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# MASTER THESIS

Titel der Master Thesis / Title of the Master's Thesis

„The role of sustainable and green public procurement  
in the fight against Climate Change and its  
implementation in the EU and in Austria“

verfasst von / submitted by

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angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of  
Master of Laws (LL.M.)

Wien, 2023 / Vienna 2023

Studienkennzahl lt. Studienblatt /  
Postgraduate programme code as it appears on  
the student record sheet:

UA 992 548

Universitätslehrgang lt. Studienblatt /  
Postgraduate programme as it appears on  
the student record sheet:

Europäisches und Internationales Wirtschaftsrecht /  
European and International Business Law

Betreut von / Supervisor:

Univ.Prof. Dr. Dr. hc. Peter Fischer

## **Abstract**

Climate change can no longer be denied. Its effects on our world, our daily lives, the economy, nature and society are now not only tangible in many ways but are also quite visible in many places. In order to best counteract these increasingly devastating and life-threatening consequences of global warming, the European Commission has already launched a series of measures. These are primarily dedicated to the promotion of sustainability and the protection of nature and the environment. One of these EU measures, the so-called "Green Public Procurement" (GPP), concerns public procurement. The aim of GPP is to oblige member states and national public purchasers to procure only products that have the least possible impact on the environment, from production to disposal. This Master Thesis will help to show that sustainable and environmentally friendly procurement has a strong (positive) impact on climate change, provided that the GPP is implemented correctly and consistently in the member states within the framework of so-called "national action plans". How well this implementation actually works and to what extent the consideration of the national action plans means a change for public contracting authorities with regard to the design of tender documents will be analyzed using the example of the GPP implementation in Austria. A major focus of this thesis is therefore - in addition to the GPP under European law - the Austrian Action Plan for Sustainable Public Procurement (naBe Action Plan) adopted by the Council of Ministers in 2010 and its criteria.

**Keywords:** Climate Change, Green Public Procurement, GPP criteria, Ecolabels, procurement procedure, Sustainable Public Procurement, NaBe Action Plan, NaBe-criteria.

## **Deutscher Abstract**

Der Klimawandel ist nicht mehr zu leugnen. Seine Auswirkungen auf unsere Welt, unser tägliches Leben, die Wirtschaft, Natur und Gesellschaft, sind inzwischen nicht nur vielfältig spürbar, sondern vielerorts bereits ganz deutlich sichtbar. Um diesen immer verheerenderen und mitunter bald lebensbedrohlichen Konsequenzen der Erderwärmung bestmöglich entgegenzuwirken, hat die Europäische Kommission bereits eine Reihe von Maßnahmen ins Leben gerufen. Diese sind primär der Förderung der Nachhaltigkeit sowie dem Schutz der Natur und Umwelt gewidmet. Eine dieser Maßnahmen der EU, das sogenannte „Green Public Procurement“ (GPP), betrifft das öffentliche Beschaffungswesen. Ziel des GPP ist es, die Mitgliedstaaten bzw. die nationalen öffentlichen Auftraggeber zu verpflichten, bloß solche Produkte zu beschaffen, die von der Herstellung bis zur Entsorgung möglichst geringe Folgen für die Umwelt haben. Diese Master Thesis soll helfen aufzuzeigen, dass eine nachhaltige und umweltfreundliche Beschaffung einen starken (positiven) Einfluss auf den Klimawandel hat, vorausgesetzt, dass das GPP in den Mitgliedsstaaten im Rahmen sogenannter „nationaler Aktionspläne“ korrekt und konsequent umgesetzt wird. Wie gut diese Umsetzung tatsächlich funktioniert und inwieweit die Berücksichtigung der nationalen Aktionspläne eine Veränderung für öffentliche Auftraggeber in Bezug auf die Gestaltung der Ausschreibungsunterlagen bedeutet, soll dabei am Beispiel der GPP-Umsetzung in Österreich analysiert werden. Ein großer Fokus dieser Thesis liegt daher – neben dem europarechtlichen GPP - auf dem vom Ministerrat im Jahre 2010 beschlossenen österreichischen Aktionsplan für nachhaltige öffentliche Beschaffung (naBe-Aktionsplan) und dessen Kriterien.

**Schlagerwörter:** Klimawandel, umweltorientierte öffentliche Beschaffung, GPP-Kriterien, Gütesiegel, Ausschreibungsverfahren, nachhaltige öffentliche Beschaffung, NaBe-Aktionsplan, NaBe-Kriterien.

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## **List of Abbreviations**

<b>AMA</b>	Agricultural market Austria
<b>BBG</b>	„Bundesbeschaffung GmbH“
<b>BEV</b>	Battery Electric Vehicle
<b>BIG</b>	„Bundesimmobiliengesellschaft“
<b>BIO</b>	biological
<b>CEAP</b>	Circular Economy Action Plan
<b>CO<sub>2</sub></b>	Carbon Dioxid
<b>COP27</b>	27th International Climate Change Conference
<b>CVD</b>	Clean Vehicle Directive
<b>dB</b>	decibel
<b>EC</b>	The European Commission
<b>ECJ</b>	The European Court of Justice
<b>e.g.</b>	example given
<b>EU</b>	The European Union
<b>EMS</b>	Environmental Management System
<b>esp.</b>	especially
<b>FCEV</b>	Fuel Cell Electric Vehicle
<b>FMC</b>	Austrian Federal Ministry for Climate Protection, Environment, Energy, Mobility, Innovation and Technology
<b>FMD</b>	Federal Ministry of Defense
<b>FSC</b>	Forest Stewardship Council
<b>ESPD</b>	European Single Procurement Document
<b>GPA</b>	Government Procurement Agreement
<b>GPP</b>	Green Public Procurement
<b>GPP-AG</b>	The Green Public Procurement Advisory Group
<b>GPD</b>	Gross domestic product
<b>i.e.</b>	id est

<b>JRC-IPTS</b>	Commission's Joint Research Centre's Institute for Prospective Technological Studies
<b>NaBe</b>	„nachhaltige Beschaffung“
<b>NMHC</b>	non-methane hydrocarbons
<b>NO<sub>x</sub></b>	nitrogen oxides
<b>LCA</b>	Life Cycle Assessment
<b>LCC</b>	Life Cycle Costing
<b>LCV</b>	Light Commercial Vehicle
<b>KPI</b>	Key Performance Indicator
<b>para</b>	paragraph
<b>PDO</b>	The protected designations of origin Seal
<b>PEFC</b>	Program for the Endorsement of Forest Certification
<b>PGI</b>	The protected geographical indications Seal
<b>PVC</b>	Polyvinylchloride
<b>SDG</b>	Sustainable development goal
<b>SME</b>	Small and medium-sized enterprises
<b>SPP</b>	Sustainable Public Procurement
<b>UN</b>	United Nations
<b>TCO</b>	Total-cost-of-ownership
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>TSG</b>	The traditional specialty guaranteed Seal
<b>WEEE</b>	Waste electrical and electronic equipment Directive
<b>WTO</b>	World Trade Organization

## Introduction

Global warming is one of the greatest challenges of our time. Not only are resources becoming ever scarcer but the global consequences of climate change in particular are becoming increasingly tangible in the form of environmental disasters such as heat waves, forest fires and floods. Therefore, careful and responsible use of our resources and our environment is more relevant than ever in the fight against the climate crisis and is also the basis for a policy that meets the demands and needs of our population and future generations.<sup>1</sup> For this reason and in order to counteract the current developments of global warming which are becoming increasingly life-threatening, the topic of sustainability in particular is moving more and more into focus both in private everyday life and within the operations of companies.

However, the meaning of the principle of "sustainability" goes much further and includes more concrete environmental policy objectives such as the preservation of biodiversity, the reduction of energy consumption or the promotion of a CO<sub>2</sub>-neutral economy. Sustainability has therefore been shaping the multilateral discussion framework in the work of the United Nations (UN) for over 30 years now.<sup>2</sup> In 2015, the Department of Economic and Social Affairs of the UN developed the so called "*2030 Agenda for Sustainable Development*" which was adopted by all member states of the UN and offers a common plan for peace and prosperity for people and the planet. 17 sustainable development goals (SDGs) for sustainable global development form the heart of the Agenda and represent an urgent call to action by all countries, both developed and developing.<sup>3</sup> The preamble to the agenda already makes it clear that, among other things, protecting the planet is a top priority:

*“We are determined to protect the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources and taking urgent action on climate change, so that it can support the needs of the present and future generations.”<sup>4</sup>*

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<sup>1</sup> Federal Ministry for Climate Protection, Environment, Energy, Mobility, Innovation and Technology, 'naBe Action Plan & Core Criteria - for the Procurement of Sustainable Products and Services' (2021) naBe Platform, 6

<sup>2</sup> Stephan Heid, Berthold Hofbauer, 'Die Nachhaltigkeit in der öffentlichen Vergabe: Das Green Public Procurement' (2021) RPA 2021, 6, Booklet 1, 1

<sup>3</sup> United Nations, 'The 17' Goales' <<https://sdgs.un.org/goals>> accessed 17 December 2022

<sup>4</sup> UN General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable De-velopment' (2015), A/RES/70/1, 2/35



In the same year, the United Nations adopted the so-called "Paris Agreement on Climate Change" at the Paris Climate Change Conference in December 2015 (COP21). This Agreement has been adopted by almost all states of the world in a binding manner under international law and thus constitutes the first legally binding global agreement on climate change. The ultimate goal of this agreement is to limit global warming to the necessary 1.5 degrees and thus prevent the 2 degrees mark from being reached which would have even more drastic consequences not only for species extinction but also for human health and rising sea levels.<sup>5</sup>

However, it is not only the UN that attaches fundamental importance to the issue of sustainability and climate protection. The current Austrian government program is also characterized by the principle of sustainability in all its pillars (see 2.1.2) and is thus in line with the current policy of the European Union (EU). With its "Green Deal"<sup>6</sup>, which aims to achieve a climate-neutral Europe by 2050, the latter has made an unwavering commitment to a sustainable circular economy. In its recent legislation, the European Commission is also already setting extremely ambitious and stringent targets and reiterating the seriousness of the endeavor. In doing so, it makes it clear that the topic of "sustainability" will gain in political and economic importance and, in particular, that a large number and variety of legal measures can be expected in this context.<sup>7</sup>

One of these measures to achieve the EU's current objectives has already been realized and concerns public procurement. As the public sector is one of the largest consumers in Europe, public procurement policy is currently one of the most central instruments for promoting the expansion of environmental and climate protection, both at national and at Union level. Measures such as green or sustainable public procurement are therefore currently crucial instruments for preventing the dreaded 2 degree mark from being reached. Even the international community acknowledged the potential of this tool by including a target on sustainable public procurement in the above mentioned Sustainable Development Goals. Thus, the target Point 12.7 has its focus on promoting "*public procurement practices that are sustainable, in accordance with national policies and priorities*".<sup>8</sup>

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<sup>5</sup> WWF, 'Folgen der Klimakrise: 1,5 Grad versus 2 Grad' <<https://www.wwf.at/artikel/folgen-der-klimakrise-15-grad-versus-2-grad/>> accessed 13 March 2023

<sup>6</sup> Commission, 'The European Green Deal' (Communication) COM (2019) 640 final

<sup>7</sup> Heid, Hofbauer (n 2) 1

<sup>8</sup> UN General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development' (2015), A/RES/70/1, 2/35

In order to understand the potential of green or sustainable public procurement in its full scope, the first chapter of this master thesis is dedicated to its basis, the European instrument of Green Public Procurement (GPP). After a brief introduction, the legal and political framework of GPP as well as its implementation at EU level and its criteria (the GPP criteria) are outlined. In addition, the chapter explains the exact process and design of procurement procedures, followed by some exemplary performance contracts taking into account GPP aspects. Finally, an overview of the most important EU eco-labels is provided.

The second major chapter of this thesis takes a look at the national level, namely the Austrian level, and scrutinizes the Austrian implementation of GPP. The focus of this chapter is therefore on the Austrian Action Plan for Sustainable Public Procurement (naBe Action Plan), the therein contained environmental criteria (naBe criteria), and the legal and political framework for its implementation and monitoring. Finally, a brief outlook on some quality labels recognized in Austria is given in order to offer a comparison to the eco-labels of the EU.

# **1. Green Public Procurement (EU)**

## **1.1. Introduction**

### **1.1.1. Definition, purpose and benefits**

In the European Commission's Communication "Public procurement for a better environment"<sup>9</sup> from 2008, which seeks to cover all public procurement procedures<sup>10</sup>, GPP is defined as follows:

*"Green Public Procurement (GPP) is a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life-cycle when compared to goods, services and works with the same primary function that would otherwise be procured."*<sup>11</sup>

But why is GPP even important? If we take a look at public sector spending on goods and services in Europe it quickly becomes clear that in many sectors such as energy, transport, waste management, social protection, health and education, the public sector is the main customer. Each year, for example, more than 250,000 public sector entities in the EU spend around 14% of GDP (about €2 trillion per year) on the procurement of services, works and supplies.<sup>12</sup> This, in return, represents a great opportunity for the public sector to promote sustainable consumption and production by using their purchasing power to choose goods and services that are sustainable or have a lower environmental impact. Subsequently, GPP is an important tool to achieve many specific environmental goals, such as energy efficiency and conservation of natural resources or, in particular, the reduction of CO emissions (e.g. CO<sub>2</sub> emissions could be reduced by 15 million tons per year if the same environmental criteria for lighting and office equipment were applied across the EU).<sup>13</sup>

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<sup>9</sup> Commission, 'Public Procurement for a Better Environment' (Communication) COM (2008) 400 final

<sup>10</sup> European Commission, 'Buying Green! A handbook on green public procurement' (2016) Publications Office, 3, 4

<sup>11</sup> COM (2008) 400 final, 4

<sup>12</sup> European Commission, 'Public Procurement' (Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs) <[https://single-market-economy.ec.europa.eu/single-market/public-procurement\\_en](https://single-market-economy.ec.europa.eu/single-market/public-procurement_en)> accessed 2 February 2023

<sup>13</sup> European Commission, 'Buying Green! Green public procurement in Europe, A summary' (2011) Publications Office, 3

In addition to this primary purpose of reducing the direct environmental impacts of public activities, GPP can also be an important driver of innovation. Since, as already mentioned, public purchasers have a large market share in some sectors, their decisions in these sectors can have a significant impact. Indeed, through the use and promotion of GPP, public authorities can provide real incentives for industry to innovate and develop competitive environmentally friendly technologies, goods or services, while expanding the market for those goods and services.<sup>14</sup>

Furthermore, while bringing environmental benefits, buying green can simultaneously save money. Thus, GPP can contribute to cost savings across a range of product and service groups by taking into account factors such as energy and water consumption, reduction of hazardous substances, use of recycled materials and proper waste disposal. Many costs can be saved in particular if a life cycle cost (LCC) approach is taken during the procurement process which considers not only the purchase price but all costs incurred during the life of the product, labor or service. This allows procurers to choose the option that represents the best value over the entire life cycle (see 1.4.4.2).<sup>15</sup>

Other (potential) benefits of GPP include increasing the confidence of citizens, businesses, and civil society in public administration, helping to build capacity for public organizations to address future environmental and resource challenges and creating healthier working conditions for government and utility employees.<sup>16</sup>

From all this, and especially given the importance of public sector spending on goods, services and other contracts, it is thus clear that the instrument of green public procurement has a high potential to achieve important environmental policy goals not only in terms of resource use and sustainable consumption/production, but especially in terms of climate change.

