels or not. Are GPP and eco-label requirements ever in conflict with the goals of procurement law, especially since environmental issues have been acknowledged as a secondary goal in the directive? Are GPP and eco-label requirements suitable measures for achieving the goals of EU environmental policy? Are there any less restrictive ways of achieving these goals? Environmental policies can be both discriminatory and also run counter to the aims of a functioning internal market and the free movement of goods. It is not possible to explicate possible situations in this space, but on a general note, when (and I am sure that this will happen) contradictions between GPP and public

procurement arise the dispute needs to be settled with the proportionality principle. Whether or not the environmental protection measure deployed is the least restrictive one is to be analysed individually in each case.

The fifth point relates specifically to the use of life-cycle analysis as a part of the evaluation of the tendered products. What should be the content of the LCA and should it be made mandatory? The analysis should purport the internalisation of externalities so that the companies profiting from pollution, or the people consuming the polluting products, would have to pay for this. Conducting an LCA could be made a mandatory part of the process if the economically most advantageous tender –criteria is used to select the winner. Since currently only the possibilities of what can be included into those criteria are listed, utilising it serves as a good way for arbitrarily formulating the award criteria. Regulating a minimum content for it, which would include environmental considerations, would promote legal certainty and fight discrimination.

#### **4.2.2 Integrating environmental protection into procurement law**

##### **Introduction**

Nele Dhondt's book *Integration of Environmental Protection into other EC Policies* analyses the content of the integration principle of article 11 TFEU and evaluates how it has been put into practice in three specific policy fields. She starts off with looking at the historical development of article 11 and then moves on to specifying its content and meaning. While doing this she notices that many writers have argued that article 11 is just a mere principle and because of its vagueness it does not have any practical meaning; it is not a legal rule that can be applied.<sup>200</sup>

From this basis she then conducts a theoretical analysis to define the nature of article 11 as a norm. Dhondt goes through the views of Hart, Dworkin and Raz on the differences between principles and rules. Specifically she tries to define can principles have legal status as parts of a legal system, and if so, what are the criteria used to determine whether a principle has legal status? Since this is just a master's thesis and there would

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<sup>200</sup> Dhondt 2003, p. 126.

be no point in summarizing an already concise summary conducted by Dhondt I will jump straight to her conclusions on the status of legal principles in EU-law.<sup>201</sup> She comes up with a typology of four classes: legal rules, non-legal rules, legal principles and non-legal principles. Article 11 TFEU can be recognized as a legal principle because of the institutional support it has received from being codified into the TFEU and being applied by the ECJ.<sup>202</sup>

What is a legal principle? A legal principle needs to be considered when making a decision if it is relevant for that case. It does not apply in the same all-or-nothing manner as rules do, but rather legal principles can be used to sort out conflicts in law. They may be used to argument in a certain direction but they do not point to a particular decision. If a conflict arises between two principles it is solved by balancing out their relevant importance to the case. This is not unrestricted discretion but the use of judgement in a particular case.<sup>203</sup>

Dhondt tries to form a plausible interpretation of the meaning of article 11 TFEU. She presents three possible interpretations. The first one is the ‘weak interpretation’. According to it the other policy areas must consider environmental issues and this must have real consequences, but final discretion on how to apply environmental protection, or not to apply it at all, is left to the respective policy fields. The second model is the ‘strong interpretation’ which obligates other policy fields to pursue also environmental goals with their own actions. The non-environmental actions must contribute to the environmental aims of the Union. The mode of interpretation differs according to the situation. If there is no conflict between the two policy fields the most environmentally friendly option must be chosen. In situations of conflict the least environmentally damaging option must be chosen. An objective that is non-compatible with the environmental aims can be completely abandoned. The third interpretation is the ‘very strong interpretation’. According to it environmental objectives are applied at all times in all policy fields. This means that priority is given to environmental issues. Her

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<sup>201</sup> As a theoretical side note, Dhondt discusses the difference between principles and policies as acknowledged by Dworkin; since principles give individuals rights they trump policies if they collide. After Dhondt concludes that article 11 TFEU is a ‘legal principle’ that has actual meaning she does not analyse what would happen if it and another Union policy were contradictory. This analysis would have been relevant since the EU has a number of policies that are contrary to environmental aims. She deals with this issue when she explains what she thinks is the best interpretation of the meaning of the integration principle, but this discussion disregards the arguments presented by Dworkin on the difference of principles and policies.

<sup>202</sup> Dhondt 2003, p 126-143.

