

### Question:

Does public procurement present a legally straightforward means of increasingly the share of renewable final energy consumption in the EU? How successful has it been so far in meeting the 2020 goals?

### From caution and complexity to greater commonality, clarity and competition: the (much needed) arrival of Green Public Procurement Reform

#### Introduction

To answer this question the best starting point is to call upon the preeminent expert on the procurement of 'green' energy, Peter Kunzlik in 2009;

*'the context in which energy procurement takes place is complex, implicating at least three areas of European policy; energy, environmental and public procurement. Energy Policy is now dealing with the most urgent issue facing the Community but which has until now found no 'bespoke' legal basis with the Treaty (TFEU). Energy policy measures, therefore, must be based on other Treaty provisions, notably those relating, on the one hand to the internal market and, on the other, to environmental protection.'*(1)

Written to compliment the adoption of the new Directives aimed at defining precisely what possibilities the public procurement regime ("PP") presented for the EU; namely Directives 2004/18/EC ("The Old PP Directive (x) and Directive 2004/17/EC ('The Old Utilities Directive')(2), with a reformist and environmentalist zeal, Kunzlik's chapter on 'green' energy is aimed at creating greater coherency on the numerous legal shortcomings, confusions and complexities that make up the disparate and fragmented (energy) pieces of the green public procurement ("GPP") puzzle.

Five years on, GPP is in a time of transition between The Old and The New public procurement Directives (Directives 2014/24/EU on public procurement "The New Public Procurement Directives" (3) and Directive 2014/25/EU(4) providing the second stage of PP reform, adopted on 26 February 2014. It remains to be seen which provisions will gain traction in the European Court of Justice ("ECJ"). It is important to note at this early juncture that GPP is optional i.e. not mandatory or binding on Member States. Following *Dundalk* (5), it became increasingly apparent to The Commission that in order for GPP uptake to gain any traction, contracting authorities first would need detailed guidance to fill the GPP knowledge gap on 'what to buy' vis a vis the latest social and environmental policy possibilities any public purchaser can take into account without breaching The TFEU 'free movement rules' ("FMR").

This paper is set out in three sections. Section I provides a general outline of the main legal complexities and consequent GPP reforms aimed at addressing them and this is followed by Section II a review of the Union rules and case-law that govern public procurement ("PP") affecting renewable uptake. As the question has asked whether PP presents a *legally* straightforward means to RES uptake, the policy background gets far less coverage than the legal framework of GPP in the form of guidance tools, rules and EU regulations. Section III address how successful GPP RES uptake has been so far.

It should be noted that historically The PP Directives have tended to incorporate and consolidate ECJ's prior decisions, as such a primary focus on the legal rules in the context of the award of public contracts in The New PP Directive is crucial as it is 'central to the Directive' (6). Relevant reforms to RES-uptake are not only that any order can now be taken in respect of the '5 preferred stages' of the tendering process but also the threshold for The Directive to apply now has to be of a value above 750,000 Euros. Scaling-up EU GPP-Transport in particular is a clear beneficiary of these changes. It should also be noted that this paper focuses almost exclusively upon *public*, and not utilities, contracts. Also regards scope, it should be noted any inquiry into GPP, including the RES uptake element, requires a focus on (for reasons of clarity) what this author calls 'the 5 preferred stages' of the tendering procedure process; namely, (i) definition of the subject matter of the contract (ii) technical specifications (iii) contract performance clauses (including 'special conditions') (iv) requirements for technical/professional ability of the tenderer (v) award criterion. The latter is commonly referred to as contract award procedure. This paper's focus is on the jurisprudence in regards to 'green' energy GPP uptake ("GPP-RES uptake" in this context). This in turn requires a focus on the latest precise rules on technical specifications and award criteria as far as they affect what products and services it is permissible for contracting authorities to purchase. As renewables is the focus clearly attention will given to the rules determining the inclusion of 'green' (known as core/comprehensive) criteria during the 'the 5 preferred stages' (7).

To address the specific issue of GPP renewable energy uptake (“GPP-RES”) this paper draws on a number of instruments including (excluding the ones mentioned); Directive 2001/77/EC “The Green Power Directive” Directive 2009/33/EC “The Clean/EE Vehicles Directive” and Directive 2009/28/EC “The RES Directive”.

It should also be noted that the phrase ‘*increasing the share of final energy consumption*’ initially came from the *Europe 2020 Strategy* (8) as part of the implementation of the wider Climate and Energy Package (“CEP”). As of 2009 (post Kyoto Protocol UNFCCC framework to tackle climate and reduce emissions via ‘production’ targets) these climate change policies took the form of a binding instrument; namely, ‘mandatory national overall targets and measures for the use of energy from renewable sources’ to be met by 2020. (9) Article 3’s The RES Directive 2009

Section 2 explains what ‘meeting the 2020 goals’ means in more detail. However, at this early juncture it should be emphasized that the main growth implicating both GPP and RES-Uptake is transport. This is evidenced by a specific legislative push stretching back to 2009’s Clean/EE Vehicles Directive (Directive 2009/33/EC) where the role of procurement featured significantly throughout. Unfortunately, a proper discussion of the developments in this area is outside this paper’s scope, however, the following key developments are of relevance. First recalling *Campus Oil*, (13) is that at Recital (2) of The RES Directive it is stated that, ‘*increasing technological improvements, incentives for the use and expansion of public transport...the use of energy from renewable sources in transport are some of the most effective tools by which the Community can reduce its dependence on imported oil.*’ And specifically addressing the 2020 goals, as an extension of Article 3’s mandatory targets and measures’ at Article 3 (4) (c) in respect to calculation of consumption from RES-E uptake (electricity), the powerful incentives are demonstrated by; ‘*and consumed in all types of electric vehicles*’ The provision offers very generous ‘bonus points (2.5 times).

In the New PP Directive, recalling *Concordia Bus Finland*,’s focus on ‘externalities’ and environmental/climate impacts to the Community at large being approved at the MEAT award criteria stage (14) special attention is also given to this area by virtue of Recital 47 2014/24/EU which focus on eco-innovative purchase of products (e.g. EV’s/electric buses) on and Recital 41 2014/24/EU on integration principles of public policy, health, other environment...sustainable development grounds for justifying favouring ‘green’ products (Article 11). It can be said with confidence that these provisions (and their associated Articles) now not only permit contracting authorities to promote the purchase of Clean/EE Vehicles in public transport, but even more significantly, by virtue of Article 68 (3) and Annex XIII Directive 2014/24/EU, The Commission has selected the transport (public) sector as the first to impose the mandatory requirement of ‘common methodology for the calculation of life-cycle costs’. The latter, referred to as LCC takes ‘externalities’ (16) at the MEAT award criteria stage to a transformative new level particular as it is complimented by new ‘innovation-related’ and ‘climate performance levels’ incorporations (17). Although welcome from a climate perspective, LCC is certainly the boldest and broadest approach to MEAT award criteria taken to date and will unquestionably involve legally uncertainties and difficulties given the degree of technique and expertise required for its practical implementation (one of the rationale behind imposing ‘common methodologies’ to assist procurers in this process). To emphasize GPP’s primary focus on the transport sector it has even be included in the definition for ‘lifecycle’ (see Definitions Annex I).