### 1.1.2. Legal Framework

With regard to the legal framework for public procurement, the EU is bound at international level in particular by the provisions of the Government Procurement Agreement (GPA) of the World Trade Organisation (WTO). In addition, there is an obligation to comply with the

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<sup>14</sup> COM (2008) 400 final, 4

<sup>15</sup> EC (n 11) 6

<sup>16</sup> Ibid 3

provisions of various bilateral agreements, which in practice are basically fulfilled by granting economic operators established in third countries the same rights as those granted to economic operators in the EU.<sup>17</sup>

At the level of European law on the other hand, the legal framework for public procurement is basically defined by the provisions of the Treaty on the Functioning of the Union<sup>18</sup> and the three Public Procurement Directives: the Public Procurement Directive 2014<sup>19</sup>, the Concessions Directive 2014<sup>20</sup> and the Utilities Directive 2014<sup>21</sup>. All three Public Procurement Directives explicitly allow environmental aspects to be taken into account when awarding contracts. Even the old Public Procurement Directive from 2004<sup>22</sup> already provided in its "1st recital" that a contracting authority may set award criteria to meet the "*needs of the public concerned, including in the environmental and/or social area*".<sup>23</sup>

In addition to these directives and above mentioned international agreements, the case law developed by the European Court of Justice (ECJ) is in particular crucial for implementing green public procurement. The ECJ has issued a large number of decisions related to public procurement in the EU interpreting the Public Procurement Directives and the Treaty on the Functioning of the European Union (TFEU). These decisions have a major impact on the way procurement is carried out.<sup>24</sup> For example, in his rulings in 2002 (*Concordia Bus*)<sup>25</sup> and 2003 (*EVN Wienstrom*)<sup>26</sup>, the ECJ defined the specific scope for including environmental criteria in tenders. Such criteria, provided they are applied fairly and transparently, enable contracting authorities to maintain high environmental standards in their procurement. These standards then apply not only to the procurement procedure itself but also already in the phase

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<sup>17</sup> EC (n 7) 5

<sup>18</sup> Ibid 4

<sup>19</sup> Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive [2014] OJ L94/65

<sup>20</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L94/1

<sup>21</sup> Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sector and repealing Directive 2004/17/EC [2014] OJ L94/243

<sup>22</sup> Directive 2004/18/EG of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114

<sup>23</sup> Ibid 1

<sup>24</sup> European Commission, 'Green Public Procurement: Legal Framework: Case Law' (Directorate-General for Environment) <[https://ec.europa.eu/environment/gpp/case\\_law\\_en.htm](https://ec.europa.eu/environment/gpp/case_law_en.htm)> accessed 6 February 2023

<sup>25</sup> Case C-513/99 *Concordia Bus Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* [2002] ECR I-07213

<sup>26</sup> Case C- 448/01 *EVN AG und Wienstrom v Republik Österreich* [2003] ECR I-14527

before the procedure and in particular in the phase afterwards, i.e. during the execution of the contract.<sup>27</sup>

In summary, the legal framework provides a set of rules and principles, which must be followed when awarding public contracts. Within this framework, environmental goals can be implemented and achieved in different ways, as will be explained later.<sup>28</sup>

### 1.1.3. Sector-specific EU legislation

In addition to the generally binding legal provisions for public procurement, there are certain areas in which specific EU environmental requirements apply. This sector-specific EU legislation creates binding obligations for the procurement of certain goods and services, for example by setting minimum energy efficiency standards that must be met. Such sector-specific legislation exists, for example, for the control of hazardous substances, waste and recycling, the procurement of clean vehicles, IT office equipment and the energy efficiency of buildings.<sup>29</sup>

Accordingly, in terms of energy consumption, the Energy Performance on Buildings Directive<sup>30</sup> required that all new buildings and major renovation projects meet the minimum energy performance requirements from 2014 and that all new publicly owned buildings are "nearly energy free" by 2019. In addition, under the EU Energy Star Regulation<sup>31</sup>, minimum energy efficiency requirements apply to central government agencies purchasing IT office equipment. Another example of sector-specific legislation is provided by the Clean Vehicles Directive<sup>32</sup> (CVD), which requires public authorities to consider energy consumption and emissions when procuring vehicles above EU thresholds.<sup>33</sup>

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<sup>27</sup> EC (n 11) 4

<sup>28</sup> EC (n 7) 5

<sup>29</sup> Ibid 6

<sup>30</sup> Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (recast) [2010] OJ L153/13

<sup>31</sup> Regulation (EU) 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 [2008] OJ 39/1

<sup>32</sup> Directive (EU) 2019/1161 of the EU Parliament and of the Council of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles [2019] OJ L188

<sup>33</sup> EC (n 7) 6

In some Member States, moreover, there are specific regulations that set binding GPP standards for certain sectors or types of contracts. Public authorities or other procurers should therefore in any case ensure that they are up to date with the current national requirements.<sup>34</sup>

#### 1.1.4. Political Framework

As already mentioned in the introduction, the EU actively promotes and supports GPP as part of its current policies and strategies. However, the potential of green procurement as a policy tool has been increasingly recognized not only in recent years but since the early 2000s. In the EU, the potential of GPP was first emphasized in 2003 within the European Commission's Communication on Integrated Product Policy<sup>35</sup> which advised Member States to adopt national action plans for the implementation of green or sustainable public procurement by the end of 2006. The Public Procurement Directives, adopted in 2004 and amended in 2014, then clarified how contracting authorities should integrate environmental aspects into their procurement processes and procedures.<sup>36</sup>

Back then in 2008, the European Commission published the already mentioned Communication "Public Procurement for a Better Environment"<sup>37</sup> as part of the so called „Action Plan on Sustainable Consumption and Production and Sustainable Industrial Policy (SCP/SIP)“. This action plan created a framework for the integrated implementation of a series of measures to improve the energy and environmental performance of products.<sup>38</sup> Since then, GPP has been supported in a number of EU policies and strategies, such as the European “Green Deal”<sup>39</sup>, through which the European Commission has presented strategies and measures to address global environmental challenges.<sup>40</sup> One of its main building blocks, the so called „Circular Economy Action Plan“ (CEAP)<sup>41</sup>, adopted in December 2015 and

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<sup>34</sup> Ibid

<sup>35</sup> European Commission, ‘Integrated Product Policy building on environmental Life-Cycle Thinking’ (Communication) COM (2003) 302 final

<sup>36</sup> COM (2003) 302 final, 2

<sup>37</sup> COM (2008) 400 final

<sup>38</sup> COM (2003) 302 final, 3

<sup>39</sup> COM (2019) 640 final

<sup>40</sup> FMC (n 1) 7

<sup>41</sup> European Commission, ‘A new Circular Economy Action Plan For a cleaner and more competitive Europe’ (Communication) COM (2020) 98 final

amended in March 2020, highlights GPP as one of the actions needed to ensure more effective and efficient use of resources.<sup>42</sup>

In this context also worth mentioning is the European Commission’s Communication “Making public procurement work in and for Europe“ from 2017, which aims to improve public procurement practices in the EU in collaboration with public authorities and other stakeholders. Basically it sets out six strategic policy priorities, one of which is to ensure wider uptake of innovative, green and social procurement.<sup>43</sup>

## **1.2. Implementation of GPP**

GPP is basically a voluntary instrument, which means that member states can decide for themselves whether to implement it and, if so, to what extent. However, especially in view of the climate crisis which is currently in the spotlight as never before, countries that implement GPP are better equipped to tackle environmental challenges (e.g. reducing greenhouse gas emissions or transitioning to a circular economy) than countries that decide not to implement GPP.<sup>44</sup>

### **1.1.1. GPP Policy**

By now, not only have many public authorities in Europe developed GPP policies or included commitments to implement GPP in other policies but the majority of Member States have adopted National Action Plans for green public procurement, which are discussed in more detail below.<sup>45</sup>

In principle, when implementing a GPP policy, it must be ensured that it is aligned with all existing policies and strategies related to procurement and the sustainable operation of the organization. In addition, effective collaboration between the various departments and staff of the organization or agency must be ensured as well as the involvement of internal users,

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<sup>42</sup> EC (n 7) 7

<sup>43</sup> European Commission, ‘Green Public Procurement: Policy Framework: Public Procurement for a better environment’ (Directorate-General for Environment) <[https://ec.europa.eu/environment/gpp/gpp\\_policy\\_en.htm](https://ec.europa.eu/environment/gpp/gpp_policy_en.htm)> accessed 6 February 2023

<sup>44</sup> European Commission, ‘Green Public Procurement’ (Directorate-General for Environment) <[https://ec.europa.eu/environment/gpp/index\\_en.htm](https://ec.europa.eu/environment/gpp/index_en.htm)> accessed 6 February 2023

<sup>45</sup> Ibid 10



suppliers and senior management. Furthermore, to be most effective, a GPP policy should establish clear and verifiable environmental criteria for products and/or services<sup>46</sup>, clear objectives and priorities as well as an envisaged time frame. It should also specify the scope of procurement activities covered, assign overall responsibility for the implementation of this policy and include a mechanism for monitoring performance. Once a policy is in place, some sort of operational implementation plan should be created and then disseminated as widely as possible within the organization and also outside (esp. to suppliers).<sup>47</sup>

In order to assist organizations or agencies in developing a GPP policy, a set of resources for GPP implementation has been developed at EU level and can be accessed on the EU GPP website (<http://ec.europa.eu/environment/gpp>). This Website contains not only information on the political and legal framework for GPP and the latest developments at the EU level and in the Member States but also studies on GPP, training materials, and especially the EU GPP criteria (see 1.3.1) and technical background reports in various EU languages.<sup>48</sup>

### 1.1.2. National Action Plans

At the national level, most EU member states have now implemented GPP by establishing national National Action Plans. These plans generally include a variety of actions and support measures for green or sustainable public procurement (SPP) and set targets, either for procurement as a whole or for individual product and service groups.<sup>49</sup> In Austria, GPP was implemented as part of the Action Plan for Sustainable Procurement (NaBe Action Plan)<sup>50</sup>, which is explained in more detail in the second part of this master thesis.

The GPP or SPP criteria developed by countries and regions are in many cases similar to the EU GPP criteria (see 2.3.1), although adjustments have been made to consider the particular circumstances of the country or the specific priorities of the authorities developing them. In general, most of these criteria are based on – if available - life cycle assessment (LCA) data, criteria of eco-labels and other environmental aspects, which will be reviewed in more detail below. In addition to these federal criteria, green and sustainable procurement practices still

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<sup>46</sup> European Commission, ‘Green Public Procurement’ <[https://ec.europa.eu/environment/gpp/index\\_en.htm](https://ec.europa.eu/environment/gpp/index_en.htm)> accessed 6 February 2023

<sup>47</sup> EC (n 7) 10

<sup>48</sup> EC (n 11), 10

<sup>49</sup> EC (n 7), 7

<sup>50</sup> FMC (n 1)

exist that have been introduced by individual contracting authorities at local and regional level. These practices have in some cases served as inspiration for the NAPs or have been taken up as examples in other Member States.<sup>51</sup>

National implementation of the GPP now includes the use of an electronic procurement system in most member states, as the Public Procurement Directives have mandated a transition to fully electronic tendering by 2018. Such an e-system provides tremendous help and support to contracting authorities in conducting procurement procedures as it allows them to track and verify both the application of the GPP criteria and the submission of the required information to demonstrate compliance.<sup>52</sup>

### **1.3. Criteria of GPP**

The core of a GPP policy consists of clear, justifiable, verifiable and ambitious environmental criteria for products and services, the main purpose of which is to facilitate the inclusion of green or sustainable requirements in public tender documents. Basically, they are designed to be included directly in tender documents, e.g in the form of technical specifications or award criteria. However, the criteria are not only intended to facilitate inclusion in bidding documents but also to balance environmental sustainability, cost considerations, market availability, and ease of review which is why they also include information on review methods.<sup>53</sup>

#### **1.3.1. EU GPP criteria**

Since 2008, the European Commission has developed more than 20 common GPP criteria for a wide range of product and service groups which are regularly reviewed and updated to ensure that they are reflecting the most recent market development.<sup>54</sup> Also, the Commission clearly sets out the means of verifying compliance with these criteria to ensure that the

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<sup>51</sup> EC (n 7), 7

<sup>52</sup> Ibid 17

<sup>53</sup> European Commission, 'Green Public Procurement: EU GPP criteria' (Directorate-General for Environment) <[https://ec.europa.eu/environment/gpp/eu\\_gpp\\_criteria\\_en.htm](https://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm)> accessed 6 February 2023

<sup>54</sup> Ibid

products and services purchased actually deliver the expected environmental performance.<sup>55</sup>

The currently valid EU GPP criteria are:<sup>56</sup>

- Cleaning products and services (*published in 2018*)
- Computers, monitors, tablets and smartphones (*published in 2021*)
- Data centers, server rooms and cloud services (*published in 2020*)
- Electricity (*published in 2012*)
- Food and catering services and vending machines (*published in 2019*)
- Furniture (*published in 2017*)
- Imaging equipment, consumables, and print services (*published in 2020*)
- Office Building, Design, Construction and Management (*published in 2016*)
- Paints, varnishes and road markings (*published in 2018*)
- Public Space Maintenance (*published in 2019*)
- Road Design, Construction and Maintenance (*published in 2016*)
- Road lighting and traffic signals (*published in 2018*)
- Road Transport (*published in 2021*)
- Textiles (*published in 2017*)

The EU's GPP criteria include two "levels" in each of the above mentioned sector. First, the core criteria and second, the comprehensive criteria. The former are designed to make GPP easy to apply by focusing on the most important areas of a product's or service's environmental performance. At the same time they are intended to keep administrative costs for companies as low as possible. In contrast, the latter are intended to address more aspects or higher levels of environmental performance and are therefore primarily designed for government agencies that want to go further in supporting environmental and innovation goals.<sup>57</sup>

### 1.3.1. Criteria development procedure

In essence, the EU GPP development process is modeled on the structure of the EU Ecolabel criteria setting process which in comparison is shorter and does not involve formal adoption of the criteria as a legal act.<sup>58</sup> However, in order to develop GPP criteria, the relevant source in the specific case must first be first found out of the so-called evidence base which takes a

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<sup>55</sup> EC (n 11), 10

<sup>56</sup> EC (n 48)

<sup>57</sup> EC (n 7) 15

<sup>58</sup> EC (n 45)

life-cycle approach, draws on available scientific information and data and involves a broad number of stakeholders. After the source is found, the considerations taken into account must be explained in a technical background report which can be reviewed on the EU GPP website (<http://ec.europa.eu/environment/gpp>) for each product group.<sup>59</sup>

In order to make the development process of EU GPP criteria more participatory and to encourage synergies between different product-related policy instruments (e.g. EU GPP and EU Ecolabel), a new procedure was introduced in 2010. This new development procedure is led by the Commission's Joint Research Centre's Institute for Prospective Technological Studies (JRC-IPTS) in Seville, Spain. The process is based on an annual work plan<sup>60</sup> which is coordinated with the EU Ecolabel workplan<sup>61</sup> and adopted in consultation with the newly established informal GPP Advisory Group (GPP AG). This AG acts as an advisory body to the European Commission on general GPP issues and in the development of EU GPP criteria. It is comprised of one representative per Member State as well as five representatives of other stakeholders (i.e. civil society, industry, SMEs, public procurement and local authority).<sup>62</sup>

### 1.3.2. International and national criteria

In the Communication “Public procurement for a better environment”<sup>63</sup> the European Commission recommended the creation of a process for setting common GPP criteria. Accordingly, the criteria used by Member States should be compatible with those of the EU in order to avoid distorting the internal market and reducing EU-wide competition. Uniform criteria would also contribute significantly to reduce the administrative burden for economic operators and public administrations. In addition, they would be particularly beneficial for those companies operating in more than one Member State and for SMEs which have limited capacity to cope with different procurement procedures.<sup>64</sup> However, as already mentioned

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<sup>59</sup> EC (n 7) 15

<sup>60</sup> European Commission, ‘Green Public Procurement: GPP Work Program for 2021’ (Directorate-General for Environment) <[https://ec.europa.eu/environment/gpp/gpp\\_criteria\\_wp.htm](https://ec.europa.eu/environment/gpp/gpp_criteria_wp.htm)> accessed 6 February 2023

<sup>61</sup> European Commission, ‘Strategic EU Ecolabel Work Plan 2020 – 2024’ (2020)

<sup>62</sup> European Commission, ‘Green Public Procurement: Process for Setting Criteria’ (Directorate-General for Environment) <[https://ec.europa.eu/environment/gpp/gpp\\_criteria\\_process.htm](https://ec.europa.eu/environment/gpp/gpp_criteria_process.htm)> accessed 6 February 2023

<sup>63</sup> COM (2008) 400 final

<sup>64</sup> Ibid 3

above (see 1.1.2) a number of international, national and regional criteria have been developed in recent years and while many national and international procedures for adopting these criteria are similar to the EU GPP system, many procedures still differ.<sup>65</sup>

### 1.3.3. Labels

Labels play an important role in today's world since they help consumers identify sustainable products or services. Therefore, they can also be crucial in public procurement procedures, especially in the development of technical specifications and award criteria, and in the verification of compliance.<sup>66</sup> In general, the 2014 Public Procurement Directives differentiate between labels where all criteria are linked to the subject matter of the contract and those that contain broader criteria (e.g. labels relating to general management practices).<sup>67</sup> However, a general distinction can be made between four different types of labels, namely the multi-criteria labels, the single issue labels, the sector-specific labels and the graded product labels.