<sup>203</sup> Ibid., p. 127-130.

conclusion is, based on the aim of the principle and ECJ case-law, that the second interpretation is the best one.<sup>204</sup>

## **Application**

In the third part of the book Dhondt conducts a practical analysis of how the integration principle has affected three different policy areas: the common agricultural policy, the common transport policy and EU energy policy. The areas studied are the efforts and failures of integration and instruments used for integration. The analysed instruments include direct regulation, market based instruments and information based instruments.<sup>205</sup> She notes that the method she uses can also be used to evaluate integration in other policy fields.<sup>206</sup> Next, I will conduct a similar review of how environmental factors have been integrated into Union procurement policy. An overview of the public procurement legislation has been presented in chapter 2.

Are the most environmentally damaging practices encouraged?

There does not seem to be any direct regulation that would encourage the most environmentally damaging products to be purchased. If the only possible award criteria would be the lowest price it would increase the purchasing of environmentally damaging products since environmental issues would be ruled out at the award stage (although environmental factors could still be considered when defining technical specifications). Local policies, which are comparable to direct regulation since purchasing authorities have to follow them, on the other hand can have the effect that the most damaging products are purchased if price is the only factor.

The scope of this study is not enough to determine are there any economic or market-based instruments that would encourage purchasing the most environmentally damaging products. Since every possible group of products can be the object of public procurement it is not possible to analyse whether price support, direct aid or quotas for example lead to purchasing authorities procuring environmentally damaging products.

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<sup>204</sup> Dhondt 2003, p. 108-110.

<sup>205</sup> Ibid., p. 190-194.

<sup>206</sup> Ibid., p. 485.

On a general level, since the ‘what to buy’ is not harmonized, and the Union procurement policy only applies to procurement contracts that exceed the thresholds<sup>207</sup>, it is very likely that the reality in many situations is far from what is envisaged in the different policy papers of the Commission.

Information based instruments are not used to promote environmentally damaging products. On the contrary, the fact that the Commission purports GPP, that different environmental labels have been put up and the integrated product policy is used by the Union shows that information is used to impact the purchase of environmentally friendly products.

Are environmentally friendly and/or the least environmentally damaging practices encouraged?

In general, the only pieces of direct regulation employed in the field of GPP are the energy star regulation and the clean vehicles directive. They force central authorities to purchase environmentally friendly products and services. In specific, the eco-design directive also effects what sorts of products are procured, but since the directive affects all products on the market it cannot be seen as integrating environmental policy into public procurement.

The above statement on market based instruments also applies to them affecting the purchase of the most environmentally friendly products. As already stated, the Union has adopted many information based measures that promote purchasing of the most environmentally friendly products.

### Integration failures

A key aspect of integrating environmental protection into other policies in the EU is are external costs internalized. Externalities are costs or benefits that are not transmitted through prices.<sup>208</sup> Environmentally damaging activity causes pollution which is an external cost. If this is not reflected to the prices of products (or the costs created at the

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<sup>207</sup> The threshold for public supply contracts is currently 125 000 €, see Commission regulation (EU) No 1251/2011.

<sup>208</sup> Dhondt 2003, p. 194.

production, consumption or disposal stage) then the external costs are not internalized. The ones benefitting from the polluting activity do not have to pay for it.

As discussed earlier, the EU uses market-based instruments instead of direct control in many of its policy fields. This is the case for GPP and eco-labels in most situations. Pinnacle in assessing how well the MBIs function is how well externalities are internalized by the current legislation. It is considered to be a market failure if this does not happen. The EU public procurement policy does not enhance the internalization of the costs of pollution. Product specific policy areas do, but since producers produce the same products for public and private markets this would happen anyway. Since GPP is a voluntary tool and the procurement regime in itself does not cause externalities to be internalized I consider this to be a market failure.

The Commission proposal for amending the procurement directive is a failure also. The current directive was enacted prior to the Treaty of Lisbon, which increased the impetus of environmental factors in the Union.<sup>209</sup> The proposal could have taken stronger steps towards integration when considering the changes brought about by Lisbon and the newer policy papers. As discussed earlier, there would have been options that would have better facilitated integration in procurement policy.

The incoherence of the eco-labelling regime hinders its functioning as a voluntary MBI. If labels are kept voluntary they should at least be as clear and precise to maximize their use and effect.