In relation to the question calling special attention to ‘*renewables in final energy consumption*’, it is also of major significance that at Directive 2014/24/EU Article 68 (1) (ii) states; ‘*life-cycle costing shall...cover parts or all...costs over the life-cycle of a product, service or works (ii) costs of use, such as consumption of energy and other resources.* Although renewables as such are not referred to specifically here (probably for reasons of caution around the ‘free movement rules’ (“FMR”) ) this provision, does however, operate as close to ‘an enabling’ or favouring GPP uptake of renewables as it could possibly get. An ‘invisible favouritism’ if you like. 2014/24/EU Recital (27) also explicitly provides the Directives apply for public passenger transport services by bus or tramway.

Lastly, although guidance orientated only, eco-innovation (which implicates GPP-RES-Transport significantly) is incorporated for the first time in a number of provisions including award criteria (18) importantly in the Contract Performance stage (19) and in Recital (47) calling for, ‘a smart, sustainable and inclusive growth (echoing Europe 2020 Strategy/Flagship Initiative For Europe’s focus on GPP role to promote ‘green’/electric vehicles) (20). This included, ‘*making the best strategic use of PP to spur innovation. buying innovative products, works and services*’. In 2013 Kunzlik noted that, “*the policy context with which GPP is considered has radically changed since Directive 2004/18/EC was first proposed.*” However, in this author’s opinion, as far as the legal difficulties attached to GPP procedure are concerned, despite the reform package brought into force in February this year there is still a

distance to cover before the Commission's objective of a "simplified" and "streamlined" GPP regime become a perceivable reality.

## **Section I**

To summarize where the difficulties (and now PP reforms) lie is best done by direct reference to The New PP Directive's Recital (2);

*'PP plays a key role in the Europe 2020 strategy set out in the Commission Communication entitled Europe 2020, a strategy for smart, sustainable and inclusive growth as one of the market-based instrument to be used... Directive 2004/17/EC and Directive/18/EC should be revised and modernized in order to increase the efficiency of public spending, facilitating the participation of SME's in PP, to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the ECJ.'*

There is clear evidence that GPP in practice is a far from legally straightforward (pop) 'means' of increasing RES-uptake. This view is based on recent feedback from contracting authorities admitting to '*perceived difficulties in including 'green' criteria during the tendering process*'. (Section3/Annex IV).

In the same vein, in 2004's *Handbook on Green Power Procurement* (21) identified three main barriers to greater GPP –RES uptake, namely; (i) lack of knowledge on environmental criteria to include in tender documents, budgetary constraints and legal uncertainty." Similarly, environmentally minded Kunzlik, identified five key 'obstacles to mobilization of GPP', which include the following; (i) that PP demand is fragmented thereby significantly weakening the "pull" that GPP demand (e.g. greater RES consumption) can achieve for eco products and solutions. (ii) 'lack of knowledge on part of public purchasers as to what eco-innovative solutions are available and as to how lawfully to implement GPP under the Directive 2004/18 (repealed) and most significantly (iii) the fact the latter may in any event be too restrictive and its meaning too readily uncertain to facilitate GPP. Addressing this, Kunzlik explains, has become The New PP Directive's main objective. (22)

So what is so complex about procurement of electricity from renewable sources of energy?

In specific regard to GPP and '*increasing the share of renewables in final energy consumption*', clearly the greatest role (in large-scale terms) to be played, is by means of expanding procurement of *electricity* from renewable sources of energy ("RES"). One of the main legal difficulties to have plagued this domain, however, is revealed by a simple inquiry into "*calculating the share of renewable sources*' examined by Niels Ladefoged in which he reveals,

*"the notion of RES represents a wide variety of energy sources or systems...just as defining it is less straightforward than one might think so is measuring it in a meaningful way."* Connecting the dots, with reference to the 2020 mandatory RES *production* targets, Ladefoged continues; "this provision reflects the fact it is impossible physically to distinguish between electricity from renewable origin and non-renewable origin at consumption level. Only at the *production* level, by measuring quantities fed into the grid by different types of installations, it is possible to quantify the share of electricity from RES." (23)

Now a moot point, in light of The New PP Directive's (very welcome from a RES uptake standpoint) is , however, the incorporation of production processes and methods ("PPM's") as characteristics now incorporated in the 'definition of certain technical specifications'. The latest in a series of progressive steps forward following from The Green Power Directive (24), Outokumpu Oy (25) *Preussen Elektra* (26) and *EVN-Wienstrom's* (27) establishment that Guarantees of Origin (GOO) be used on request as "methods of proof". All these cases were crucial in establishing the duties of verification, transparency, open access and scientific validity. As it is important to recognize the key role GOO presents today as means of facilitating the increase of RES-Uptake and the legal debate that led to its incorporation additionally into The RES Directive 2009 (28), Kunzlik's comments on the issue require brief recollection.

First, Kunzlik explains, the purpose of the 'technical specifications' stage of the tendering process (often misinterpreted and misapplied) as being, "*to define the scope of non-discriminatory and transparency requirements, not to prohibit other requirements. A concern for the effectiveness of these [general principles] should seek a wide, rather than narrow interpretation.*"

Secondly; arguing against the Commission's long-standing confusion on the point, he clarifies that PPM prescriptions [required for RES-E uptake] affect the *production* but not the consumption characteristics of the electricity procured; Confirming that the reason behind why the ECJ had to issue the GOO he says, "*these different origins becomes indistinguishable in its characteristics at the consumption stage...which is why in Preussen Elektra the ECJ emphasized the importance of promoting RES across the IEM but also the difficulty of customers knowing if the RES-E is credible*". Citing his 'invisibility fallacy', Kunzlik criticizes the Commission's position on the 'invisibility of 'green' electricity was 'absurd'. Emphasizing his rationale as being, "from the perspective of *consumption* characteristics, electricity from RES and electricity from fossil fuels are indistinguishable. There are no consumption characteristic difference between them." Concluding that, "*patterns of demand justify treating green electricity as different from electricity from fossil fuel (such demand affecting 'the value (i.e. externalities-wise) of the electricity...authorities can specify green electricity because from an environmental standpoint it is beneficial.*" (29)

With all this in mind it is yet to be seen whether the apparent restriction in The New PP Directive under the provision for 'technical specifications' at Article 42 (4) requiring, 'that unless justified by the subject-matter...technical specifications shall not refer to a specific origin make or source or a particular process which characterizes the products/services..types of specific origin of production with the effect of favouring or eliminating certain undertakings or certain products.' Whether the latter will constrain ES uptake remains to be seen. Competition in energy field is fierce there is not a trend away from governments picking 'winners' in favour of a market-driven approach. For RES to compete it must do so based on its own effectiveness to lower costs at same time as climate performance. The greater significance when compared with the very liberal approach (at the award of contracts stage) at "any stage of the life cycle [including] factors that do not form part of their material substance" is that in the award criteria stage (as presented in Section 3 from The Uptake Report, the technical specifications stage is more popular and perceived to involve less difficulties. (28) (preferred stage against LCC – see stats in Section 3)

For GPP RES uptake has received attention in important policy document referring to the key role to be played by green-technologies/renewables through national support schemes including GPP. (as of Nov Significantly in 2012 the current subsidies schemes are being abolished in favor of the tendering process (30 in addition to feed-in tariffs and quota obligations). Since 2006-2008 The Council committed the EU Commission to 'operational targets by the 'best performing Member States (with a yet-to-meet 50% target). The framework for implementation, the *Sustainable Consumption and Production and Sustainable Industrial Policy ("SCP/SIP") Action Plan*, and Communication on Public Procurement for a Better Environment) (31) is aimed at benchmarking performance and driving EU GPP 'green' criteria along assessment methodologies which examine how Member States can step up their efforts to promote GPP across a range of 'product groups' to assist in meeting the 2020 goals. (32). Having reviewed these policy communications one observation that is becoming increasingly obvious is that with the exception of GPP-RES-Transport renewables uptake (in the form of RES Directive 2009) appears to be somewhat overtaken by the eco/innovation-related notion in the New PP Directive at least.