Multi-criteria labels, such as the Nordic Swan, the Blue Angel or the EU Ecolabel<sup>68</sup> are the most common type of eco-label and also the most widely used in green public procurement procedures. Their name is explained by the fact that they apply not just one but a set of criteria that set the standard for the label in question. For each product or service group covered, different sets of criteria are established. They are based on scientific information about the environmental impact of a product or service throughout its life cycle, from the extraction of raw materials to production and distribution, the use phase, and final disposal.<sup>69</sup>

Single issue labels on the other hand are based on one or more pass/fail criteria related to a specific topic, e.g. energy efficiency. If a product meets these criteria it is allowed to carry the label. Examples of this type of label include the EU Organic label or the Energy Star label for office equipment.<sup>70</sup>

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<sup>65</sup> EC (n 7) 16

<sup>66</sup> Ibid

<sup>67</sup> Ibid 17

<sup>68</sup> Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel [2010] OJ L27/1

<sup>69</sup> EC (n 7) 16

<sup>70</sup> Ibid 17

In addition there are sector-specific labels which, as the name suggests, include sector-specific criteria such as forestry certification schemes operated by organizations like the FSC (Forest Stewardship Council) or PEFC (Program for the Endorsement of Forest Certification) and so called „graded product“-labels. The latter classify products or services according to their environmental performance in relation to the issue in question rather than according to pass/fail criteria. A good example of this is the EU energy label which ranks energy-related products according to their energy efficiency.<sup>71</sup>

In any case, (eco)labels play a crucial role in award procedures with a focus on sustainability as they can be used not only to define the selection and/or award criteria but also to ensure and verify the quality and other factors such as seasonality and regionality of the products to be procured. The most important quality labels in the EU are explained in point 1.6.

#### **1.4. The procurement process**

Public procurement is the process by which public authorities such as government departments, state-owned entities or local authorities purchase work, goods or services from (private) companies. The process starts with the assessment of needs and goes through contract awarding to contract management and final payment.<sup>72</sup>

##### **1.4.1. Principles of Public Procurement**

Public procurement, which is essentially about matching supply and demand to deliver the goods, services and works that the public sector is responsible for providing, is governed by the general principles derived from the EU Treaty and the specific rules of the three Public Procurement Directives 2014.<sup>73</sup>

In general, a contracting authority is obliged to obtain the best value for taxpayers' money when procuring or seeking the most economically advantageous offer. This does not necessarily mean going for the cheapest offer, especially since best value not only measures the cost of goods and service but also takes factors such as quality, efficiency, effectiveness

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<sup>71</sup> Ibid

<sup>72</sup> OECD, 'Public Procurement' <<https://www.oecd.org/governance/ethics/public-procurement.htm>> accessed 7 February 2023

<sup>73</sup> EC (n 7) 21

and expediency into account. Moreover, in the event that the contracting authorities decide to implement GPP in the procurement procedure, environmental protection can also be one of these factors and thus be considered on an equal footing with others when awarding the contract. The goal of (best) value is therefore to find a solution that meets the requirements set out in the procurement documents - including competitive environmental requirements - in the most cost-effective way.<sup>74</sup>

In addition to value for money there are other considerations that must be taken into account in advance when designing the procurement process. Thus, contracting authorities must comply with the European and national legal framework during each stage of the procurement procedure and ensure a good level of competition or avoid hindering competition, for example by applying overly restrictive specifications. Apart from that, public authorities have an obligation to act fairly in their procurement. This means applying the principles of the internal market which form the core of the 2014 Public Procurement Directives and the basis for the national legislation derived from these directives. These include the principles of equal treatment and non-discrimination as well as the principle of transparency and proportionality:<sup>75</sup>

#### *1.4.1.1. Principle of equal treatment and non-discrimination*

The principle of equal treatment, which can be considered a central principle in public procurement law, applies during the entire procurement procedure. It basically contains the obligation for contracting authorities not to treat comparable situations differently and not to treat different situations equally. This means, for example, that contracting authorities must provide the same information to all bidders and to apply the same deadlines to all of them.<sup>76</sup> It also includes the requirement that all bids submitted by bidders must comply with the specifications in the tender documents and, vice versa, the obligation of the contracting authority itself to comply with the specifications in the invitation to tender.<sup>77</sup>

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<sup>74</sup> EC (n 7) 21

<sup>75</sup> Ibid

<sup>76</sup> Ibid

<sup>77</sup> Heid, Ring, 'Bundesvergabegesetz: BVergG 2018, zu § 20 BVergG 2018' (2019), LexisNexis, Verlag Österreich, 1, 3

Moreover, the principle of equal treatment is of particular importance in the context of bid evaluation: if a contracting authority allows only one bidder to improve its bid, this is considered to be a violation of the principle of equal treatment.<sup>78</sup> The only exception to this principle is when different or equal treatment is objectively justified. This is the case, for example, when bids with different environmental performance are evaluated differently for an ecological award criterion.<sup>79</sup>

The principle of non-discrimination on the other hand, requires contracting authorities to ensure that bidders from all EU countries and countries with equivalent rights have equal access to the contract.<sup>80</sup> According to the case law of the ECJ, however, "hidden" discrimination also violates the principle of equal treatment which is the case, for example, if the contracting authority specifies that the services will only be awarded to companies that are at least majority state-owned<sup>81</sup> or if the authority provides an "automatic" exclusion of bids considered to be unusually low in the tender documents<sup>82, 83</sup>

In addition, the ECJ has emphasized in several decisions that the principles of equal treatment and non-discrimination must also be observed in procurement transactions that do not fall within the scope of the relevant Procurement Directive. However, this is only the case if there is a clear cross-border interest in a contract, whereby the estimated contract value, the place of performance, the technical specificity of the service and the existence of (real) complaints from "foreign" companies are decisive.<sup>84</sup>

#### *1.4.1.2. Principle of transparency and proportionality*

The principles of equal treatment and non-discrimination are followed by a transparency requirement, which demands that the entire procurement procedure must be as transparent as possible.<sup>85</sup> It follows, that the invitation to tender must be broad enough to ensure good and

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<sup>78</sup> Ibid

<sup>79</sup> EC (n 7) 21

<sup>80</sup> Ibid

<sup>81</sup> Case 3/88 *Commission of the European Communities v Italian Republic* [1989] ECR 04035

<sup>82</sup> Case C-147/06 *SECAP und Santorso* [2008] ECR I-03565

<sup>83</sup> Heid, Ring (n 75) 3

<sup>84</sup> Ibid

<sup>85</sup> Heid, Ring (n 75) 4



fair competition choice.<sup>86</sup> In addition, it requires that the successful tenderer must be objectively comprehensible which means that the award criteria must be formulated in such a way that they can be interpreted in the same way by tenderers with an average level of expertise exercising the usual diligence<sup>87,88</sup> With regard to the award decision, the case law further requires the contracting authorities to inform rejected bidders of the reasons for the rejection of their bids to eliminate the risk of favoritism or arbitrariness on the part of the contracting authority.<sup>89</sup>

The principle of proportionality on the other hand stipulates that the measures taken in an award procedure must be proportionate to the objectives pursued and must not go beyond what is necessary to achieve those objectives.<sup>90</sup> The contracting authority is bound by the principle of proportionality at various stages of a procurement procedure, in particular when determining exclusion and selection criteria and related evidence, setting deadlines and excluding contractors.<sup>91</sup>

#### 1.4.2. Methods of Public Procurement

Finding and choosing the best procurement method or contract form is essential before every procurement procedure. In certain situations the choice of the method may be determined by external factors such as funding arrangements or a company policy to always use the same form of procurement. However, when a decision is due it must be made carefully, taking into account the various factors relating to time, the nature and scope of the contract, quality control and cost certainty.<sup>92</sup> Basically there are a number of procurement methods from which the contracting authority must choose one. The most important types of procedures are briefly explained below:

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<sup>86</sup> EC (n 7) 21

<sup>87</sup> Case C-19/00 *SIAC Construction Ltd v County Council of the County of Mayo* [2001] ECR I-07725

<sup>88</sup> Heid, Ring (n 75) 4

<sup>89</sup> EC (n 7) 21

<sup>90</sup> Ibid

<sup>91</sup> Heid, Ring (n 75) 4

<sup>92</sup> LexisNexis Construction Expert, 'Choosing the right procurement method- construction projects' <<https://www.lexisnexis.co.uk/legal/guidance/choosing-the-right-procurement-method-construction-projects>> accessed 23 January 2022

#### *1.4.2.1. Open and restricted procedure*

The open procedure is the most common procurement method. In this procedure, an unlimited number of contractors are publicly invited to submit bids and after that, all bidders who meet the specified conditions are admitted for evaluation of their bid. The advantage of this procedure is that it gives access to the widest possible choice of potentially environmentally friendly solutions. However, a big disadvantage of this kind of procedure is that it is not possible to choose which company or companies are invited to bid (e.g. on the basis of their environmental capabilities).<sup>93</sup>

In contrast to the open method, the restricted procedure is a two-stage procedure. In the first stage an unlimited number of contractors are invited to submit requests to participate through a public notice. Then, in a second stage, only selected suitable applicants (e.g., those with the technical capacity in the environmental field) are invited to submit bids. According to Article 65 para 2 of Directive 2014/24/EU this must be at least five companies, provided there are enough suitable applicants.<sup>94</sup> The advantage of this procedure is that it can be used to determine the appropriate level of environmental performance to aim for in the specifications, award criteria, and contract clauses. However, one disadvantage is that by limiting the number of competitors, bids with high environmental performance may be overlooked.<sup>95</sup>

#### *1.4.2.2. Competitive procedure with negotiation and competitive dialogue*

Like the restricted procedure, the competitive procedure with negotiation is a two-stage procedure. Negotiations are conducted with the bidders admitted to the second stage in order to concretize or modify existing solutions.<sup>96</sup> In the context of GPP this procedure therefore has the advantage that, unlike the open and restricted procedures, it can be designed very flexibly which in turn makes it possible to better understand and control the impact of environmental requirements on costs.<sup>97</sup>

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<sup>93</sup> EC (n 7), 22

<sup>94</sup> Gruber-Hirschbrich, 'Art des Vergabeverfahrens' (2022) Lexis Briefings, 2

<sup>95</sup> EC (n 7), 22

<sup>96</sup> Gruber-Hirschbrich (n 75) 2

<sup>97</sup> EC (n 7) 22 – 23

The competitive dialogue on the other hand is an open procedure in the course of which the contracting authority invites an unlimited number of contractors to submit requests to participate. It then conducts a dialogue with selected suitable candidates on all aspects of the contract and only if one or more solutions corresponding to the invitation to tender could be identified, the respective participants are invited to submit a bid on the basis of these.<sup>98</sup> The competitive dialogue thus offers the same advantage as the competitive procedure with negotiation, namely the most extensive flexibility.

#### *1.4.2.3. Innovation partnership and framework agreement*

If a contracting authority wishes to acquire goods or services that are not currently available on the market, it can enter into an innovation partnership with one or more partners.<sup>99</sup> This method is also similar to the two-stage competitive procedure with negotiation: after publicly inviting an unlimited number of contractors to submit requests to participate, selected suitable applicants are invited to submit offers for the development of an innovative product, work or service. Subsequently, the concrete content of the contract (development and subsequent acquisition of the resulting products or services) is negotiated.<sup>100</sup> With regard to GPP, the method of innovation partnership may be particularly appropriate if the current state of the art in a sector is insufficient to address environmental challenges identified by an agency, such as the need to adapt to climate change or manage natural resources.<sup>101</sup>

The last method to be explained in this context is the framework agreement which constitutes an agreement without obligation of acceptance between one or more contracting entities and one or more contractors. Its purpose is to determine the terms and conditions of the contracts to be awarded during a given period, in particular with regard to the envisaged price and, where applicable, the envisaged quantity.<sup>102</sup> Framework agreements are the type of procurement procedure which are often best suited for a GPP contract as it allows for greater flexibility in contracting and increases the efficiency of tendering in GPP implementation. In

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<sup>98</sup> Gruber-Hirschbrich (n 75) 9

<sup>99</sup> EC (n 7) 23

<sup>100</sup> Gruber-Hirschbrich (n 75) 10

<sup>101</sup> EC (n 7) 23

<sup>102</sup> Gruber-Hirschbrich (n 75) 8

addition, they can increase incentives for vendors to offer greener solutions by allowing them to win multiple contracts to cover the additional costs of implementing these solutions.<sup>103</sup>

#### *1.4.2.4. Conclusion*

In an overall consideration of all these procedures it quickly becomes clear that it is not easy to choose the right or best type of process. However, with regard to GPP, it must also be well considered in which phases environmental criteria or considerations can be applied. This may be the case, for example, in the substantive and technical specifications, in the selection and exclusion criteria (e.g., compliance with environmental laws, technical and professional capability), in the award criteria, or in the contract performance clauses.<sup>104</sup>

In addition, when deciding which procedure to use and how best to integrate environmental criteria in the tender documents, it is very useful to know the market, e.g. in terms of availability, costs, and potential practical impact of more environmentally friendly alternatives. Even simple online market research can help to obtain some basic information. However, in case a more detailed picture of the market is needed, it is possible to enter into a dialog with potential suppliers before the respective procurement procedure. This can be particularly useful if ambitious environmental requirements are to be set in the tender or innovative solutions are being considered that are relatively new to the market. Apart from that, the procurement directives also allow prior market consultation with suppliers, which serves the purpose of obtaining advice that can be used in the preparation of the procedure. But it should be noted that these consultations must be conducted in a transparent and non-discriminatory manner and their results must not give an unfair advantage to any of the participating suppliers. Therefore, it must be ensured that the essential information is made available to all potential candidates or bidders, and sufficient time is provided for the preparation of the bids.<sup>105</sup>

In summary, depending on the subject matter of the contract and the information gathered in the pre-procurement phase, different procedures may be used to implement GPP. For example, methods such as the competitive process with negotiation and competitive dialogue may