### Integration efforts

The adaptation of directive 2004/18/EC, which codifies into law the Concordia and Wienstrom cases, is definitely a positive effort to integrate environmental issues into procurement policy. The Commission proposal for amending the directive continues this development. The active role taken by the Commission to promote GPP has to be acknowledged also. The introduction of various labels that help to utilize GPP also supports this work. Although none of these measures are mandatory, they still have an effect on integration. Efforts of dealing with the market failure are still lacking in the procurement field.

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<sup>209</sup> On the changes made to article 3 TEU see Kingston 2012, p. 101.

## Net balance

It is difficult to analyse do the integration efforts outweigh the failures. A practical way is to look at statistics. A survey conducted in 2009 that studied procurement contracts concluded in seven member states showed that 45 % of the contracts included some sort of environmental considerations.<sup>210</sup> In 2008 the Commission proposed that by 2010 50% of all tendering procedures should be green ('compliant with endorsed common GPP criteria').<sup>211</sup> It can be considered as an achievement that the factual situation is so close to the policy objective. But since the actual content of the contracts has not been studied we do not know are the environmental considerations used the best or most strict ones available. Considering integration, there still is much that can be done, and if articles 3 TEU and 11 TFEU are to be taken seriously also should be done.

Based on the above analysis, my suggestions on improving integration of environmental protection into procurement law are i) to imposing obligations on both 'how to buy' and 'what to buy' and ii) to remove the differences between the labels issued by the Union and harmonizing the labelling regime so that no national divergence can exist on that matter.

In conclusion, article 11 TFEU should be understood as a legal principle that does have practical usage and that it can affect the outcome of a legal case or an administrative decision. The ECJ has applied it and secondary Union legislation sometimes contains a statement on how that piece of legislation complies with the principle and what has been done in this respect.<sup>212</sup> The most suitable interpretation of the meaning of the principle is the 'strong interpretation'. According to it, secondary policies must favour the most environmentally friendly options if they are not contrary to the primary aims, and if environmental protection is contrary to that aim then the least detrimental choice on the environment has to be chosen. In some situations applying the integration principle might lead to discarding the primary aim if it cannot be reconciled with the environmental objective. Environmental aims have to be considered in other policy areas but furthering environmental goals is not the main aim of those specific policies. The Union has taken action on several fronts to integrate environmental policy into procurement law but there is still a lot that can be done.

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<sup>210</sup> PWC 2009, p. 28.

<sup>211</sup> COM(2008) 400, p. 8.

<sup>212</sup> See recital 5 of directive 2004/18/EC on how the procurement directive is supposed to contribute to integration.

### 4.3 Integration and coherence

Since the integration principle is written into the TFEU it must have some meaning. What practical effect should it have when trying to reconcile contradicting objectives? This question has often been assessed in legal literature but no definite answer has yet been given. When broadening to scope to encompass also its interrelation with the free movement rules the question is even more complicated.

As long as minimum harmonisation continues to be used divergence between national practices will exist. This leads to problems concerning the effectiveness of Union measures and the democratic legitimacy of the whole integration project.<sup>213</sup> Neither the treaty drafters the legislator nor the ECJ seems to have figured out an answer to the above mentioned, which ultimately stems from the difficulty of reconciling different aims and objectives.<sup>214</sup>

Kingston's proposition on utilising a proportionality analysis is a plausible answer for how to reconcile differences between treaty objectives and secondary law<sup>215</sup>, but it does not solve the problem of conflicting treaty objectives. Schumacher has argued that since the treaty objective of environmental protection has been given an enforcement tool via the integration principle, it would mean that it should be given priority over other objectives.<sup>216</sup> Jans' argumentation runs counter to this, but he does not propose a solution and just concludes that integration is 'difficult and sensitive'.<sup>217</sup> A completely opposing and some way pragmatic answer is given by Notaro who thinks that on the long term an answer cannot be found and does not need to be found, since both trade (free movement) and the environment are needed and one would be useless without the other.<sup>218</sup>

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<sup>213</sup> On the other hand full harmonisation also poses problems. See what problems the Commission recognised that full harmonisation of procurement law would have, SEC(2011) 1585, p. 33.

<sup>214</sup> Dougan 2000, p. 885.

<sup>215</sup> See also Schumacher 2000, p. 39, who presented almost identical arguments.

<sup>216</sup> Schumacher's argument is based on ECJs 'contextual interpretation' of the Treaties; Schumacher 2000, p. 38. The Treaty of Lisbon changed the Treaty in a way that Schumacher's argument does not seem convincing anymore. See Jans 2010, on the demise of the integration principle.