The most important point to make on the issue of the barrier of fragmentation of demand which GPP RES uptake is aimed at addressing (particular in the public transport and buildings sector with energy efficiency and RES-E combined formula) is the development (and now incorporated into the New PP Directive at Article 68) of sector-specific EU GPP criteria life-cycle costing methodologies (LCC) which is successfully adopted across contracting authorities offer the promise of aligning demand around common standards. Crucially, as highlighted in the Clean/EE Vehicles context (33 Annex XIII) the EU has started to enact sector-specific procurement harmonization measures to require contracting authorities not to purchase products that do not meet stated environmental standards, otherwise known as 'high-than-harmonized standards' (34) Flagship mechanisms for scaling up demand, 'dynamic competition' and cheaper innovative products and 'green' energy are centralized purchasing activities (including dynamic e-purchasing and public-to-public purchasing aimed at municipalities pooling resources for greater purchasing power via economies of large-scale). (35)

By way of contrast to past difficulties, this section now outlines the New PP Directives reforms (i.e. incorporations into The New PP Directive) and the key areas of contention or confusion experienced by contracting authorities during the tendering process. To reflect the case-law the areas of concentration are in regard to The 'award of contracts stage (including contract award criteria and LCC) followed by 'technical specifications' stage.

### The New PP Directive PP Reform Rules – addressing key difficulties in the tender procedure

In line with Article 11 TFEU, the new rules aim at better integration of environmental considerations in PP procedures. Echoing Sue Arrowsmith's chapter on the equal status of environmental and social policies as 'horizontal policies' and emphasis on the importance of terminology in PP (36), the New Directive incorporate 'the horizontal clause' in three ways (all optional): (i) environmental requirements (ii) on the use of environmental labels (iii) taking account of environmental factors covering the whole production process (iv) life-cycle costing approach. The rules attached to this include; compliance with certain environmental obligations across all legislative levels (best bids included) (x cow), non-compliance triggering exclusion (e.g. abnormally low tenders not complying with GPP).

### "Costs" Most Economically Advantageous Tender (MEAT) – the three main difficulties

Due to *Concordia Bus Finland* (x), authorities can choose to take into consideration more than just the price (MEAT) i.e. when assessing bids they can look at social and environmental factors outside their direct economic advantage (not just 'lowest price'). When setting out the tender evaluation, criteria must be relevant to the product/service being procured (e.g. not a firm's general CSR). These broader allowances can include benefits of community power (37).

The difficulties of "costs" are threefold; first, to overcome reluctance over expense attached to high quality/'green' and eco-products over conventional goods. A new life-cycle cost effectiveness approach has been adopted incorporating the environmental/climate 'externalities' impact over the product/services whole "life-cycle" from extraction to disposal. (37b)

At the award criteria stage 'green' criteria, e.g. EU GPP-Transport takes form of 'core/comprehensive' criteria. At Article 68 Directive 2014/24/EU this costing methodology now permits an authority at the contract award criteria stage to opt for LLC (with option of price only). Significant to RES-uptake, as mentioned earlier this provision at Article 68 (1) (ii) addresses consumption of energy and other resources, while at Article 68 (1) (b) covers 'environmental externalities' including 'costs of emissions of GHG', other 'pollutants and other climate change mitigation costs'. Second, due to the level of technical expertise required to assess LCC especially in light of *Dutch Coffee* (38) and duty of precision at either technical specifications or award criterion stage, authorities are being directed to "common life-cycle methodologies"/European standards and EU GPP criteria to avoid variation breach of FMR rules across product/sector groups permanently purchased. (FMR). As a consequence of the 'voluntary' nature of GPP targets uptake is (39). Third, in addition to the expertise-gap of authorities, another inevitable area of difficulty will be arriving at correct calculations against the rule that environmental externalities can only be taken into account if their monetary value can be determined and verified according the 'general principles' explored below. (40).

### Award Criteria – most significant changes to The Old PP Directives rules

Regards 'contract award criteria' '*from the point of view of the contracting authority*' (voluntary/autonomy) *lowest price* basis is now repealed in favour of *best price-quality* basis. (Article 67 (2) Directive 2014/24/EU) (41). Importantly this includes innovation and environmental quality considerations (linked to the subject-matter), however, the cost element can take form of a 'fixed price' or a economic operators 'quality criteria only'. Impressing its optional nature, Member States are permitted to 'not use price only or cost only as the sole criteria' and can restrict their use certain categories/types of contracts.

At Article 67 (3) Directive 2014/24/EU is probably the most significant reform regarding the MEAT contract award criteria. This permits use of the latter relating to "the specific process of production or provision works, supplies, services or any other stage in its life cycle... *even where such factors do not form part of their material substance.*" This last incorporation is crucially significant in respect to the "indistinguishability" conundrum expressed earlier. It appears so radical that PP has now reached beyond mere 'production' targets/goals that it is going as far as to now be tackling the wider 'consumption' 'externalities' implicated in global trade i.e. the impact fossil fuel based (coal in particular) is having on the climate (hence 'climate mitigation costs/performance levels cited). This reflects the climatologist/scientific community line of thinking, such as Dieter Helm (42), that imported carbon is just as damaging to the atmosphere as domestically produced carbon. This argument is made even more likely by Article 68 (1) (b) incorporations (as above) cost of emissions/GHS gases and other pollutant emissions and other climate change mitigation costs." While this confirms *Dutch Coffee*' ruling that environmental award criteria need to relate to an 'intrinsic characteristic' of the product/service purchased, the final incorporation that has made it into the New PP Directive goes further than even Kunzlik predicted the year before (43). These radical changes are subject to the monetary value 'determined and verified.' It should be noted this is a less burdensome test for the public purchaser to comply with than the duty of precision in *Dutch Coffee*. These radical changes will inevitably involve high degrees of expertise and 'scientific validation' and will bring with this provision a host of problems on

disparate methods of proof and what can be “objectively justified/verifiable’. However methodical the scientific community (rightly so) they cannot be truly ‘objective’ on climate mitigation/performance as it’s an unknown phenomenon. This is why the Commission is increasingly seeking mandatory requirements for ‘common methodologies’ to create harmonized standards across the EU.

#### Production Process – New Rules

Article 42 The New PP Directive confirms that procurers can now consider all factors of the production process, provision or trading even where such factors do not form part of their material substance provided they are linked to the subject-matter and proportionate to its value and objective. For example: when technically describing the products/services for ‘to buy’, they may require it does not involve toxic chemicals (*Concordia Bus Finland*) or are (i) produced/provided using PPMs/renewable energy sources (iii) offering products/services meet these conditions in the best possible way. Following *Dutch Coffee* they may favour the product of widely recognized/verifiable origin (e.g. fair trade). (iv) procurers can assess value for money on basis of environmental/climate performance basis.