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<sup>103</sup> EC (n 7) 27

<sup>104</sup> Ibid 22

<sup>105</sup> Ibid 24

be particularly appropriate when you need to be able to tailor a solution to your specific needs, as mentioned earlier. Once the decision has been made, it is advisable to inform the market about the planned award procedure at an early stage (e.g. by publishing a prior information notice), especially if the invitation to tender includes environmental criteria. This gives potential suppliers sufficient time to prepare for their requirements.<sup>106</sup>

### 1.4.3. Contract-drafting

As a preparation for the definition of the respective contract clauses it is first essential to choose and define the subject-matter since it determines the permissible scope of specifications and other criteria which may be applied. After that, contracting authorities must consider which technical specifications, selection and award criteria, and contract clauses are appropriate for the specific contract. However, it should be borne in mind that all stipulations which the contracting authority makes within the tender documents must be formulated in full compliance with EU public procurement legislation and other relevant EU or national legislation.<sup>107</sup>

#### *1.4.3.1. Subject-matter*

When defining the subject-matter, public authorities are essentially free to choose which product, service or work they want to procure. This free choice has the advantage that it leaves plenty of room for environmental considerations to be incorporated. However, a major disadvantage is that this freedom can sometimes limit or impede market access, distorting the level playing field for companies.<sup>108</sup> In order to prevent that, the principles of non-discrimination, free movement of goods and free movement of services enshrined in the Treaty of the European Union apply in all cases where there is a specific cross-border interest in a contract. In addition, Article 42 para 2 of Directive 2014/24/EU stipulates that the technical specifications included in the tender must not create unjustified obstacles to competition (see 1.4.3.2). When defining the contract, it must therefore be guaranteed that these do not affect access to the tender for other EU companies or companies from countries

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<sup>106</sup> Ibid

<sup>107</sup> COM (2008) 400 final, 5

<sup>108</sup> EC (n 7) 28-29

with equivalent rights (e.g. those bound by the WTO Agreement on Government Procurement).<sup>109</sup>

Furthermore, with regard to the potential environmental impact of the contract, it is critical to find out the actual need before starting the procurement process. For example, resources or equipment may be shared with other agencies and thus only procured in a smaller and more environmentally friendly quantity. Also possible, for example, is the procurement of reused, recycled or remanufactured products. The relevant EU GPP criteria and technical background reports provide a good way to get an overview of environmental impacts and offer guidance on how they should be considered when awarding a contract.<sup>110</sup>

The final step in defining the subject matter of the contract is to select an environmentally friendly contract title which sends a message to bidders and other contracting authorities that the environmental performance of the product or service will be the focus of the contract. Once the actual need has been identified, the necessary market consultations have been conducted, and an appropriate title has been selected, the specific (environmental) requirements must be defined as follows:<sup>111</sup>

#### *1.4.3.2. Technical specifications*

In general, (environmental) technical specifications to be included in the tender documents have two functions: On one hand, they contain a concrete description of the contract on the basis of which potential bidders can decide if they are interested to submit a bid or not. On the other hand, they represent measurable minimum criteria against which the submitted bids are evaluated. In this process, all those bids that do not comply with the specifications are then eliminated from the procedure (unless variants have been expressly admitted, see in more detail below).<sup>112</sup>

As far as the formulation of technical specifications is concerned, these must be as transparent as possible, i.e. clear and comprehensible. This requirement is met if the specifications can be understood in the same way by all economic operators and if those are able to verify their

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<sup>109</sup> Ibid

<sup>110</sup> Ibid 29-30

<sup>111</sup> Ibid 30-31

<sup>112</sup> Ibid 32

compliance when evaluating tenders. Furthermore, the specifications must not be defined in relation to the general capabilities, characteristics or policies of the bidder, but to the characteristics of the specific work, good or service to be procured and with a link to the subject-matter of the contract.<sup>113</sup> And as with all other criteria and contract terms, the contracting authority must also observe the principles of non-discrimination, equal treatment, transparency and proportionality when defining the technical specifications.<sup>114</sup>

According to the 2014 Public Procurement Directives, the most valuable sources of information for the development of technical specifications are the GPP Criteria, which can be inserted directly into the tender documents (see 1.3.1.). Alternatively or in addition, criteria of third-party Ecolabels may be used, e.g. to define the characteristics of the goods or services being procured or to verify compliance with the technical specifications by accepting the label as a proof in this regard.<sup>115</sup> For the latter, it is necessary that the requirements for obtaining the label pursuant to Article 43 para 1 of Directive 2014/24/EU are met (see 2.1.3), although other labels that meet equivalent requirements (i.e. satisfy the same objective criteria) must be accepted.<sup>116</sup> Furthermore, as explicitly mentioned in the procurement directives, the technical specifications may refer to European, international or national standards and various other technical reference systems.<sup>117</sup> These may be, for example, technical standards containing environmental characteristics such as material use, durability or energy and water consumption.<sup>118</sup> Contracting authorities may also determine that the product to be procured must be made of a certain material, contain a certain percentage of sustainable, recycled or reused content or may not contain any kind of restricted hazardous substances included e.g. in the RoHS Directive<sup>119, 120</sup>

As an alternative or in addition to that kind of specifications, it is also possible to provide requirements on the production processes and methods for the specific order. However, not permissible, for example, is the requirement of only one specific production process which is reserved for one/more suppliers in one country or region (unless this is justified by the

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<sup>113</sup> Article 42 (1) and Annex VII of Directive 2014/24/EU; Article 60 and Annex VIII of Directive 2014/25/EU

<sup>114</sup> EC (n 7) 34

<sup>115</sup> Article 43 (1) of Directive 2014/24/EU; Article 61(1) of Directive 2014/25/EU

<sup>116</sup> EC (n 7) 37-39

<sup>117</sup> Article 42 (3) of Directive 2014/24/EU; Article 60 (3) of Directive 2014/25/EU

<sup>118</sup> EC (n 7) 33

<sup>119</sup> Directive 2011/65/EU on the restriction of the use of certain hazardous substances in electrical and electronic equipment [2011] OJ L174/88

<sup>120</sup> Ibid 32-33

exceptional circumstances of the contract), as this would violate the principle of non-discrimination.<sup>121</sup> In terms of GPP, technical specifications may also refer to the expected performance or function of the product or service to be procured as they usually leave more room for innovation and challenge the market to develop new technical solutions.<sup>122</sup> Thus, performance-based or functional specifications provide bidders with relatively wide latitude to propose what they perceive to be the most appropriate solution since they basically dictate only the desired outcome and expected deliverables (e.g. in terms of quality, quantity, and reliability). An example of an environmental performance specification could be that a vehicle must not emit more than a certain amount of pollutants.<sup>123</sup>

Regardless of what the technical specifications are based on, the tender documents should specify in advance the type of evidence with which compliance with the criteria can be provided by bidders. However, due to the complexity of environmental requirements additional technical expertise may be required. Examples of possible forms of evidence include (eco)labels or relevant environmental regulations such as the WEEE<sup>124</sup> or the Timber Regulation<sup>125, 126</sup>.

Another way to prove that a product meets a certain specification or performance level is through test reports or certificates issued by a conformity assessment body. However, if a bidder for reasons beyond his control does not have access to a test report or certificate within the relevant time limits, a technical document or other form of evidence must also be accepted (the same applies to the proof by labels). Alternatively, a tenderer may submit a self-declaration that the offer meets the environmental requirements. Such a declaration must be accepted in particular, if it is not possible for the bidder during the tender procedure to prove compliance with the requirements by objective evidence from third parties. However, the

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<sup>121</sup> EC (n 7) 34-35

<sup>122</sup> Article 42 (3) of Directive 2014/24/EU; Article 60 (3) of Directive 2014/25/EU and Annex VII of Directive 2014/24/EU; Annex VIII of Directive 2014/25/EU

<sup>123</sup> EC (n 7) 33-34

<sup>124</sup> Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE) (recast) [2012] OJ L197/38

<sup>125</sup> Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market Text with EEA relevance [2010] OJ L295/23

<sup>126</sup> EC (n 7) 40-41



public authority always has to consider the principles of equal treatment, transparency and proportionality.<sup>127</sup>

One last important point to mention in this concern are variants as means of adding flexibility to the specification. Variants allow bidders to offer an alternative – eventually more environmentally friendly - solution which may not meet the full technical specification, but certain minimum requirements (e.g. specification requires conventionally fueled vehicles, but allows alternatively fueled, electric or hybrid vehicles as a variant). However, if a bidder submits a tender with a variant, it will be evaluated against the same award criteria as the bids without variants in order to determine the most economically advantageous bid.<sup>128</sup>

#### *1.4.3.3. Exclusion criteria*

Exclusion criteria which are exhaustively listed in the Public Procurement Directives refer to specific circumstances of an economic operator, on the basis of which the contracting authority may refuse him participation in the procedure or exclude him from the already ongoing procedure. In principle, it is at the discretion of the contracting authority whether or not to exclude the specific bidder if one of these criteria is met. However, the exclusion is always mandatory in the case of particularly serious crimes and Member States also have the possibility to make the exclusion mandatory in national law. In the context of GPP, the main exclusion criteria are the following:<sup>129</sup>

- Non-compliance with applicable national, EU or international environmental regulations<sup>130</sup>;
- Serious professional misconduct that calls integrity into question<sup>131</sup>;
- Significant/persistent deficiencies in compliance with essential requirements under previous contracts that have resulted in termination or comparable sanctions<sup>132</sup>;
- Misrepresentation of any of the above or inability to provide supporting documentation<sup>133</sup>;

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<sup>127</sup> EC (n 7) 40-41

<sup>128</sup> Ibid 37

<sup>129</sup> Ibid 42-43

<sup>130</sup> Article 57 (4) (a) of Directive 2014/24/EU

<sup>131</sup> Article 57 (4) (c) of Directive 2014/24/EU

<sup>132</sup> Article 57 (4) (g) of Directive 2014/24/EU

<sup>133</sup> Article 57 (4) (h) of Directive 2014/24/EU

- Violation of applicable environmental requirements under EU or national law;
- Violation of certain international environmental conventions (namely, the Vienna Convention on the Ozone Layer, the Basel Convention on Hazardous Waste and the Stockholm Convention on Persistent Organic Pollutants)<sup>134</sup>.

In any case, a maximum exclusion period of three years from the date of the event in question applies, unless a longer period is specified by final judgment against the operator or shorter period by national law.<sup>135</sup> The operator concerned also has the possibility of so-called "self-cleaning" in order to prove his reliability despite the existence of one of the grounds for exclusion. To do this, it must prove that it has (or will) compensate for the damage caused by the criminal act or misconduct, has comprehensively clarified the facts by actively cooperating with the investigating authorities, and has taken concrete technical, organizational and personnel measures that are suitable for preventing further criminal acts or misconduct.<sup>136</sup> However, it is at the sole discretion of the contracting authority again whether it decides that the measures are sufficient to allow the operator to participate in the proceedings or not. In the latter case, the authority is obliged to inform the operator of the reasons for the exclusion.<sup>137</sup>

#### *1.4.3.4. Selection criteria*

Selection criteria serve the purpose of determining whether an economic operator is suitable at all, i.e. whether it has the appropriate capacities to fulfil the contract. In two-stage award procedures such as the competitive procedure with negotiation they are part of the first stage and serve to reduce the number of candidates invited to submit a tender in the context of a pre-selection. Thus, only if an operator meets the criteria specified in the tender documents he will be considered for the second stage of the procedure and/or admitted to the execution of the contract.<sup>138</sup>

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<sup>134</sup> Annex X of Directive 2014/24/EU

<sup>135</sup> Article 57 (7) of Directive 2014/24/EU

<sup>136</sup> Article 57 (6) of Directive 2014/24/EU)

<sup>137</sup> EC (n 7) 43-44

<sup>138</sup> Ibid 44

However, a contractor may rely not only on its own capacity, but also on the capacity of another company, e.g. if the latter forms a formal bidding consortium with the (main) company or is its parent company or subsidiary. In this case, their joint capacity must be taken into account for the execution of the contract, provided that the main bidder can prove that the resources of the other company are available to it for the entire execution of the contract (e.g. by submitting a signed commitment to this effect). In addition, he must prove that the parent or subsidiary company also meets the exclusion and all relevant selection criteria for the contract.<sup>139</sup>

The main selection criteria for GPP purposes are referring merely to the technical and professional capacity of the economic operator<sup>140</sup>. For example, criteria may refer to specific experiences and references of the economic operator<sup>141</sup> to obtain information on previous experience in performing contracts with similar environmental requirements. Thereby it must be ensured that it is clearly defined what kind of information is relevant and how it will be evaluated. According to the Public Procurement Directives, a maximum look-back period of five years for works contracts and three years for supplies and services contracts is stipulated (unless a longer period is necessary to ensure an adequate level of competition).<sup>142</sup>

Alternatively or in addition, the educational and professional qualifications of the staff may be defined as selection criteria.<sup>143</sup> This may be important, for example, if road transport services are to be procured and the public authority want to make sure that drivers have been trained in eco-driving to reduce fuel consumption and emissions.<sup>144</sup> Furthermore, when selecting suitable tenderers, a sample or description of products or materials and/or certificates of conformity or quality may be requested to verify that products meet specific environmental requirements (e.g. in terms of durability or energy consumption).<sup>145</sup> Another option for contracting authorities is to require a check of the research facilities and quality control measures and/or the production capacities of suppliers or technical capacities of service providers (e.g.