<sup>217</sup> Jans 2010, p. 8. The same applies to Arrowsmith, 'The legal and policy questions that arise in this area are challenging ones that are not easily answered'; Arrowsmith 2010, p. 182. Gunningham seems to be as hopeless, 'Unfortunately, the general answer to such questions is it all depends. '; Gunningham 2009, p. 209.

<sup>218</sup> Notaro 2000, p. 491.



Coherence of the legal system is usually regarded as a something desirable.<sup>219</sup> How well the integration principle of article 11 TFEU is put into practice is essential for the coherence of the EU legal system. Even if coherence within the legal system would not be reached through integration, coherence of legal argumentation can still be achieved. The coherence of legal argumentation cannot solve the problem of conflicting objectives but it can assure substantial legal certainty in decision making. Substantial legal certainty is more important than mere procedural legal certainty.<sup>220</sup> The process of justification, either at the ECJ or by national judges, can in the end lead to coherence of the legal system.<sup>221 222</sup>

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<sup>219</sup> A comprehensive definition of coherence: ‘Certainly, the idea of coherence is deeply rooted in contemporary legal systems and is often understood as including elements such as consistency, comprehensiveness, and completeness as well as cross-connection and mutual justification between the parts of a whole. In legal theory, these aspects of coherence are often used to describe global or local coherence of a legal system.’, Paunio 2011, p. 94.

<sup>220</sup> Paunio 2011, p. 115.

<sup>221</sup> Kiikeri 2011, p. 261.

<sup>222</sup> See also Semmelmann 2010, who argues that the economic constitution does not give priority to economic goals over other goals of the Union. Because of this, decision in conflict situations need to be based on an open and balanced proportionality analysis.

## 5. Discussion

The following contradictions or inconsistencies of Union law can be deduced from this thesis. First, article 3 (3) TEU contains the contrary aims of a well-functioning internal market and a high level of environmental protection. Second, pursuing environmental aims with public procurement is contrary to the aim of efficient use of public funds. Thirdly, inconsistency exists within the procurement framework. Directive 2004/18/EC only sets GPP as a desired state and grants possibilities for utilising it, while other secondary norms have mandatory effects on the purchasing authorities. And fourthly, the Union's eco-labelling regime is inconsistent. The primary goal (and legal basis) of each label is either the internal market or the environment, but all of them actually contribute to both objectives. In addition, some of the labels are mandatory and others voluntary.

The evolution of Union law and policy on procurement and the environment can be outlined by the following stages:

1. How can environmental factors be taken into account in public procurement?
  - Reducing the environmental burden caused by public procurement.
2. How can public procurement be guided by environmental factors?
  - Making public procurement as environmentally friendly as possible.
3. How can environmental goals be pursued with public procurement?
  - Specific environmental goals targeted with specific public procurement practices.
4. How can public procurement be harnessed to environmental needs?
  - Switching the purpose of public procurement from economic to environmental.

Concordia started this development and took the Union to the first level. The integration principle of article 11 TFEU requires that Union practices reach the second level. The uptake and promotion of voluntary GPP by the Union is doing this. Some parts of current secondary legislation, notably the energy star regulation and the clean vehicles directive, already reach the third level. The approach adopted by the Union regarding product policy and goals related to carbon dioxide emissions for example can be seen as functioning on the third level also, even though they are not obligatory. There are no

implications of Union law currently established at the fourth level or even any policies trying to pursue it.

The above listed problems cause incoherence in the Union's legal system. Environmental goals have to be reconciled with free movement rules within the procurement policy. The Union should explicitly take steps to move to the third stage of the outlined evolution. This would allow taking the objectives of article 3 (3) TEU seriously, while leaving the issue about the nature of the economic constitution of the Union untouched. The legal, economic and governance arguments presented in chapter 4 do not support a conclusion that the fourth level of evolution should be reached; changing the aim of procurement law from efficient use of public funds to protecting the environment.

Taking environmental protection seriously can be achieved by measures falling under the third phase. These should include the following. Abolish the restriction to use NPR PPMs when setting technical specifications. Issuing 'what to buy' obligations that would make GPP mandatory for all purchasing authorities. Reinforcing the 'how to buy' procedural rules to make sure that no arbitrary discrimination would take place while the environmental criteria are applied in the procurement procedure, and also to increase legal certainty. Take a uniform approach to product labelling and making certain labels mandatory, to facilitate both the free movement of goods and the efficient administration of GPP in practice.