#### Labels

The new rules allow purchasers to refer to a specific label or eco-label when laying down the environmental characteristics of the works/goods/services they wish to purchase. Conditional upon five conditions be satisfied. Article 75 Directive 2014/24/EU .(44)

## **Section II**

### **Rules , rights, duties and obligations – from a restrictive to an (environmentally) expansive judicial approach**

As PP law is as straightforward as a spaghetti junction, the starting point is to be asking the correct legal questions.

The pieces of the EU PP puzzle bring two important issues to the fore; firstly, the question mark over who ultimately decides the law and where is the line to be drawn on national autonomy. In particular the extent to which Member States (“MS”) can favour renewables in their procurement, tax and trade policies without breaching the FMR. Is according to the latter that energy and electricity are ‘goods’ and therefore subject to TFEU rules on custom duties, discriminatory tax and quantitative restrictions and *measures* having equivalent effect (“MEQR”) (emphasis added) (45) Daniel Wilsher Seminar 8 Low Carbon Procurement City Law School March 2014). As one of the Internal Market’s “four freedoms”, the Free Movement of Goods and Services (“The FMR”) is provided for in Article 34 TFEU (the prohibitions) and Article 36 TFEU (derogations). The latter has been held as justified on grounds of ‘imperative public interest’ and energy security of supply (*Campus Oil* (46)). Within this context a Member State can be a risk of direct or indirect discrimination.

A key objective in ‘meeting the 2020 goals’ is executed by means of the ‘mandatory overall national targets’ (47). This requires MS to transpose these provisions into domestic law by means of implementing ‘measures’. (x)

However, according to Article 34 (48) MEQR’s are (in theory) prohibited. This paradox has prompted some commentators to argue that RES Directive 2009 has therefore been adopted ‘on the wrong legal basis’ (49 Dr Kim Tallus). A proper discussion of this point is outside of the scope of this paper, however, it helps explain why there been so many controversial cases.

Prior to *Concordia Bus Finland* (50) the environmentally-leaning ECJ were at loggerheads with the internal-market leaning Commission. On how strike the right balance with integrating environmental considerations into in tendering process, the ECJ has taken incrementally progressive steps whilst safeguarding Member States autonomy. The Integration Principle at Article 11 TFEU, unlike Article 34 TFEU works in favour of the ‘renewables’ cause with its emphasis on environmental protection and sustainable development. (51) Article 11 TFEU 2009)

As for present procurement practice, The New PP Directive echoes of Article 11 TFEU are only too apparent (Recital 41 2014/24/EU).(52)

It is a consequence of The Integration Principle, the ‘horizontal policies’ (i.e. environmental and social) are now formally integrated into the TFEU’s DNA. This has led, as mentioned earlier, to PP Reform now using the ‘horizontal clause’ approach. (Factsheet GPP The European Commission May 2014) (53)

While AG Jacobs emphasized safeguarding environmental cause in *Preussen Elektra* “Article 11 (53) is not merely programmatic; it imposes legal obligations. It has, therefore, had powerful effect.” (54) On the other hand, Article 114 TFEU (the internal market harmonization power) has been operating to safeguard for that of the Internal Market.

On the issue of who ultimately governs (EU or MS), the question to address is how far can contracting authorities be permitted to push the boundaries on ‘what to buy’; for instance, can they set criteria requiring 100% RES-E. The answer is in the affirmative as evidenced in Annex on The Best Performers. Despite the settled law on this point mentioned earlier, caution and perceived difficulties are the mainstay for most authorities wanting set higher-than-harmonized standards and even just including ‘green’ criteria at any one of the 5 ‘preferred stages’. Procurers caution is well-founded given that a single procurement decision can be a MEQR’ (*Dundalk*) (55)

By way of attempting to resolve the legislative clash and help procurers get over their fears of getting “caught” breaching the Union rules a key objective of The PP Reforms is to make better use of the Internal Market Problem Solving Network (SOLVIT) and EU Pilot as set out in The New PP Directive. (56)

Given the divergent directions of Article 11 (57), Article 114 (58) and Article 194 (59) this author submits that despite the generosity of the ECJ towards Member States discretion on the environmental/climate measures, from a constitutional perspective, there is clearly a big question marks over whether national autonomy exists now only in theory. It is, therefore, unsurprising the ‘expansion’ of EU GPP Public Transport criteria (using RES) is framed in an energy security of supply context. Undoubtedly, this is to ensure national support schemes and measures can pass the IEM’s justification and proportionate test. (60 -Recital (2) MS energy security is one of the last bastions of Member States sovereignty, the Treaty rule below certainly suggests that purchasing powers ultimately rest with Brussels.

This ‘final word’ on the issue is most clearly evidenced by the language used of Article 114 (6) TFEU which clearly states “the Commission...approves or rejects the national provisions.”

However, due to the specific insertion of renewables as part of the energy obligation at Article 194 TFEU the procurement of renewables clearly fall within one of the Treaty exclusions; “*promote energy efficiency and energy saving and the development of new and renewable forms of energy*”.

It should also be The Old/New PP Directives seeks to employ the Treaty provisions on cross-border trade by eliminating the potential for discrimination against imported energy of foreign companies in tenders.

In theory authorities are meant to have freedom of choice on “what to buy”, whilst the EU regulators role is to dictate “how to buy” i.e. the procedural framework. As long as the MEQR remains in place, in reality MS will be constrained.

The existence of ‘no unrestricted discretion rule’ (x) just further emphasizes the point. This is further evidenced by the infringement proceedings The Commission has against Malta, Greece and Poland for not doing enough “to meet the 2020 goals”.

As there is insufficient space to cover the details of the case-law that has brought ‘green’ energy PP to where is today Annex III offers a more complete picture of the background.

It now remains to emphasize;

The key principles, rules, obligations, rights, duties, concepts and notions are as follows;

#### General Principles – Recital 1 The New PP Directive

Environmental and social policies enjoy ‘equal status’ under the concept of ‘horizontal policies’ / the horizontal clause.

These general principles derive from TFEU 2009

Within these treaty rules are:

A - Free movement of goods i.e. FMR

B - Freedom of establishment / to provide services, i.e. PP practices should not undermine the cohesion of the internal market. Exceptions include measures on environmental / energy security grounds Article 11 / Article 194 TFEU 2009

There are another 6 general principles that have been raised in green energy procurement cases:

- 1 Equal Treatment
- 2 Non Discrimination
- 3 Mutual Recognition
- 4 Proportionality
- 5 Transparency
- 6 Open Access for competition

The two principles of over-arching importance are non discrimination and transparency.

#### Treaty Rules:

- 1 Freedom of Establishment: Rules against discrimination on grounds of nationality.
- 2 Free Movement of Goods: Of paramount importance is a prohibition on criteria to give national/regional and local operators an unfair advantage, thereby distorting competition.
- 3 By virtue of articles 11 (integration) and 194 (the energy obligation) states are permitted to legislate/implement measures favoring procurement of renewables. Under FMR measures can be justified (imperative national interest/energy security) under article 36 (derogations). Case: Campus Oil.