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<sup>139</sup> Ibid 49

<sup>140</sup> Ibid 44

<sup>141</sup> Annex XII, Part II (a) of Directive 2014/24/EU

<sup>142</sup> EC (n 7) 45-46

<sup>143</sup> Annex XII, Part II (f) of Directive 2014/24/EU

<sup>144</sup> EC (n 7) 46

<sup>145</sup> Annex XII, Part II (k) and Part II (e) of Directive 2014/24/EU

technical competence in minimising waste creation, reducing fuel consumption or avoiding leakage of pollutants).<sup>146</sup>

The Public Procurement Directives also contain the option to require evidence of the operator's environmental management system (EMS) as a selection criterion, though equivalent evidence, such as an in-house system, must also be accepted.<sup>147</sup> With the help of an EMS, public or private organizations can improve their overall environmental performance by, for example, using only natural resources such as water and energy or purchasing only sustainable office materials. If an EMS is actually used, the organization can apply for certification under one of the environmental management systems commonly used in the EU (the EMAS<sup>148</sup> or the EN/ISO 14001).<sup>149</sup>

Since many environmental impacts of supply or service contracts occur not at the delivery of the final product or service, but within the supply chain, it may be also appropriate to require an indication of the supply chain management and tracking systems that the bidder will be able to apply in the performance of the contract.<sup>150</sup> In the case of works contracts, on the other hand, it will be more appropriate to set out specific contractual clauses for potential subcontractors and to require an indication of the portion of the contract that the bidder intends to award to those subcontractors. Such criteria can thus help to only select economic operators with efficient systems and moreover, to determine how environmental impacts are managed in the context of a specific contract.<sup>151</sup>

However, according to Article 62 para 2 of Directive 2014/24/EU, all these selection criteria must be related and proportionate to the subject matter of the contract, which means that they need to be tailored to the specific requirements of the contract (including the contract value and the level of environmental risk). In terms of GPP, it is furthermore important to note that environmental aspects can only serve as a selection criteria if they are not part of the award

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<sup>146</sup> EC (n 7) 48

<sup>147</sup> Annex XII, Part II (g) of Directive 2014/24/EU

<sup>148</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 [2009] OJ L342/1

<sup>149</sup> EC (n 7) 46-47

<sup>150</sup> Annex XII, Part II (d) and (j) of Directive 2014/24/EU

<sup>151</sup> EC (n 7) 47-48

criteria, which may often make more sense since award criteria provide more flexibility regarding the definition of criteria and types of requested evidences (see 1.4.4.1).<sup>152</sup>

As with technical specifications, the Public Procurement Directives contain specific provisions on the type of evidence that may be required with regard to the tenderer's eligibility. In addition, the E-Certis online service (<http://ec.europa.eu/markt/ecertis>) helps public purchasers and economic operators to find the various certificates that are usually required as proof of eligibility in award procedures. However, in order to minimize the effort required for the submission and verification of evidence for each procedure, contracting authorities must in particular accept a self-declaration by the bidder, the so-called "European Single Procurement Document" (ESPD), in which the bidder confirms that he meets all exclusion and selection criteria, as provisional evidence.<sup>153</sup> The EEE, present as a standard electronic format, also contains a link to the database where the tenderer has already uploaded the relevant certificates or confirms that he can provide them without delay upon request by the contracting authority. Such a request for submission is possible if this is necessary for the proper conduct of a procedure and the client is not already in possession of these documents.<sup>154</sup>

#### 1.4.4. Contract-awarding

In the award phase, which aim it is to identify the most economically advantageous tender (MEAT), the contracting authority evaluates on one hand the price and costs of the bids and on the other hand the quality of the bids, both on the basis of award criteria published in advance.<sup>155</sup>

##### *1.4.4.1. Award criteria*

Just like the selection criteria, the award criteria must be related to the subject matter of the contract and must relate in all respects to the works, supplies or services to be procured.<sup>156</sup> However, different to the technical specifications which are evaluated on a pass/fail basis, the award criteria are weighted and scored with points, meaning that a bid offering better

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<sup>152</sup> Ibid 46

<sup>153</sup> Article 59 of Directive 2014/24/EU)

<sup>154</sup> Article 59 (4) and (5) of Directive 2014/24/EU

<sup>155</sup> EC (n 7) 50

<sup>156</sup> Case C-513/99 *Concordia Bus Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* [2002] ECR I-07213

environmental performance , for example, may receive more points.<sup>157</sup> In any case, a contracting authority must think carefully about whether an (environmental) characteristic should be a minimum requirement, i.e. a technical specification, or an award criteria. However, it is possible, for example, to define a minimum performance level in the technical specifications and then assign additional points for even better performance within the award criteria.<sup>158</sup>

The contracting authorities are basically free to decide which award criteria to use and how to weight them. In addition, the procurement directives leave a great deal of leeway in the application of award criteria that include an "environmental impact assessment", which is why they can refer to almost the same factors that have already been explained in the context of the technical specifications such as concrete sustainability aspects like renewable or ecological production and/or GPP criteria or eco-label criteria (see in more detail 1.4.3.2).

However, as far as the formulation of the award criteria is concerned, the Public Procurement Directives contain some basic rules with regard to their transparency which also reflect the established case law of the ECJ. According to that, award criteria must not lead to an unrestricted freedom of choice for the public authority<sup>159</sup> but must provide an objective basis for differentiating between the bids and be sufficiently specific. This objectivity requirement is met if the criteria can be interpreted in the same way by all "*reasonably well-informed and normally diligent tenderers*"<sup>160</sup> and relate to factors that can be verified by the contracting authority<sup>161</sup>. In addition, award criteria need to ensure the possibility of effective competition and should not be formulated in a manner that restricts or impedes that very competition.<sup>162</sup> Finally, in order to comply with the principle of transparency, the award criteria must be made known in advance, i.e. in the contract notice of the award procedure and in the tender documents.<sup>163</sup> Here, the ECJ has defined the required level of detail and determined which information must be included in the notice in any case. These are, in particular, the award

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<sup>157</sup> EC (n 7) 50-51

<sup>158</sup> Ibid 53

<sup>159</sup> Case 31/87 *Gebroeders Beentjes BV v State of the Netherlands* [1988] ECR 04635, para 26

<sup>160</sup> Case C-19/00 *SIAC Construction* [2001] ECR I-07725, para 42

<sup>161</sup> Article 67 (4) of Directive 2014/24/EU; Article 82 (4) of Directive 2014/25/EU

<sup>162</sup> EC (n 7) 52

<sup>163</sup> Annex 5, Part C (18) of Directive 2014/24/EU

criteria and their weightings, as well as all sub-criteria and their weightings.<sup>164</sup> In summary, it can therefore be stated that (environmentally) award criteria are only permissible if:

- they are linked to the subject matter of the contract,
- they do not give the contracting authority unrestricted freedom of choice,
- they ensure the possibility of effective competition,
- they are explicitly mentioned in the contract notice and in the tender documents, together with their weighting and any sub-criteria to be applied, and
- they comply with the principles of the contract.<sup>165</sup>

#### *1.4.4.2. Life-cycle costing*

In the award phase, not only the quality of the bid, but also the costs of a bid are evaluated. In terms of GPP, this can be done with the help of so-called life cycle costing (LCC), which takes into account all costs incurred during the life of the product, work or service. This includes not only the purchase price, but also all associated costs (e.g. for delivery, installation, insurance.), operating costs (e.g. forenergy, fuel, and water consumption, spars and maintenance), end-of-life costs (e.g. for decommissioning or disposal) and, where applicable, costs of externalities (e.g. greenhouse gas emissions) under the specific conditions described below.<sup>166</sup>

In addition to costs borne directly by the contracting authority, external environmental costs incurred by society as a result of certain environmental impacts (e.g., related to climate change) may also be taken into account as part of a bespoke method for calculating LCC. This method must be based on objectively verifiable and non-discriminatory criteria, be accessible to all interested parties, and be able to provide the necessary data at a reasonable cost from normally diligent economic operators.<sup>167</sup> It must also be ensured that the method does not unduly favor or disadvantage any operator. If, on the other hand, a common method for calculating LCC is mandatory under EU law (e.g., for road vehicles under the Clean Vehicles

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<sup>164</sup> EC (n 7) 53

<sup>165</sup> Ibid 50

<sup>166</sup> Ibid 57

<sup>167</sup> Article 68 (2) of Directive 2014/24/EU; Article 83 (2) of Directive 2014/25/ EU

Directive<sup>168</sup>), this method must be applied<sup>169</sup>. However, if LCC is to be used in the procurement process, the specific calculation method and the data to be provided by the bidders must already be specified in the contract documents.<sup>170</sup>

In conclusion, it can therefore be said that using a life-cycle cost approach reveals the true costs of a contract. And due to the consideration of energy and water consumption, maintenance and disposal costs, which are in general not reflected in the purchase price, the LCC may show that the greener option is also the more cost-effective one over the entire life cycle of the product, work or service. LCC thus represents an important tool in procurement procedures with a focus on environmental aspects, which is why it is already being used by an increasing number of authorities in Europe to evaluate tenders.<sup>171</sup>

#### 1.4.5. Contract-performing

##### *1.4.5.1. Contract performance clauses*

Contract performance clauses are used to specify how a contract must be performed. These clauses may include environmental considerations, provided that these are - again - linked to the subject matter of the contract and have been published in advance in the tender documents to ensure that the tenderers are able to take them into account in the price of their bids.<sup>172</sup> In addition, contract clauses may include the specific commitments made as part of the procurement process (e.g. enforcing compliance with the environmental performance levels evaluated as award criteria) or provisions regarding the modification of contracts after their award (e.g. switching to a more sustainable product). Here, it is common that the contracting authority may stipulate within the tender documents that bidders will be excluded from further participation if they do not agree to these contractual clauses.<sup>173</sup>

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<sup>168</sup> Directive (EU) 2019/1161 on the promotion of clean and energy-efficient road transport vehicles [2019] OJ L188

<sup>169</sup> Article 68 (3) of Directive 2014/24/EU and Article 83 (3) of Directive 2014/25/EU

<sup>170</sup> EC (n 7) 59

<sup>171</sup> Ibid 58

<sup>172</sup> Article 70 of Directive 2014/24/EU; Article 87 of Directive 2014/25/EU

<sup>173</sup> EC (n 7) 62



#### *1.4.5.2. Monitoring contract performance*

In connection with these contractual clauses it is important to mention that those are only effective if their compliance is properly monitored. The most common forms of monitoring contract performance are requesting evidence of compliance, having the client conduct spot checks, or having a third party monitor compliance. In addition or alternatively, it may be effective to provide for appropriate penalties for non-compliance with the clauses or to set bonuses for good performance in the contract with the help of key performance indicators (KPIs) that can be linked to the contractor's right to payment.<sup>174</sup>

If a contract contains elements of subcontracting it must be ensured in any case that the obligations under the GPP are enforced throughout the supply chain. Options for monitoring subcontracting agreements include requiring joint liability of the prime contractor and all subcontractors for environmental compliance (if provided for in national law) or the replacement of a subcontractor if its compliance with environmental requirements cannot be verified.<sup>175</sup>

However, not only compliance with environmental targets within individual contracts but also the assessment of progress towards overall GPP targets requires an effective monitoring system. In addition to the monitoring activities of the European Commission, several EU Member States have already established (or are in the process of establishing) systems to monitor national GPP implementation and specific procedures for collecting information. But not only the number and value of GPP contracts should be reviewed, also a review of GPP activities in qualitative terms is advisable, which focuses not only on obstacles, remedies and further improvements needed but also on an assessment of future objectives.<sup>176</sup>

### **1.5. GPP in different contract types**

Since the individual contracts awarded as part of a procurement process are naturally all structured and designed differently, each contract requires its own approach to GPP. In the

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<sup>174</sup> Ibid 66

<sup>175</sup> Ibid 67

<sup>176</sup> EC (n 11) 11

following, this individual GPP approach shall be exemplified on the basis of contracts from five different product and service groups.<sup>177</sup>

#### 1.5.1. Construction works

As the construction sector is one of the most significant sectors not only in economic and social terms but also in environmental terms, it represents an important focus area for GPP. The main environmental impacts of this sector relate to the use of buildings (esp. energy and water consumption), the materials used in construction, as well as their transportation and waste generated during construction. The goal of a GPP approach in this service group is to consider both, the overall impact of a building and the environmental characteristics of the individual components.<sup>178</sup>

GPP policies in the construction sector can be implemented, for example, by including selection criteria for architects and engineers based on their experience in designing sustainable buildings. Alternatively, or in addition, minimum energy efficiency standards (with additional points for performance above the minimum), preferences for renewable energy system designs, or restrictions on hazardous substances in building materials and/or incentives for the use of sustainable wood and materials made from recycled content may be included. In this sector it may also be useful to establish contract clauses for waste and resource management and the transport of construction materials to the construction site to minimize environmental impacts.<sup>179</sup>

#### 1.5.2. Food and Catering Services

Agriculture, as an essential part of the European economy, has a very large environmental footprint. Not only does it produce high greenhouse gas emissions when transporting or storing food, but it also contributes significantly to soil and water pollution through its food and packaging waste. Despite this huge footprint, however, the public sector procures a large amount of food and beverages for schools, hospitals, prisons, or public events, as part of public procurement, although the trend is now already moving towards purchasing more

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<sup>177</sup> Ibid 12

<sup>178</sup> EC (n 7) 68

<sup>179</sup> EC (n 11) 12

sustainable food. This is critical for our climate and environment as choosing more sustainable alternatives, producing food organically and reducing waste has enormous potential to make a measurable difference.<sup>180</sup>

In general, there are several ways to incorporate a GPP approach for this service group into the bid documents and contract, such as setting a minimum percentage of food that must be organic or in season and awarding additional points for percentages that are above the minimum requirements. In addition, is possible to include contract clauses to minimize food and packaging waste or certain environmental management measures for caterers, such as staff training, as selection criteria.<sup>181</sup>

### 1.5.3. Office IT Equipment

Public authorities are large consumers of office IT equipment such as computers, printers, lighting and other energy consuming products. These electronic devices have a similar environmental footprint to agriculture due to the raw materials and energy consumed in their manufacture and disposal. Therefore, the potential for savings in this sector is enormous. In particular GPP can not only help to save costs and reduce the environmental impact in this sector but also encourage the market to adopt higher environmental standards. Typical GPP concepts for IT equipment include, for example, requirements for energy efficiency (in operating, standby, and off states) or a design that ensures a long service life and/or facilitates reuse and recycling of the equipment. Other possibilities include limiting the noise level of a device and/or banning or limiting substances that have been classified as hazardous to human health or the environment.<sup>182</sup>

### 1.5.4. Road Transport

The transport sector accounts for around 25% of greenhouse gas emissions in the EU, with road transport being the largest contributor. In principle, there are already many ways to reduce the environmental impact of vehicle use, for example by promoting electric cars, car sharing or other modes of transport such as e-trains. These alternatives can not only save

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<sup>180</sup> EC (n 7) 70

<sup>181</sup> Ibid

<sup>182</sup> Ibid 13

significant costs and taxes in the public sector but also provide health benefits. Specific GPP approaches for these kind of contracts are, for example, the specification of vehicles with the lowest possible CO<sub>2</sub> emissions and/or the promotion of electric or hybrid vehicles or of environmentally friendly tires and regenerated lubricating oils. In addition, it is common in this sector to apply LCC (including the cost of environmental externalities) to compare the actual costs of different vehicles.<sup>183</sup>

#### 1.5.5. Paper and Wood products

When procuring paper and wood products, which can be a major burden in terms of deforestation, biodiversity loss, and water and energy consumption, a wide variety of criteria related to GPP can be provided. A common criterion is, for example, the requirement that the paper to be procured must be made from recycled fiber and/or sustainably managed forests, or the obligation to provide supply chain information to confirm the legal origin of all wood.<sup>184</sup> In the procurement of furniture, the application of eco-principles which allow the adaptation and reuse of items may be required.<sup>185</sup>

### 1.6. EU Ecolabels

Within the EU there are several ecolabels that aim to promote sustainability and regionality and protect the environment. Most of these labels are managed by the European Commission and are recognized across borders throughout the entire Community territory. The most important of these labels are outlined in more detail below:

#### 1.6.1. „The EU Ecolabel“

Launched in 1992, the EU Ecolabel as the European Union's official and globally recognized environmental label promotes products and services with a reduced environmental impact and provides consumers with accurate and scientifically sound information about that environmental impact so that they can make informed purchasing decisions. The label is

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<sup>183</sup> Ibid 72

<sup>184</sup> Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market Text with EEA relevance [2010] OJ L295/23

<sup>185</sup> EC (n 11) 14

regulated by the Regulation on the EU Ecolabel<sup>186</sup> and managed by the European Commission and the Member States.<sup>187</sup>

In principle, manufacturers, importers and retailers can apply for the EU Ecolabel for their goods and services on a voluntary basis, but must meet high environmental standards throughout the product's life cycle in terms of raw material extraction, production, distribution and disposal. Not only does this encourage entrepreneurs to develop innovative, durable and recyclable products, but participation in the EU Ecolabel also gives them the opportunity to participate in relevant European Commission initiatives (such as the Sustainable Consumption Pledge).<sup>188</sup> The selection and promotion of products and services with the EU Ecolabel is therefore not only beneficial for consumers, but also for the environment in particular. After all, the EU Ecolabel makes an important and decisive contribution to meeting current ecological challenges such as climate neutrality by 2050 or the transition to a circular economy.<sup>189</sup>

#### 1.6.2. „The organic logo“

The EU organic logo helps consumers to identify organic products produced in the EU on the one hand, and farmers to market them throughout the EU on the other. A product can be labeled with the logo if it meets strict conditions regarding its production, processing, transportation, and storage (e.g., it must consist of at least 95% organic ingredients) and has been certified as organic by an approved inspection body or institution. In addition to the logo, the place where the agricultural raw materials that make up the product were grown must be indicated, as well as a code number of the control body.<sup>190</sup>

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<sup>186</sup> Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel [2010] OJ L27/1

<sup>187</sup> European Commission, ‚About the EU Ecolabel - Understand how the EU Ecolabel works and how stakeholders can strengthen the reach of the label‘ (Directorate-General for Environment) <[https://environment.ec.europa.eu/topics/circular-economy/eu-ecolabel-home/about-eu-ecolabel\\_en](https://environment.ec.europa.eu/topics/circular-economy/eu-ecolabel-home/about-eu-ecolabel_en)> accessed 26 February 2023

<sup>188</sup> European Commission, ‚EU Ecolabel – Better for you, better for the environment‘ (Directorate-General for Environment) <[https://environment.ec.europa.eu/topics/circular-economy/eu-ecolabel-home\\_en](https://environment.ec.europa.eu/topics/circular-economy/eu-ecolabel-home_en)> accessed 26 February 2023

<sup>189</sup> Ibid

<sup>190</sup> European Commission, ‚The organic logo – Aims of the organic logo‘ (Directorate-General for Agriculture and Rural environment) <[https://agriculture.ec.europa.eu/farming/organic-farming/organic-logo\\_en](https://agriculture.ec.europa.eu/farming/organic-farming/organic-logo_en)> accessed 26 February 2023

For most organic products, the logo is mandatory, especially for pre-packaged EU food products that are produced and sold as organic in the EU. For other products the logo is optional, such as imported organic products that meet the relevant EU rules for importing organic products or those sold on third country markets. However, the logo may not be used, for example, in large-scale catering establishments such as restaurants or hospitals, or for products outside the scope of organic regulations such as cosmetics or products from hunting.<sup>191</sup>

### 1.6.3. PDO, PGI and TSG

In addition to the EU Ecolabel and the organic logo, the European Commission awards three seals that indicate the geographical origin of a food, its quality or its connection with a specific region. In principle, foodstuffs of all kinds can bear these "quality marks", however the manufacturer must first apply for them in an approval procedure which is based on the EU Regulation on quality schemes for agricultural products and foodstuffs<sup>192</sup>.<sup>193</sup> The three seals to be explained below are the protected designations of origin (PDO) and the protected geographical indications (PGI) and the traditional specialty guaranteed (TSG):

- **Protected designations of origin (PDO)** - This EU label is only awarded to products (including food, agricultural products and wines) that originate 100% from a well-defined geographical area, provided that every part of the production, processing and finishing process has taken place in that area. For example, the olive oil "Kalamata" is produced entirely in the region of Kalamata in Greece using olives only from this area.<sup>194</sup> In the case of wine, the grapes must therefore come exclusively from the area where the wine is produced. As an Austrian example, the Vorarlberg mountain cheese or the Styrian beetle beans can be mentioned.<sup>195</sup>

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<sup>191</sup> Ibid

<sup>192</sup> Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs [2012] OJ L343

<sup>193</sup> Foodwatch Austria, 'Das Problem mit den drei EU-Qualitätssiegeln, Herkunftskennzeichnung' (2020) <<https://www.foodwatch.org/at/informieren/herkunftsangaben/das-problem-mit-den-drei-eu-qualitaetssiegeln/>> accessed 25 February 2023

<sup>194</sup> European Commission, 'Geographical indications and quality schemes explained - Aims of EU quality schemes' (Department of agriculture and rural environment) <[https://agriculture.ec.europa.eu/farming/geographical-indications-and-quality-schemes/geographical-indications-and-quality-schemes-explained\\_en#how-products-are-protected](https://agriculture.ec.europa.eu/farming/geographical-indications-and-quality-schemes/geographical-indications-and-quality-schemes-explained_en#how-products-are-protected)> accessed 25 February 2023

<sup>195</sup> Food Watch Austria (n 173)

- **Protected geographical indications (PGI)** – This seal is awarded to food, wines and agricultural products that are "typical" of a geographical area. This applies when a certain quality, prestige or other characteristics can be attributed to the geographical origin. Unlike PDO, however, for most products only a single step of production must take place in the named area (i.e., the raw materials may come from another area). For example, the “Westfälische Kochschinken” is produced in Westphalia using an old process and is therefore awarded the PGI, though the meat used does not come 100% from animals born and raised in that region.<sup>196</sup> Examples from Austria are the "Tiroler Speck” and the "Steirisches Kürbiskernöl”.<sup>197</sup>
  
- **Traditional specialty guaranteed (TSG)** - In principle, the TSG is not a genuine seal of origin, but merely refers to the "traditional character" of the product without being linked to a specific geographical area. A product (food and agricultural products) has a traditional character if it has been produced in a traditional way or if it consists of traditional ingredients. Thus, the label refers only to tradition, so neither the product nor the ingredients need to have been produced or processed in the place that gives it its name.<sup>198</sup> For example, "Gueuze" is a traditional beer made by spontaneous fermentation but produced in Brussels, Belgium.<sup>199</sup> Other examples are the Pizza Napoletana or the Dutch Matjes.<sup>200</sup> It is also worth mentioning that if a product is marked with the TSG, its name protects against counterfeiting of the e.g. traditional production process and against misuse.<sup>201</sup>

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<sup>196</sup> EC (n 175)

<sup>197</sup> Food Watch Austria (n 174)

<sup>198</sup> Ibid

<sup>199</sup> EC (n 175)

<sup>200</sup> Food Watch Austria (n 174)

<sup>201</sup> EC (n 175)

## **2. Sustainable Public Procurement (Austria)**

### **2.1. Introduction**

#### **2.1.1. Definition**

Having established that a relevant part of the environmental impact of public administration is attributable to the products, services and construction work procured, it became clear that a climate-neutral public or rather climate change-orientated public administration can only be successful if it aligns its procurement in an environmentally compatible manner. A first important step in this direction has been achieved with the Austrian Action Plan for Sustainable Public Procurement, the “naBe action plan”, which will be explained in more detail below.<sup>202</sup> According to this naBe Action Plan, sustainable public procurement (SPP) is defined as follows:

*“Sustainable, seasonal and regional public procurement means procurement by public contracting authorities that follows the principles of economy, efficiency, expediency and environmental compatibility of the service, and in doing so follows the best offer principle and ensures that social standards are observed in the production or provision of the service.”<sup>203</sup>*

However, before taking a closer look at the naBe action plan and its criteria, it is important to understand the policy and legal framework for implementing SPP in Austria:

#### **2.1.2. Political Framework**

In its Communication on Integrated Product Policy of 18 June 2003<sup>204</sup>, the European Commission invited the Member States to “draw up action plans for greening their public procurement. They will allow Member States to choose the options that best fit their policy framework [...]”. However, this call was a mere recommendation, which is why GPP implementation was basically voluntary and very flexible. In particular, the way in which environ-

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<sup>202</sup> Gerhard Weiner, Karin Hiller, Angelika Tisch, ‘Der neue naBe-Aktionsplan – Aufbruch in die klimaneutrale Verwaltung’ (2022) NR 2022, 238, Booklet 2, 1

<sup>203</sup> FMC (n 1) 6

<sup>204</sup> COM (2003) 302



mental aspects were taken into account was left to the sole discretion of the contracting authorities.<sup>205</sup> This was also one of the reasons why the implementation of the GPP at the national level initially failed. There were several hurdles, for example, insufficient information on life-cycle costs of products and on the costs of environmentally friendly products in general. The number of established environmental criteria was also limited at this time, and where they existed, there were initially inadequate mechanisms (such as databases) for publishing them. Furthermore, knowledge of the benefits of environmentally friendly products and services was still very low at that time, and there was also great uncertainty about the legal possibilities of integrating environmental criteria into tender documents. In the end, however, implementation mainly failed due to the initial lack of political support and correspondingly scarce resources for the enforcement and promotion of GPP, as well as the lack of coordination of the exchange of best practices and information between regional and municipal authorities.<sup>206</sup>

Due to all these hurdles, it took several more years until the first EU member states followed the call of the Commission and started to develop national action plans. Austria, for example, only developed the Austrian National Action Plan for Sustainable Public Procurement, the “naBe Action Plan” in 2010 (see 2.2). Five years later, the Republic of Austria, together with the other member states of the United Nations, committed to implement the "2030 Agenda for Sustainable Development" with the 17 sustainable Development Goals (SDGs), as mentioned in the introduction. Also worth mentioning in this context is the current government program "*Out of Responsibility for Austria*", the aim of which is, among other things, to make SPP the standard in public procurement procedures in order to leverage the enormous economic potential of around 46 billion euros per year (equivalent to around 12 percent of GDP). This goal is to be achieved in particular through the purchase of 100 percent green electricity, the rapid switch to an electrically powered public vehicle fleet and the purchase of 100 percent regional and seasonal foods in conjunction with an organic quota. This and the other goals of the government program are reflected in the specifications of the naBe Action Plan, which will be outlined below.<sup>207</sup>

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<sup>205</sup> Werner, Hiller, Tisch (n 183) 2

<sup>206</sup> COM (2008) 400 final, 5-6

<sup>207</sup> FMC (n 1) 8

### 2.1.3. Legal Framework

The legal basis for the implementation of the GPP at the national level can be found primarily in the provisions of the new Public Procurement Directives 2014. In Austria, these directives were implemented in the Federal Public Procurement Act 2018, which contains clear specifications on how Austrian public authorities can contribute to environmental protection and the promotion of sustainable development. The basis provision is Section 20 para 5 of the Austrian Federal Procurement Act 2018 which stipulates the following:

*“(5): In the award procedure, consideration must be given to the environmental compatibility of the service. This can be done in particular by taking into account ecological aspects (such as energy efficiency, material efficiency, waste and emission prevention, soil protection) or animal welfare in the description of the service, in the definition of the technical specifications, by defining concrete award criteria or by stipulating conditions in the service contract.”<sup>208</sup>*

This provision thus declares the consideration of environmental aspects in the awarding of contracts to be one of the general principles of the procurement procedure. In principle, contracting authorities are completely free to decide how or in what form this consideration of environmental aspects should take place (e.g. in the form of award criteria, technical specifications or contract terms), though a kind of "order" results from the explanations to Section 20 para 5 of the Austrian Federal Procurement Act 2018.<sup>209</sup> Accordingly, the definition of the subject matter of the contract, e.g. by means of ecological technical specifications or the prescribing of Eco-labels, is to be given preference over the definition of corresponding award criteria since, if the consideration in the former is insufficient, this error cannot or can hardly be rectified afterwards.<sup>210</sup> In any case, it follows from the above quoted provision that aspects of environmental sustainability can be taken into account in all phases of the procurement procedure and thus across the entire award process.<sup>211</sup>

Regardless of this discretion of the contracting authorities in the application of sustainable aspects, the SPP is also subject to the strict procurement law regime of the Federal Procurement Act 2018. This is intended to prevent the SPP or sustainability in practice from leading

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<sup>208</sup> Section 20 (5) of the Austrian Federal Procurement Act 2018

<sup>209</sup> Stephan Heid, ‘die nachhaltige Beschaffung im BVergG 2018‘ (2019) VIL 2019, 3, Booklet 2, 1

<sup>210</sup> Explanatory notes on the Federal Procurement Act 2018 [2018] EBRV 69 BlgNR 26. GP, 53

<sup>211</sup> Heid, Hofbauer (n 2) 2

to a softening of the applicable procurement rules and principles. For this reason, the ECJ has developed certain basic rules in its established case law that limit or clearly determine the scope of action of the public sector, as explained above in connection with the determination of the award criteria (see 1.4.4.1).<sup>212</sup>

### *2.1.3.1. Ecological technical specifications*

Concrete requirements with regard to ecological technical specifications can be found in Section 94 of the Austrian Federal Procurement Act 2014, which implements the requirements of the Clean Vehicle Directive<sup>213</sup>. This provision obliges contracting authorities for the procurement of road vehicles to define as technical specifications in particular energy consumption, CO<sub>2</sub> emissions and emissions of nitrogen oxides (NO<sub>x</sub>), non-methane hydrocarbons (NMHC) and particulates.<sup>214</sup>

Furthermore, in accordance with the Energy Efficiency Directive<sup>215</sup>, Section 95 of the Austrian Federal Procurement Act 2018 stipulates that contracting authorities such as the Federal Chancellery, the Federal Ministries or the „Bundesbeschaffungs GmbH“ (BBG)<sup>216</sup> must ensure that only goods that meet the energy efficiency requirements set out in Annex XIV to the Austrian Federal Procurement Act 2018 (e.g. belonging to the highest possible energy efficiency class) are used. However, these energy efficiency requirements must not lead to a restriction of competition, which may be the case if a certain product in the highest energy efficiency class can only be offered by one or a small number of contractors. In addition, it must always be ensured that the award is only made at reasonable prices. This would not be the case, for example, if the additional costs of procuring the energy-efficient product were disproportionate to the energy savings calculated over the life cycle<sup>217,218</sup>.

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<sup>212</sup> Ibid

<sup>213</sup> Directive (EU) 2019/1161 on the promotion of clean and energy-efficient road transport vehicles [2019] OJ L188

<sup>214</sup> Heid, Hofbauer (n 2) 2

<sup>215</sup> Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC Text with EEA relevance [2012] OJ L315/1

<sup>216</sup> Annex III of the Austrian Federal Procurement Act 2018

<sup>217</sup> EBRV 69 BlgNR 26. GP, 125

<sup>218</sup> Heid (n 190) 2

Alternatively or additionally, public authorities may also require a specific Ecolabel under Section 108 of the Austrian Federal Procurement Act 2018 as proof that the performance meets the required characteristics of the label (Eco-labels recognized in Austria are listed in the brochure "Sustainable Shopping" published by the BMNT). The requirements for this, which correspond to those of Article 43 para 1 of Directive 2014/24/EU (see 1.4.3.2), are met if the following can be affirmed: the requirements of the label must exclusively concern criteria related to the subject-matter of the contract, must be based on objectively verifiable and non-discriminatory criteria and must be established by a third party over which the contractor applying for the quality mark cannot exercise a decisive influence. Moreover, the label must have been drawn up in the context of an open and transparent procedure in which all relevant interested parties can participate and must be accessible to all interested parties<sup>219</sup>. According to the case law of the ECJ, however, it is inadmissible in any case to stipulate an Ecolabel as the sole technical specification of the subject matter of the contract<sup>220, 221</sup>.

#### *2.1.3.2. Ecological criteria*

When defining the environmental criteria, a distinction must be made between the exclusion and selection criteria which relate to the individual contractor, and the award criteria which refer to the respective service and are to be used to determine the technically and economically most favorable bid.<sup>222</sup>

When determining exclusion (or suitability) criteria, public contracting authorities must in principle observe the legal requirements of Section 78 para 1 number 5 of the Austrian Federal Procurement Act 2018, which justify exclusion of the bidder from the award procedure but may, for example, additionally require the proof that a contractor complies with certain systems or standards for environmental management<sup>223</sup>. In contrast, there is greater discretion both in the determination of ecological selection criteria and in the determination of ecological award criteria as the Austrian Federal Procurement Act 2018 does not contain any specific requirements in this regard (with the exception of the already mentioned mandatory award criteria of Section 94 para 1 of the Austrian Federal Procurement Act 2018). Public

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<sup>219</sup> Section 108 para 1 of the Austrian Federal Procurement Act 2018; Article 43 (1) of Directive 2014/24/EU

<sup>220</sup> Case C-368/10 *European Commission v Kingdom of the Netherlands* [2012] OJ C194

<sup>221</sup> Heid (n 190) 2

<sup>222</sup> Ibid

<sup>223</sup> Section 87 para 2 of the Austrian Federal Procurement Act 2018

contracting authorities are therefore largely free to design the selection and award criteria, but must take into account the general award principles of Section 20 of the Austrian Federal Procurement Act 2018 and the relevant case law of the ECJ<sup>224</sup>, according to which environmental protection criteria may not grant the contracting authority unlimited freedom of choice.<sup>225</sup>

### 2.1.3.3. *Ecological contract clauses*

In addition to the general principles of European law and (national) public procurement law<sup>226</sup>, Section 110 para 1 number 13 of the Austrian Federal Procurement Act 2018 is particularly relevant for the definition of ecological contract clauses. It stipulates that the contract must specify in particular economic, innovation-related, social or ecological conditions to be met during the provision of the services. Ecological contract clauses as conditions of performance can be, for example, the delivery of goods in larger quantities instead of individually, the reuse of packaging material, or the collection, return, recycling or reuse of waste generated during or after the use or consumption of a product<sup>227</sup>.