#### Duties:

Duty to offer equivalence or other ISO Euro-norms (*Dundalk*)

Duty of verification including methods of proof including GOO (*Preussen Elektra*) (*EVN Wienstrom*)

Duty of scientific validity (*EVN Wienstrom*)

Duty of precision (61 *Dutch Coffee*)

Duty of clarity (*Dutch Coffee*)

#### Basic Notions/Concepts:

The three key tendering procedural (preferred) stages that are shrouded in difficulty are: 1 – Technical Specification, 2 – The Award of Contracts/Award Criterion 3 – Conditions for Performance Contracts. Given the multiplicity of rules, basic notions, concepts, legal uncertainties, it is of no surprise that procurers “perceived difficulties when setting “green” criterion during the tendering process. A good example is Recital 89 2014/24/EU where MEAT criterion (in order to avoid confusion with the award criterion currently known as MEAT in the old directive a different terminology should be used to cover the concept namely; the best price-quality ratio).

- 1 The old/new PP directives are intended to provide a common procedural framework across the EU, however with EU28 transposing the rules into domestic law inevitably creates fragmentation and non-harmonization.
- 2 As emphasized by Sue Arrowsmith, horizontal policies and the importance attached to terminology are integral to PP.
- 3 Regarding PP procedure, there are no set limits on contracting authorities on “what to buy” provided they comply with the rules on how to set criteria.
- 4 A distinction should be made between mandatory requirements / obligations (i.e. binding which are subject to Treaty rules) Such as the Clean Energy Efficiency directive on LCC methodologies.
- 5 Promotion optional guidance in the directive intended to steer GPP best practice.
- 6 As well established case law held externalities are lawfully included in MEAT award criteria. *Concordia Bus Finland*.
- 7 Must comply with general principles.
- 8 To be permissible, the freedom to choose “what to buy” with regard to setting environmental climate requirements criteria must be justifiable and in compliance with other general principles.
- 9 There is an important distinction between public supply contracts (products) and public service contracts (services). See Annex Definitions. This is made more clear when placed in the context of Kunzliks “Green Energy” chapter subheadings
  - A: Award criteria favoring products *produced using* energy from renewable sources.
  - B: Technical specifications requiring that products be supplied must themselves be made using only electricity from renewable energy sources.



- C: Special conditions requiring that products to be supplied must themselves be made using only electricity from renewable energy sources. I.e. The point being that products made using RES is a further progressive stretch of the rules. *Concordia to Dutch Coffee*.
- 10 The concept of relative waiting (*EVN Wienstrom*) acts in favor of both RES uptake and authorities national autonomy as laid out in Article 67(5) authorities are permitted to specify relative waiting during contract award criteria to determine MEAT.
  - 11 As stated in Article 70 there has been an important new incorporation into special conditions which permits authorities to include economic, innovation-related, environmental, social or employment related considerations
  - 12 Conditions for performance of contracts

Issues of difficulties regarding the 'technical specification' preferred stage – from invisibility, indistinguishability, to material substance.

Key Legal Concept: In regard to the controversy over PPM requirements, by virtue of Annex VII(1b), legal clarity has now been secured that "technical specifications mean that public supply or service contracts define the required characteristics of a product/ service such as quality levels, environmental (and the significant addition of) climate performance levels... including requirements relevant to the product... production processes and methods at any stage of the life cycle of the supply or service and conformity assessment procedure's of similar transformational legal implications. Article 42.1 states characteristics may also refer to the specific process or method of production... or to a specific process of another stage of its life cycle even where such factors do not form part of their material substance provided that they are linked to the subject matter of the contract and proportionate to its value and objectives. This clarifies once and for all that the indistinguishability characteristic of favoring green electricity is no longer going to be a barrier to increasing RES uptake. However this isn't as straight forward as it appears, by virtue of Article 42(4)'s following restriction; "unless justified by the subject matter of the subject, technical specifications shall not refer to a specific make or source or particular process which characterizes products/services... of a specific origin of production" heron lies the apparent contradiction. i.e. if it is not justified, it is a breach of the treaty rules.

### **Section III**

#### **How successful has it been so far in meeting the 2020 goals?**

So what exactly are the 2020 goals? This is part of the Climate and Energy package CEP which is a set of binding legislation aimed at the EU meeting ambitious climate and energy targets for 2020. Known as the "20-20-20 targets"; they set three key objectives. 20% reduction in EU GHG emissions , raising the share of EU energy consumption produced from RES to 20%, and a 20% improvement in EU energy efficiency all by the year 2020.

The 2020 goals are not as straight forward as they first appear. On the one hand there are the mandatory targets set out in Article 3 or the Renewable Energy Directive, while on the other there is the Europe 2020 strategy goals aimed at GPP uptake. The first important difference is that the former is mandatory and binding on member states, while the latter is purely voluntary. That said, EU GPP is operating within a framework of it's own, namely the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan/communication on public procurement for a better environment. This 2008 framework included (a practical evaluation methodology to measure progress made by 2010 and thereafter), this "enabling approach" has involved the commission working in alignment with member states (NREAP) to develop a GPP Training toolkit criterion; namely the "core" and "comprehensive" criterion designed to guide public purchases decisions. Significantly the only product group which includes "renewables" as a core criteria is electricity. In contrast, the RES directive calculation methodology is across the three sectors mentioned above. i.e. it is not aligned.

By way of gauging the degree of success, it is first helpful to quote the EU GPP's own performance and targets and to recall the 2004 "Handbook on Green Public Procurement" which stated that "only 19% of the public administrations of the EU15 (now EU28)" undertakes a significant amount of green purchasing. Despite claims of success, the reality is that progress has been slow so far probably to the fact that these targets are voluntary unlike those contained within the RES directive.

### The renewable energy directive framework:

20% share of energy from RES in EU gross final energy consumption (10%) role for GPP-RES-Transport for 20-20-20 and key role for EV's for EU's energy security of supply.

The RES directive 2009 has imposed EU targets on Member States (62)

Clearly GPP has been unexploited thus far, as the Europe 2020 strategy emphasized; PP plays an important role in the overall economic performance of the EU. In Europe, public authorities spend around 18% of GDP on supplies, works and services. Given the volume of purchases (estimated in 2004 to be Euro 1,500 Billion. (63) (PP can be used as a powerful lever for achieving a single market of smart, sustainable and inclusive growth).

To briefly outline, this instrument sets operational targets to be achieved by 2010, a general 50% target per annum to be met by the best performing member states. This committed the commission and member states to develop "a structured process to share best practice and expertise on GPP taking into account the potential to promote GPP at local and regional levels. The commission will facilitate EU wide benchmarking of GPP performance according to an assessment methodology across major product groups. (64) "The PwC Report" 2009)

In 2006, Renewed SDS set a target that the EU average of GPP in 2010 would meet the level of best performing member states in 2006. The target set out in "The Public Procurement for a Better Environment" report was more demanding; by 2010, they aimed for all PP to include green criteria. These EU targets only achieved 26% in 2009-2010

Before giving a synopsis of how successful GPP uptake has been so far, it is first important to briefly outline the legal framework of the targets as set out mandatorily in the RES directive 2009. This is being achieved through (mandatory national overall targets) Article 3 RES Directive 2009 with member states introducing measures, support schemes and measures of cooperation between states. The important distinction to make is that a separate target exists for RES-Transport i.e. 10% of final consumption of energy in transport in that MS (Article 5 RES Directive 2009). By way of connecting the dots, Article 3(4) (c) emphasizes a key role for RES-Public Transport (including EV's) even to the point of offering powerfully incentivizing bonus points increasing the consumption of EV's powered by RES-E. The "calculation" of share of energy from RES at Article 5 of the RES directive states that; where the calculation "gross final energy consumption of energy from RES" is broken down into three specific sectors;

- A - RES Electricity
- B - RES-Heating and Cooling
- C - Final energy of consumption from RES (omitting the "gross" – Transport). The thrust of Section III is to emphasize the fact that EU GPP Transport has been chosen as the flagship sector for public procurement. (Article 5 RES Directive 2009)

By way of an initial observation, the statistical data of renewable energy uptake in GPP is woefully inadequate. For instance, there were only two recent reports publically available and significantly these are not in alignment with the RES directives (share of final energy consumption calculations and methodologies) for meeting the 2020 goals. Therefore in order to answer Section III's question, the findings of several reports, both GPP specific and non-GPP specific had to be reviewed. In reaching this sections conclusions, the two reports are namely 1: - Collection of Statistical on Green Public Procurement in the EU – ("the PwC Report" (64) and The GPP Uptake EU27 Report (The GPP EU27 Uptake Report CEPS 2012 (66)

This section will now turn to review the 'highlights' of the three main documents which are as follows;

- 1 - "The 2009 PwC Report" (64)
- 2 - "GPP RES Electricity – 2011 EU Commission Report" (65)
- 3 - "GPP Uptake EU27 Report" (66)

1 - Including core "and comprehensive criteria" early stages of developing the concept.

### The concept for GPP Uptake

'GPP Training Toolkit' to guide public purchasers' GPP including renewable energy uptake in the best performing Member States. Early days for GEPP's the report only presented the levels and impact of GPP of the 'Green-7': Austria, Denmark, Finland, Germany, the Netherlands, Sweden and UK.

It is interesting to compare PwC's definition of GPP with that of Peter Kunzlik (see "definitions") Annex. In short, the PwC definition focuses on the *process* of green procurement and defines a green *product* as a product with specific environmental characteristics which define a product as 'green'. These 'green criteria' are linked to either;

1. The *impacts* of a product and divided into '*core*' criteria (addressing the most significant environmental *impacts* and/or easy to verify)
2. '*Comprehensive*' (best environmental *products* which may require more efforts to procure in terms of verification).

Compliance is a key factor here in relation to these two distinct award criteria.

GPP uptake is often measured by comparing the actual value of the procured contract as opposed to the total number of contracts procured.

### **GPP Award Criteria and RES**

From 2009 onwards, RES has become an increasingly key element in GPP benchmarking especially across the 'product groups' of electricity, transport<sup>1</sup> and construction<sup>2</sup> covered in this report. Notably Life Cycle Analyses (LCA) were not used but are now permitted and even mandatory in case of The Clean/EE Directive.

### **GPP RES-E uptake 2009**

The 'core' criteria specified 50% of higher RES-E. The highest value procured contracts belonged to electricity.

The 'comprehensive' criteria specified 100% Res-E.

In 2009, of the "Green-7" an overall average level of 45% 'green' of the total procurement *value* (across all products groups) revealed UK scoring as the best performing on GPP (75%), Netherlands the lowest (27%). For total *number of contracts* Austria performed best (62%) and Germany lowest (46%).

However, regarding GPP RES-E uptake, a very different picture is revealed that shows Austria and Netherlands with highest scores for GPP RES-E while Sweden scores highest with its Eco-Label uptake. See Annex III for GPP RES-E 'Best Performers' in 2009.

## **2 - GPP-RES-Electricity – 2011 summary of its evolving success**

Is GPP-RES-E reaching its potential?

Public administrations play an important role in increasing the share of RES-E. They represent a high portion of the market, which can achieve significant energy/emissions savings results in line with meeting 'the 2020 goals' and driving the sector forward. As public purchasers, these bodies are also large consumers, estimated between 6% - 7% of the European total. Procuring RES-E can, therefore, significantly shift demand for increasing renewables vital to achieving The RES Directive's<sup>3</sup> targets.

Since the late nineties these public bodies have been allowed to choose their electricity supplier (as a result of IEM market liberalization reforms). However, a doubling of efforts is required to achieve "success" (for 2020 goals). Hurdles to overcome include greater liberalization of EU electricity markets and undoing the pro-conventional energy trade practices and market conditions preventing competition of the new to break through.

The success of RES-E depends on how protracted the procedural issues around purchasing are in each authority. Factors hindering success include: limitations due to specific electricity needs of the public body, level of centralization in purchasing, national progress of electricity liberalization, national support schemes' effectiveness, whether green electricity is on offer and what administrative procedures are required.<sup>4</sup>

### **Re-defining "success"; balancing wider eco-concerns with production/ consumption goals**

While trading of RES-E is encouraged, options available are limited by country and region. As detailed in Annex 2<sup>5</sup> the uptake of GOO, Eco-Labels and Euro-Norms/Standards enable individual Member States to strike their own balance as well as ensure credibility of source and flow. An obstacle to establishing acceptable EU-wide criteria is the “different availability” (and cost) of these environmental/ verification and credibility mechanisms. For instance, Austria and Sweden both have a high proportion of hydro and biomass but also have tighter environmental criteria. Point being, the true picture isn’t always reflected in the percentages presented.

Regarding RES-HE-CHP, countries vary on whether including fossil fuels in the mix should be considered ‘green’. In Sweden where RES-E through hydro is significant, according to this Commission report, it does not lower emissions. However, in Germany hydro uptake significantly improves energy efficiency in line with 2020 goals.

According to the Report, the overall rationale in favour of RES-E is that wind, solar, hydro and geothermal ‘create no Co2 emissions during the *production* of electricity phase’. RES plants are local, smaller in character and closer in proximity to production facility. This contrasts with fossil fuel production facilities involving raw materials’ extraction and transportation which are far more harmful to the environment.<sup>6</sup>

### **Gradual increasing but slow overall uptake of GPP RES-E and reasons why – success is increasing the share as well as saving emissions**

In spite of compliance with the national RES Directive targets (‘2020 goals’), ‘the majority of public authorities have not taken the opportunity to purchase at a local level’. As illustrated in Annex 2, although there are examples of GPP-RES-E, according to the Commission’s report (2011) procurement “is still rare”. Since The Green Power Directive 2001 only Austria, The Netherlands and Germany really acted on ambitious GPP policies for the uptake of renewables on any meaningful scale.