In any case, compliance with these contractual conditions and other ecological specifications must be monitored by the contracting authority over the entire performance period, e.g. through inspections by the local construction supervision or spot checks. In addition, violations of these must be sanctioned with, for example, contractual penalties. In this context, it is also important to mention that the execution of the service without complying with the ecological specifications may constitute an inadmissible material change to the contract, which may lead to the nullity of the contract and the obligation to issue a new invitation to tender pursuant to Section 365 para 2 number 1 of the Austrian Federal Procurement Act 2018.<sup>228</sup>

Ultimately, however, the GPP-criteria developed by the European Commission (see 1.3.1) and the naBe-criteria based on the Austrian Action Plan for Sustainable Public Procurement, the “naBe Action Plan”, to which the following chapter is devoted, also provide assistance

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<sup>224</sup> Case C-513/99 *Concordia Bus Finland* [2002] ECR I-07213; Rn 69; Case C- 448/01 *EVN und Wienstrom* [2003] ECR I-14527, Rn 33

<sup>225</sup> Heid (n 190) 2

<sup>226</sup> Section 20 para 1) of the Austrian Federal Procurement Act 2018

<sup>227</sup> EBRV 69 BlgNR 26. GP , 137

<sup>228</sup> Heid (n 190) 2

with regard to the definition of ecological technical specifications, criteria and contract clauses:

## **2.2. “NaBe Action Plan”**

### **2.2.1. Purpose and goals**

The naBe Action Plan, which is the Austrian Action Plan for Sustainable Public Procurement, was decided to be implemented by the Council of Ministers in July 2010. Under this Action Plan all federal ministries commit themselves and their subordinate departments to take the naBe criteria into account when awarding contracts and to instruct the legal entities whose management of the share rights is entrusted to them to apply the naBe criteria or to recommend their application. Moreover, with the decision of June 2021 concerning the implementation of the revised version of the action plan, the federal government also recommends that the offices of the state governments, cities and municipalities take the naBe criteria into account.<sup>229</sup>

In general, the naBe Action Plan pursues four goals which are to be achieved within the legal framework provided by the Federal Procurement Act 2018. The main purpose is to support public authorities such as the federal ministries and their subordinate departments in SPP by defining specific requirements for 16 different procurement groups, the naBe-criteria. Furthermore, the Action Plan objects to organize and support the process of implementing SPP at the federal level and to bundle all initiatives in the area of SPP by harmonizing its core criteria with the corresponding criteria of the federal states, cities and municipalities, other public clients and publicly funded programs. As a last goal, the naBe Action Plan shall ensure Austria's pioneering role in SPP in the EU, though Austria has already been one of the leaders in sustainable public procurement in the European Union for years.<sup>230</sup>

### **2.2.2. The naBe-criteria**

The naBe-criteria, which were developed under the leadership of the Federal Ministry for Climate Protection, Environment, Energy, Mobility, Innovation and Technology (FMC),

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<sup>229</sup> Ibid 1

<sup>230</sup> Ibid 6-9

form the core of the naBe Action Plan.<sup>231</sup> They consist of criteria for the procurement of products, services and works for 16 different procurement groups, and only services, works or products that meet these criteria, are considered sustainable.<sup>232</sup>

As far as the formulation of the naBe criteria is concerned, particular attention was paid to making them as practical as possible. They were therefore formulated in such a way that compliance with the criteria can be checked on the basis of information contained in eco-labels, for example, and moreover, in a way that they (like the GPP) can be copied directly into the tender documents. This can be done, for example, in the form of mandatory suitability criteria, technical specifications or even optional award criteria, contract conditions or mere recommendations.<sup>233</sup>

The 16 criteria can basically be divided into three different categories: consumer goods and events (*category A*), durable products or capital goods (*category B*), building facilities (*category C*). In each group, factors such as life cycle costs, energy efficiency and circular economy, and renewable raw materials are considered, with additional factors (such as regionality and animal welfare) applying to the food and delivery services procurement group. However, the majority of naBe criteria tend to be in the middle range in terms of their level of requirements so that the contracting authorities have sufficient leeway in determining the most economically and technically favorable offers.<sup>234</sup> The product groups currently listed as naBe-criteria are as follows:

- Cleaning products and services
- Civil engineering
- Electrical appliances
- Electricity
- Events
- Food and Catering services
- Furniture
- Hygiene
- IT equipment

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<sup>231</sup> FMC (n 1) 6

<sup>232</sup> Ibid 9

<sup>233</sup> Werner, Hiller, Tisch (n 183) 2

<sup>234</sup> Ibid 2

- Lamps
- Office supplies
- Paper
- Public space maintenance
- Structural engineering
- Textiles
- Vehicles<sup>235</sup>

Since it would otherwise go beyond the scope of this master's thesis, only a few specific naBe criteria will be examined in more detail below:

#### *2.2.2.1. Cleaning products and services*

The specifications in this product group apply to the procurement of hard surface cleaners, floor care products, machine dishwashing products, hand dishwashing products and laundry detergents. All these cleaning agents must meet the requirements of the EU Ecolabel or the Austrian Ecolabel for ingredients and packaging.<sup>236</sup> In addition, the naBe criteria for this product group must be taken into account. These include, for example, limits on toxicity to aquatic organisms for all ingredients, bans on numerous substances (e.g. microplastics, nanosilver and reactive chlorine compounds) or requirements for resource-efficient packaging of cleaning agents. Also covered, for example, is the requirement for certified sustainable cultivation for ingredients made from palm oil or palm kernel oil.<sup>237</sup> All of these criteria are intended to ensure that the cleaning agents procured do not pose a risk to human health or the environment and aim to ensure that cleaning services are only provided by well-trained employees.<sup>238</sup>

#### *2.2.2.2. Electrical appliance*

The greatest environmental impact in the life cycle of electrical appliances, such as ovens and hobs, stove hoods, televisions, dishwashers, coffee machines, refrigerators and freezers,

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<sup>235</sup> FMC (n 1) 6

<sup>236</sup> Ibid 37-38

<sup>237</sup> Ibid 38-41

<sup>238</sup> Ibid 38



tumble dryers and washing machines, is generally caused during manufacture and by electricity consumption during use. Therefore, in order to use the equipment for as long as possible and reduce the environmental impact, the repair of defective equipment is recommended. The aim of the specifications for electrical equipment is thus to procure only energy-efficient and durable electrical equipment.<sup>239</sup>

In principle, when awarding supply and service contracts in the upper threshold range, public contracting authorities may only procure appliances that meet the energy efficiency requirements set out in Section 95 of the Austrian Federal Procurement Act 2018. In addition, the naBe criteria for this product group must be taken into account which stipulate, for example, that contractors must supply spare parts within 7 years of the date of purchase. Furthermore, the contracting authorities are recommended to specify in the tender documents that defective equipment is to be repaired instead of being disposed of and that the total cost of ownership (TCO) must be taken into account when calculating the purchase price. These costs are those incurred by the client in acquiring, using and disposing of the electronic device. Other naBe criteria include, for example, the requirement that the electronic equipment must be packaged without PVC and/or have a maximum sound power level of 40 dB(A).<sup>240</sup>

### 2.2.2.3. *Electricity*

In the area of electricity, Austria is currently pursuing two main goals as part of its Integrated National Energy and Climate Plan from 2019<sup>241</sup>. On the one hand, the federal ministries are to purchase 100% electricity certified with the Austrian Ecolabel "Green Electricity" (Directive UZ 46)<sup>242</sup> from the year 2021 onwards<sup>243</sup> and on the other hand, 100% of Austria's electricity consumption is to be covered by renewable energy sources (i.e. wind, solar, aerothermal, geothermal, hydrothermal, ocean energy, hydropower, biomass, landfill gas, sewage gas and biogas<sup>244</sup>) by the year 2030. Achieving these goals not only requires switching to

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<sup>239</sup> Ibid 45

<sup>240</sup> Ibid

<sup>241</sup> Federal Ministry Austria, 'Integrated National Energy and Climate Plan for Austria - 2021-2030 - pursuant to Regulation (EU) 2018/1999 of the European Parliament and of the Council on the Governance System for the Energy Union and Climate Change' (2019)

<sup>242</sup> Austrian Ecolabel, 'Richtlinie UZ 46 Green Electricity' (2020), Version 6.0

<sup>243</sup> Federal Chancellery Austria, 'Aus Verantwortung für Österreich – Regierungsprogramm 2020-2024' (2020)

<sup>244</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L140/16, 16

green power but also requires additional power-saving measures such as the use of energy-efficient appliances.<sup>245</sup>

The naBe criteria relevant here stipulate that the electricity to be procured must meet the requirements of the above mentioned Directive UZ 46 on Green Electricity of the Austrian Ecolabel (UZ 46). For example, during the term of the contract, the names of the power plants and the quantities of energy purchased must be disclosed. Also, separate trading of electricity and guarantees of origin is not permitted, which means that electricity traders are not allowed to sell electricity from non-renewable energy sources as electricity from renewable energy sources by purchasing guarantees of origin (e.g. for electricity from hydropower in Norway). However, the most important requirement of the UZ 46 directive is that the electricity to be procured must come 100% from renewable energy sources and of this at least 1% from photovoltaics and 10% from power plants that are not older than 15 years or were revitalized/expanded no more than 15 years ago.<sup>246</sup>

#### 2.2.2.4. *Events*

The specifications of this naBe group apply to singular events with up to 100 participants for which, in addition to the naBe criteria below, the minimum requirements of the Directive UZ 62 Green Meetings and Green Events<sup>247</sup> from the Austrian Ecolabel must be observed. The aim of the criteria for events is in particular to promote environmentally friendly mobility and sustainable nutrition and to avoid food waste. Specifically, the naBe criteria in this service group include some binding requirements for the specific event, such as good public accessibility to the event location, a simple waste avoidance concept or reusable systems and reusable transport packaging, and incentive systems for environmentally friendly mobility. With regard to the food to be offered at the event, the criteria also stipulate a mandatory minimum share of sustainable food and beverages, as well as a mandatory offer of vegetarian/vegan food and free tap water. In addition, meat products must meet certain quality and animal welfare standards and information about their origin must be disclosed.<sup>248</sup>

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<sup>245</sup> FMC (n 1) 42

<sup>246</sup> Ibid 43-44

<sup>247</sup> Austrian Ecolabel, 'Richtlinie UZ 62 Green Meetings and Green Events' (2023) Version 5.1

<sup>248</sup> FMC (n 1) 16-17

#### 2.2.2.5. *Food and Catering services*

The aim of sustainable procurement of food and catering services is to reduce negative environmental impacts and consider aspects such as food quality and animal welfare. However, the term "catering services" covers not only communal catering in large kitchens (e.g. of care and educational institutions) but also catering at regularly recurring events and services provided by external service providers. The criteria explained below serve to procure food that is of high quality and in which animal welfare plays a major role. In addition, they aim to avoid food waste and ensure short transport routes in order to reduce transport-related CO<sub>2</sub> emissions.<sup>249</sup>

Particularly worth mentioning here is the "Österreich isst regional" (Austria eats regionally) forum founded in 2020 as part of the na-Be-platform (see 2.2.4), whose sponsors are the BMK, the Federal Ministry of Defense (BMLV), the federal provinces, the Austrian Chamber of Agriculture, the Austrian Federal Economic Chamber, Agrarmarkt Austria Marketing GesmbH and the BBG. The goal of the forum is to focus on the procurement of sustainable food with an increased emphasis on regionality, seasonality and organic production, as well as greater animal welfare. For this reason, the naBe criteria on food and catering services outlined below have been centrally anchored in the forum's list of tasks. Based on these mandates, the forum is to support the implementation of the necessary processes on both the supply and demand side.<sup>250</sup>

Mandatory requirements to be considered within this naBe product group are, for example, the gradual increase of the minimum share of organically produced food from 25% to 55% by 2030, as well as compliance with high animal welfare standards. Based on the latter, animal products must meet the requirements of the Austrian Animal Welfare Act and the 1st Animal Husbandry Ordinance. Furthermore, the naBe criteria provide for an adaptation of the menu in e.g. nursing homes to the effect that at least one vegetarian/vegan main dish is on the menu daily which is seasonal & regional and contains at least one main ingredient from organic/ecological production. A large focus of this service group is also on regionality, which is why 100% of the procured food must come from the region if possible (e.g. fish

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<sup>249</sup> Ibid 29

<sup>250</sup> Werner, Hiller, Tisch (n 183) 3

products must come from regional waters or sustainable aquacultures). Also envisaged are mandatory origin labelling for meat, milk and eggs and reusable systems for packaging.<sup>251</sup>

The application of these naBe criteria can be done in different ways. For example, care can be taken to purchase only regional products or to give preference to sustainable products, e.g. by only using organic products, paying attention to animal welfare or giving preference to products that originate from fair trade countries in the South. In the case of animal products, it is particularly advisable to pay attention to the labeling of origin. Here, for example, the contracting authority can include various existing quality labels such as the Austrian Eco-label or the AMA Quality Seal (see 2.3) within the technical specifications and thus define their quality requirements as minimum criteria for participation in the award procedure.<sup>252</sup>

#### 2.2.2.6. *Vehicles*

The following specifications apply in addition to the regulations of the Clean Vehicles Directive (CVD)<sup>253</sup> and cover passenger cars, light commercial vehicles (LCV), buses, bus and waste collection services, and tires. However, not covered are e.g., vehicles of the public safety service or the Federal Army.<sup>254</sup>

One of the most important naBe criteria in this product group is the obligation to procure only pure battery electric vehicles (BEV) or pure hydrogen fuel cell electric vehicles (FCEV). if the daily travel distance does not exceed 160 km (passenger car) or 80 km (LCV). However, if regular charging of the vehicle is not possible and a suitable electric vehicle is not available, vehicles with mixed electric drive (e.g. plug-in hybrid, range extender) shall be procured and ultima ratio, efficient vehicles with combustion engine. In addition, it is recommended to require that the vehicles are powered by green electricity.<sup>255</sup>

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<sup>251</sup> FMC (n 1) 29-36

<sup>252</sup> Ibid

<sup>253</sup> Directive (EU) 2019/1161 on the promotion of clean and energy-efficient road transport vehicles [2019] OJ L188

<sup>254</sup> FMC (n 1) 51

<sup>255</sup> Ibid 51-61

### 2.2.3. Implementation control

Successful implementation of the naBe Action Plan requires a clear control-management. This control is carried out jointly by the ministries, the BBG and the „Bundesimmobiliengesellschaft“ (BIG) under the lead and coordination of the FMC. While the BIG manages the federal government's real estate, the BBG serves as a purchasing partner for public authorities such as federal ministries, federal states, cities and municipalities.<sup>256</sup>