The main reason for the slow uptake for GPP-RES-E is a lack of political will, and the harmonization and coordination of national policies to set appropriate requirements. This is due to a lack of national guidance from ministerial level and as the Commission reveals, “where there is guidance it is often very limited and kept at a very general level”.<sup>7</sup>

## **3 - The GPP Uptake EU27 Report**

### **Overall results show significant increase for GPP especially for EU GPP-Transport but strikingly low figures for EU GPP-E**

To summarise, this report provides a sketchy, fragmented picture and generally low RES uptake. ‘Significant increase’ in EU GPP-Transport (the target has been met) This success is primarily due to a series of legislative and promotional instruments which have been implemented across the EU (the clean/EE vehicles directive 2009). In regard to contracting authorities experiencing difficulties while including green criteria in the “five preferred stages”; these include

- *Many authorities face difficulties including green criteria in public procurement; perceived difficulty of including green criteria vary across the EU27, average level of difficulty of including “green” criteria in contracts was 3.06, only 17% of respondents found the inclusion of GPP criteria relatively easy, 44% reported a perceived difficulty of 3 out of 5, and the remaining 39% find it relatively difficult. See Annex V*
  - 1 - Sticking to ‘price’ over LCC cost-effectiveness methodologies
  - 2 - Low GPP-RES-E results against EU GPP’s potential value of 117.5 billion Euros (38% of the total value procured included GPP criteria)
  - *Most authorities “often” use green requirements when procuring goods or services; governments “often” include environmental criterion (51%), semi-public (45%), local (47%).*
  - *The preferred stage to include green requirements is;*
    1. Technical specifications (38%),
-

2. Inclusion in the definition of the subject matter of the contract (25%).
3. Inclusion in the contract performance clauses (15%), followed by in the requirements for technical/professional ability of the tenderer (14%)
4. In the award criterion (10%).<sup>8</sup>

- *Green criteria are frequently included in the technical specifications of contracts* (number of responses 1,818); procuring authorities were asked to report at which stage of the procurement process green criteria were included (across product and service groups).
- *Purchasing price remains the predominant criterion to evaluate contracts;*
- *Traditionally, PP relied on “lowest price” as the key award criterion.* However, the need to take into account environmental factors such as RES, has led EU/Commission to adopt “life cycle costing”. On average, most commonly used criterion remains purchasing costs (64%), followed by “mixed option” (30%). Demonstrating difficulties relating to its implementation LCC is least commonly used criterion (6%).
- *Top ten member states evaluating tenders according to purchasing cost/LCC methodologies in descending order are;* Ireland (25%), Netherlands (22%), UK (19%), SK (17%), SI (10%), BG (10%), DK (9%), CY (9%), GR (8%), HU (8%). (pg 37 3.4 The Uptake Report)
- *Conclusion:* GPP uptake in the EU27 provides a fragmented picture.
- *Top four performers* (Belgium, Denmark, the Netherlands and Sweden), followed by a second group of countries reporting a level of uptake between 20% and 40% across the 10 product groups. *Overall, the level of EU GPP uptake appears lower than the 50% target set by the Commission in 2008.* As many as 12 countries – Portugal, Ireland, Poland, Czech Republic, Finland, Slovenia, Hungary, Romania, Bulgaria, Greece, Latvia and Estonia – feature a level of EU GPP uptake below 20%. Due to the low response rate in some countries, these results have to be read with caution.
- Too much variation of approaches and targets in the EU27 – some countries set general GPP targets for all public contracts, and only in 3 cases are these targets aligned with the EU target of a 50% uptake by 2010.
  - *In some countries Latvia/Denmark/Portugal have been exemplary.*
  - *Different practices of the inclusion of green criteria.*
 Public authorities can include green criteria at different stages;
- Including them in technical specifications is making them a “must have”, while their inclusion in the contract award phase, as a preferential element with a certain weighting, will not necessarily lead to a green contract.
- *The ingredients for GPP success:*
  - *Leading countries in GPP establishing credible, long-standing policies with compulsory elements, and institutionalized, proactive capacity efforts” (See Annex III)*
- *Only three EU GPP criteria were used by more than 50% of the respondents.* These include Co2 emissions in Transport.<sup>9</sup>

To conclude – difficulties:

“It is safe to state that under the present conditions, monitoring progress towards the achievement of the EU-stated goal of reaching 50% of EU GPP uptake in selected service groups is very difficult.”

Main reasons for difficulties;

- (i) Wide variety of definitions adopted across EU27 as regards what belongs to the different product groups.
- (ii) Various classifications of when a contract can be considered to be green
- (iii) The very limited availability of information on GPP in official European and national statistics/databases on public contracts, such as TED. *Life Cycle Costing (LCC) methods are not frequently used by public authorities. The most commonly used criterion is still the purchasing cost (“lowest price”) (64%).*

To Conclude:

In summary in respect to Section 3 is that the overall picture emerging from the Uptake Report is as it states, “encouraging, but a lot must still be done.”

The following recommendations can be summarized (many of which have been incorporated into The New PP & Utilities Directives 2014):

- Further harmonization of targets, taxonomies and terminology to create cohesion where it is currently highly fragmented.

- threat of climate change the higher than harmonized standardization and mandatory requirements in carefully selected and appropriate sectors is the correct response.

Although these results give some idea More co-ordination between Commission and Member States is much desired. With growing of the success of GPP-RES uptake so far, it is clear they are woefully inadequate. GPP-RES-Transport is clearly the frontrunner assisted by the considerable legislative push it is receiving and the manner with which it combines the complex implications of PP in the three areas identified by Kunzlik at the start of this paper, namely, maintenance of security of supply, maintenance and improvement of European competitiveness through further development of the internal energy market and last but no means least the need to step up to the environmental, climate and sustainable development challenge.

The law governing PP is clearly highly convoluted and fragmented, however, the PP reforms are a welcome attempt to over the difficulties inherent in the subtly and finely distinguished rules that apply across all 5 of the preferred stages of the tendering procedure process. The incorporation of the notion of 'factors [that] do not form part of the material substance' at Article 67 (3) (b) 2014/24/EU are welcome for the renewables lobby as will be the inclusion of PPM's in Annex VII applying to technical specifications. From an environmentalist, climate and eco-innovation perspective, the incorporations while welcome, however, this author predicts will inevitably bring with them even greater uncertainty even than already exists.

Regarding increasing the share of renewables in final energy consumption the author refers the reader to the impressive results (with a few exceptions) in Annex IV, three countries have already met their targets and most appear to be on track.

In respect of EU GPP Res-uptake the sector which will undoubtedly be the winner in the foreseeable future will be EU GPP RES-Transport. Happily, the alignment between the RES Directive 2009 and public transport/Clean EE and EV's is a good one. The mandatory requirements attached to LCC Article 68 1 (ii) will certainly help the alignment of these two Directives even further (subject to the restrictions on 'origin of production' in the technical specifications at Art 42 (4). As to how the ECJ will interpret these developments remains to be seen, but given their current trajectory this author would suggest the Court will rely heavily on the scientific validity, open access to competition and duties for precision principles as so articulately laid out by AG Kokott in *Dutch Coffee* in 2012.

This paper will conclude with his own authoritative Opinion that; "whether and to what extent environmental and social considerations must be taken into account ...is a question of fundamental importance for the further development of PP law. In giving its answer the Court is faced with the challenge of finding an equitable balance. (67)

## FOOTNOTES

### PAGE 1

(1) Peter Kunzlik Social and Environmental Policies in EC Procurement Law New Directives and New Directions (eds) Sue Arrowsmith and Peter Kunzlik (CUP) 2009 Chapter 9 'The Procurement of Green Energy pg 369)

(2) Directive 2004/18/EC "The Old PP Directive" on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts 31 Mar 2004)

(3) Directive 2004/17/EC 'The Old Utilities Directive" on procurement by entities operating in the water, energy, transport and postal services sectors 31 Mar 2004 on electricity production from renewable energy sources 27 Sept 20010

(4) Directive 2014/24/EU on public procurement and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors 31 Mar 2004)

(5) *Dundalk (Commission v Ireland) Case C-45/87 ECR 783 [1987]*

This case examined indirect discrimination where a contracting authority specified a tender which prima facie is neutral but in practice favoured nationally based companies. Examination of Art 34 TFEU prohibitions, held the authority's specifications were so narrow they had infringed the free movement rules because it failed to offer any ISO standards or equivalent's. It was held 'a single procurement decision can be a measure having equivalent effect to a quantitative restriction (MEQR) under Article 34 TFEU.