To steer the implementation of the naBe Action Plan two bodies were established. This is on the one hand the interministerial steering group and on the other hand the group of naBe officers. The latter was established for the operational level and consists of one selected procurement officer per ministry. As they primarily act as central information and contact persons both internally and externally, they provide an important link to practice and also raise awareness of sustainable procurement in their own department. However, within the first body, all heads of the procurement sections in the ministries are represented as well as the management of BBG and BIG. Its main tasks include not only the publication of the naBe criteria on <https://www.nabe.gv.at/> and its regular revision and updating, but also the continuous further development of the naBe Action Plan (e.g. development of further naBe-criteria by identifying and prioritizing additional products and services), the coordination of the central measures for implementing it and the continuous exchange on the implementation of the criteria in all relevant procurement processes of the ministries.<sup>257</sup>

In addition to these main tasks, the interministerial steering group develops and defines a uniform interdepartmental monitoring system to provide information on the current implementation status of the naBe Action Plan. This system relies on data mainly collected by the above-mentioned naBe officers, compiled and evaluated by the FMC or provided by the BBG. It basically consists of indicators that allow conclusions to be drawn about the institutionalization of the naBe action plan in the individual federal institutions, the application of naBe criteria in procurement procedures and contracts, and the naBe conformity of the products and services procured. Based on these indicators, the interdepartmental steering group prepares an annual performance report. In addition, the results of the monitoring system will be incorporated into the evaluation of the naBe Action Plan planned for 2024 which will

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<sup>256</sup> Werner, Hiller, Tisch (n 183) 2

<sup>257</sup> Ibid 2

focus not only on the economic and environmental impact of the naBe Action Plan but also and above all on user satisfaction.<sup>258</sup>

#### 2.2.4. The naBe platform

After the decision of the Council of Ministers in 2010, which brought the first naBe Action Plan into force, it quickly became clear that strong networks were needed for a long-term change in the existing procurement structures. For this reason, the naBe platform was established in September 2019 through the website [www.nabe.gv.at](http://www.nabe.gv.at). The Website is managed by the BGG since it has a good understanding of both the needs of public administration and the opportunities in the markets. The main objective of the naBe platform is to act as an information and service point and is aimed not only at those responsible for purchasing at the BBG and the departments, but also at those of the provinces, municipalities and public institutions outside the federal government. Other goals of the platform are to establish itself as a central hub for sustainable procurement in Austria and also to network within the EU.<sup>259</sup>

### 2.3. Austrian Ecolabels

In Austria, there are already a large number of Ecolabels in different sectors and with different purposes. On the one hand there are those labels which, if done well, can make the production, trade and consumption of food and other goods more sustainable and fair. They give the consumer an orientation with regard to sustainability and thus contribute to transparency. On the other hand there are those labels that stand for the preservation of important areas, nature conservation or the support of social measures. However, since such labels do not involve the production process, they do not change the causes of environmental destruction or social skills and thus have only a small-scale effect. So-called regionality labels also belong to the same category.<sup>260</sup> In the following, a few of the quality seals recognized in Austria shall be explained in more detail:

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<sup>258</sup> Ibid 2-3

<sup>259</sup> Ibid 3

<sup>260</sup> Südwind, GLOBAL 2000, SUPPLY CHA!NGE Project, 'Der Gütesiegel Check – wie gut sind Gütesiegel wirklich?' (2017), 3-5

### 2.3.1. „The Austrian Ecolabel“

The Austrian Ecolabel was launched within the initiative of the Ministry of the Environment in 1990 with the aim of informing the public about the environmental impact of products during its entire lifecycle, thus during production, use and disposal, and to make consumers aware of environmentally friendly alternatives. Accordingly, if a product or service is awarded the Austrian Ecolabel, this guarantees that these products or services have a low impact on the environment and are of high quality at the same time. However, the label is not only awarded to products and services, but also to tourism services, schools and other educational institutions, and - on a voluntary basis – to entire companies from certain industries.<sup>261</sup>

In addition to these outlined advantages for consumers, the Austrian Ecolabel is also beneficial for companies. Not only does the public sector increasingly prefer products labeled with the eco-label, but the right to use the Austrian Ecolabel for all awarded products also provides companies with a uniform instrument for communicating their environmental commitment to the outside world and tapping into new customer segments. Thus, with the help of certification companies guarantee not only a certain quality of their products but also environmentally friendly product design, usability, durability and conformity to standards.<sup>262</sup>

### 2.3.2. “The AMA Quality seal”

The AMA Quality Seal is awarded by the “Agrarmarkt Austria Marketing GesmbH” on the basis of a statutory mandate. As an officially recognized quality label and in conjunction with the Austrian national colors, it provides information about the traceable origin of the product and its high quality. This means, for example, for animal products that the meat may only be labeled with the AMA quality seal if the animals were born, fattened, slaughtered and cut in Austria. For milk and dairy products such as cheese or yogurt, in contrast, the cows must not only live on Austrian farms and be milked there, but the processing into the end product must also take place in the domestic dairy. The same applies to fruit, vegetables and potatoes which must be grown exclusively in domestic fields, orchards and greenhouses in order to be labeled with the seal. Even in the case of foods made from several ingredients, all the

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<sup>261</sup> Austrian Ecolabel, ‘Richtlinie UZ 62 Green Meetings and Green Events’ (2023) Version 5.1, 4

<sup>262</sup> FMC, ‘The Austrian Ecolabel - What does the Ecolabel provide for companies?’ (2022) <<https://www.umweltzeichen.at/en/for-companies/start/was-bringt-das-umweltzeichen-den-betrieben>> accessed 7 March 2023

relevant agricultural ingredients must come exclusively from Austria (unless, for example, one ingredient is not produced in Austria or is produced in insufficient quantities, such as strawberries in fruit yogurt).<sup>263</sup>

This makes it clear that the quality requirements for products eligible for the AMA Quality Seal go beyond the legal requirements and are checked and monitored by comprehensive control measures. This control, which involves the entire food chain, consists not only of mandatory self-monitoring by the companies but also of regular monitoring audits by independent, specialized and state-accredited auditors, who in turn are controlled by AMA supervisory bodies. The AMA Quality Seal thus offers a guarantee that the product bearing the seal is a high-quality and strictly controlled foodstuff whose origin is 100 % traceable.<sup>264</sup>

### 2.3.3. „The BIO AUSTRIA Logo“

This label is managed by the eponymous association of Austrian organic farmers "Bio Austria" which represents the agricultural interests of about 12,500 Austrian organic farms at international and national level. The association is not only committed to the protection of the environment and natural resources but also in particular to the dignity of animals in the form of species-appropriate livestock farming that is committed to animal welfare.<sup>265</sup>

Above all, however, Bio Austria stands for the development and maintenance of a certain “bio quality” that complies with the EU organic regulation and the even stricter association guidelines. Thus, the association guidelines stipulate, for example, that the entire farm must be managed organically in the sense of circular economy, which is why it is not possible to manage fruit growing organically and pig fattening conventionally. In addition, strict fertilizer regulations and restrictions on organically approved pesticides apply, and particular attention is paid to the well-being of the animals (e.g., species-appropriate design of the stalls and the

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<sup>263</sup> Agrarmarkt Austria Marketing GesmbH, ‘AMA Quality seals’ <<https://amainfo.at/en/konsumenten/quality-seals/ama-quality-seal>> accessed 23 February 2023

<sup>264</sup> Ibid

<sup>265</sup> BIO Austria Association for the Promotion of Organic Agriculture, ‘Bio Austria’ <<https://www.bio-austria.at/bio-austria/>> accessed 23 February 2023



amount of exercise and space available). Only if a food product meets these criteria of quality, it is marked with "The BIO AUSTRIA Logo".<sup>266</sup>

#### 2.3.4. „Fairtrade Austria“

Fairtrade Austria is a non-profit association based in Vienna which was founded in 1993 and since then has been working for fair trade with farming families and workers on plantations in Africa, Asia and Latin America. The association awards goods with the Fairtrade seal when these goods originate from fair trade, which means that they have been produced in compliance with certain social, ecological and economic criteria and have been grown and traded in accordance with the international standards of Fairtrade International. These standards are the "law" that must be adhered to by smallholder cooperatives, plantations and companies throughout the entire supply chain to ensure the sustainable development of producer organizations in developing countries. In addition, the standards include criteria on democratic organizational structures, environmental protection and also safe working conditions.<sup>267</sup>

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<sup>266</sup> Ibid

<sup>267</sup> FAIRTRADE Austria Association for the promotion of fair trade with the countries of the South, 'What is Fairtrade?' <<https://www.fairtrade.at/was-ist-fairtrade>> accessed 23 February 2023

## **Conclusion**

Climate change is an undeniable global emergency that requires international cooperation and coordinated solutions at all levels. For this reason, in November 2022 the 27th UN Climate Change Conference (COP27) with representatives of all 190 contracting parties to the UN Framework Convention was held in Sharm El-Sheikh, Egypt. The main objective of this conference was to reduce the drivers of global climate change and thus curb the consequences of global warming. To achieve this goal, the Paris Agreement adopted at the Paris climate conference in December 2015 (COP21) should be adapted to current circumstances.<sup>268</sup> Negotiations at the conference therefore focused on key issues such as measures to reduce CO<sub>2</sub> emissions and climate adaptation (e.g. cultivation of climate-resistant cereal varieties). Furthermore, under the topic of "Loss and Damage", discussions were held on how damage caused by the climate catastrophe can be compensated. This primarily concerned financial aid for the countries of the global South which suffer most from the consequences of climate change. As early as 2009, the industrialized countries which are mainly responsible for CO<sub>2</sub> emissions pledged to pay 100 billion U.S. dollars in climate aid to the affected countries each year, a promise that has not yet been kept. Thus, a new annual contribution for financial aid should be negotiated at COP27 for the period after 2025.<sup>269</sup>

After an extension of the meeting period, it was finally possible to agree on a final declaration in which the participating countries reaffirmed their earlier decision to reduce the burning of climate-damaging coal. However, an explicit ban on oil and gas was not explicitly agreed upon, which was strongly criticized by climate activists and environmentalists as well as representatives of many countries who called for an urgent end to dependence on dirty energy sources. In addition, for the first time, an agreement was reached on a joint pot of money to compensate for climate damage in poorer countries, with the help of which inevitable and increasingly frequent consequences of global warming such as droughts, floods, storms and desertification are to be mitigated (the sums

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<sup>268</sup> WWF, 'UN-Klimakonferenz COP27' <<https://www.wwf.at/cop27-un-klimakonferenz-2022/>> accessed 24 February 2023

<sup>269</sup> Ibid

for the new compensation fund and the payers were not mentioned, however).<sup>270</sup> In general, the 27th UN Climate Conference was seen as a difficult process in many respects and was called successful only in a few parts.

In contrast, the instrument of sustainable and environmentally friendly procurement achieves far better and above all more long-term results in the fight against global warming as it is clear from the explanations in this master's thesis. In particular, it was shown that GPP, although very complex, is also a very efficient and effective tool that plays a crucial role not only in the fight against climate change but also in protecting the environment by enabling the achievement of certain environmental goals and targets such as the reduction of CO<sub>2</sub> emissions, energy efficiency and the conservation of natural resources. However, as shown in this Master Thesis, more sustainable use of natural resources and raw materials benefits not only the environment but also the economy as a whole. By increasing public demand for more environmentally friendly goods and services and at the same time expanding markets for those goods/services, GPP incentivizes companies to develop new environmental technologies. This enormous potential of GPP was recognized very early on by the Danish Minister of the Environment in particular, who said:

*“If we in the public sector were better at buying green, we could solve several problems at once. We would be improving the climate and environment at the same time as creating growth and jobs at enterprises which develop green technology. In other words, green procurement is one of the keys to transforming the world to a green economy” (Danish Minister for Environment, 2012)<sup>271</sup>*

However, against the background of the developments of GPP outlined in this master's thesis it also becomes clear that the successful implementation of green public procurement at the national level is more difficult than it might sound, considering the circumstances which have prevented or delayed the implementation of national action plans for a long time (see 2.1.2). From this it has been learned that successful implementation can only take place as a team with the involvement of appropriate expertise in public procurement law as well as experts

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<sup>270</sup> MDR Aktuell, ‘Klimagipfel COP27, Klimalog: Klimakonferenz einigt sich auf Abschlusserklärung‘ (2022) <<https://www.mdr.de/nachrichten/welt/politik/un-klimakonferenz-scharm-el-scheich-102.html>> accessed 24 February 2023

<sup>271</sup> Danish Ministry of Environment and Food, ‘Green procurement is the key to green growth‘ (2012)

from various disciplines. Furthermore, it requires correct application of the GPP through correct and wise design of the respective national “green” criteria (esp. award criteria). This not only enables compliance with the political role model function of the GPP, but also sends ecological signals to the market and secures internal budget targets which makes it clear that the central economic pillar of public procurement is inextricably linked to the principle of sustainability. That is why both contracting authorities and contractors are required to implement a smart and holistic sustainability strategy within the procurement procedure.<sup>272</sup>

Conversely, this thesis also makes clear that the application of GPP, as beneficial as it may be for the nature and the environment, implies a significant change for public authorities and other public purchasers with regard to the selection and design of procurement procedures. In particular, the GPP requires contracting authorities and public agencies to procure only what is absolutely necessary and consider the environmental impact of a product not only at the time of its use but throughout its entire life cycle when designing tender documents. In addition, GPP implies a commitment to promoting environmentally sound innovation in products and services and to fostering communication and information sharing among local governments, businesses, and consumers.<sup>273</sup>

Although the necessary framework conditions for the application of GPP already exist at national and European level, there are still some obstacles to its implementation which is mainly due to the high information requirements and administrative burden for both the authorities and the economic operators. There are, of course, individual positive examples, such as the naBe Action Plan as outlined in this master's thesis. Nevertheless, the consideration of sustainable criteria currently still plays a subordinate role, whereby high potential which could make an important contribution on the path to climate neutrality by 2045 remains unused. Especially in the construction sector, where a large part of the emissions is caused by the production of the required raw materials, the savings potential through the application of GPP would be enormous. This applies in particular to the application of alternative technologies for the production of steel and plastics, for example, since these basic materials could be produced in an almost CO<sub>2</sub>-neutral manner through the use of climate-friendly hydrogen. Unfortunately, this is currently still mere theory as such climate-neutral materials are not yet considered economically viable due to high investment and operating costs. This problem

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<sup>272</sup> Heid, Hofbauer (n 2) 6

<sup>273</sup> State Agency for Environment and Climate Protection, ‘GPP’ <<https://umwelt.provinz.bz.it/dienstleistungen/green-public-procurement.asp>> accessed 24 February 2023

could be solved, however, by introducing a mandatory public quota on green steel and plastics in public procurement at the European level. Such a mandatory quota could create the first secure sales markets for climate-friendly basic materials, strengthen investment security for companies and save a large amount of CO<sub>2</sub> (e.g. according to one study, a quota of 30% on green steel and plastics could save almost 1.9 million tons of CO<sub>2</sub> annually).<sup>274</sup>

In summary, taking into account all the circumstances presented in this master's thesis, and in particular considering the high level of public sector investment in goods and services in Europe, it is once again clear what enormous potential GPP has in the fight against climate change. It not only promotes the acquisition of climate-friendly products and services but thereby also actively and decisively contributes to the avoidance of greenhouse gas emissions and, in addition, strengthens the acceptance of new types of (environmentally friendly) goods among private customers. In summary, it can therefore be said that the instrument of Green Public Procurement is not only an essential tool for achieving environmental policy goals in terms of resource use, consumption and production, but in particular in the fight against climate change and global warming, the consequences of which are currently being felt more and more clearly.<sup>275</sup>

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<sup>274</sup> Fischer A, Küper M, 'Green Public Procurement. Potenziale einer nachhaltigen Beschaffung' (2021) IW-Policy Paper, 23, 5

<sup>275</sup> EC (n 7) 4

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