(6) Directive 2014/24/EU ' Recital (1) states, " The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the TFEU, and in particular the free movement of goods, freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and

transparency. However for public contracts above a certain value...coordinating national procurement procedures so as that those principles are given practical effect and PP is opened up to competition.”  
(7)The 5 ‘Preferred Stages’ refers to the tendering procedural process stages exercised when setting ‘green’ energy criteria; (i) defining the subject matter of the contract (ii) technical specifications (iii) inclusion in the contract performance clauses (iv) during the requirements for technical/professional ability of the tenderer (iv in the award criterion)

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(8) Directive 2001/77/EC “The Green Power Directive” on electricity production from renewable energy sources 27 Sept 2001)

(9) Directive 2009/33/EC “The Clean/EE Vehicles Directive on the promotion of clean and energy – efficient road transport vehicles 23 Apr 2009

(10) Directive 2009/28/EC “The RES Directive”

Directive 2009/28/EC on the promotion of the use of energy from renewable sources (The Res Directive 2009) 23 Apr 2009

The GPP Uptake Report 2012 proved in Section II by the low uptake and feedback from authorities claiming difficulty in including ‘green’ requirements in award criteria)

Article 3 ( 4 ) (c ) RES Directive 2009 ‘consumption shall be considered to be 2.5 times the energy content of the input of electricity from renewable energy sources)

(13) Campus Oil v Minister for Energy [1984] ECR 2727. Here the ECJ accepted discrimination on the basis that energy security justified the barriers to trade. The nationally-legislated purchase obligations deemed a ‘hindrance to trade’ under Article 34 FMR were justified under Article 36

‘derogations/justifications on grounds of energy-security of supply and in particular the ‘imperative of the public interest’ (The Irish oil refinery argued maintaining the plant was fundamental to their existence and running of the country. This judicial acceptance was handed down during the 1980’s Middle East Oil crisis.

(14 ) Concordia Bus Finland dealing with whether environmental performance can be used to evaluate tenders under The Old PP & Utilities Directive 2009 AG Misho breakthrough Opinion in favour of environmental ‘externalities’ (i.e. non-financial considerations/non ‘lowest price’ only of direct economic benefit to the Council) on basis of noxious and noisy pollutants used The Integration Principle in Article 11 as its legal basis.

(15) Article 11’s Integration Principle as a legal basis is incorporated into The New PP Directive at Recital (41) ‘nothing in this Directive should prevent the imposition of enforcement of measures necessary to protect public policy, public security, health, human and animal life, plants or other environmental measures, in particular with a view to sustainable development, provided measures conform to TFEU.

(16) i.e. internalizing environmental/climate impacts of consumption into the ‘costs’ attached to purchasing beyond mere financial concerns i.e. price

(17) **Climate** The New PP Directive 2014/24/EU ‘technical specifications’ Article 42 (1) ‘stage of its life cycle even where such factors do not form part of their material substance (provided specifically for green electricity past-barriers), and Annex VII (1) (b) ‘Certain Technical Specifications including ‘quality levels, environmental and climate performance levels; Article 67 Life-Cycle Costing Article 68 (1) (b) environmental externalities...such costs may include the cost of emissions of GHG and other pollutant emissions and other climate change mitigation costs.” And at Conditions for Performance of Contracts Article 70 New PP directive ‘ special conditions relating to the performance of a contract provided that they are linked to the subject matter of the contract within the meaning of Article 67(3) and the call for competition...conditions may include economic, innovation-related, environmental or social.’ considerations”

(18) On MEAT award criteria for the first time it includes in the indicative list permissible criteria the words “innovative character” thereby making clear that MEAT criteria can be used to favour product works or services which incorporate innovations including eco-innovations - Peter Kunzlik From Suspect Practice to Market Based Instrument: Policy Alignment and The Evolution of EU Law’s Approach to ‘Green Public Procurement’ 2012 Issue 3 P.P.L.R

(19) Contract Performance Article 70 Conditions for performance of contracts “Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject matter of the contract within the meaning of Article (67) (3) and indicated in the call for competition or in the procurement documents. Those conditions may include economic, *innovation-related*, environmental, social or employment-related considerations.

(20) Recital 47 (2014/24/EU) ‘research and innovation, including eco-innovation...main drivers of future growth...center of Europe 2020 Strategy for smart, sustainable and inclusive growth/ public authorities should make the best strategic use of PP to spur innovation. Buying innovative products, works and services plays a key role in improving efficiency and quality of public services while addressing major

societal challenges. It contributes to achieving best value for public money as well as wider economic, environmental and societal benefits.

*Europe 2020 Strategy* (x COM(2010) 2020 final) noting that a resource-efficient economy will reduce Europe's dependence on foreign sources of raw materials. From Lisbon Treaty 2009 adoption, for the first time, a specific treaty base for a Union energy policy by including Art 194 (explicitly including renewable energy into the TFEU. A number of policies developing the renewable energy industry has been a primary focus of the EU for over a decade with the primary instrument taking the form of The Renewable Energy Directive 2009. The Focus being to 'increase the use of RES in final energy consumption'. Article 3 2009/28/C

PAGE 3

(21) Handbook on Green Power Procurement The International Renewable Energy Magazine Vol 5, Number 5; 2004, 8 (2004), REFOCUS Sept/Oct 2004 pg.10 [www.re-focus.net](http://www.re-focus.net))

(22) Peter Kunzlik From Suspect Practice to Market Based Instrument: Policy Alignment and The Evolution of EU Law's Approach to 'Green Public Procurement' 2012 Issue 3 P.P.L.R

() The International renewable energy magazine Vol 5 2004 REFOCUS Sept/Oct pg 10 [www.re-focus.net](http://www.re-focus.net))

() Peter Kunzlik From Suspect Practice to Market Based Instrument: Policy Alignment and The Evolution of EU Law's Approach to 'Green Public Procurement' 2012 Issue 3 P.P.L.R)

(23) EU Energy Law Vol III Book One 'Renewable Energy Law and Policy In The European Union' A. Hercsuth et al Claey's & Casteels 2010 pg 211)

(24) The Green Power Directive 2001/77/EC highlighted the importance of a definition of RES and electricity from RES and the difficulties inherent in the physical indistinguishability from conventional power. Consequentially, 'methods of proof' and in particular Guarantees of Origin (GOO) have since become crucial for informing customers/procurers of credibility/verifiability of electricity from RES origin at production stage. (not consumption where its impossible to identify once inputted into the grid.

Additionally, the 'value' for money (externalities) issue was raised. GOO were incorporated into 2001 Directive on basis MS have to ensure that a GOO for green electricity is issued whenever requested.

(25) Outokumpu Oy In addition to this case finding discriminatory national measures under Art 110 due to a tax policy which favoured hydro-power produced domestically. One of the key issues was that the Swedish RES firm being discriminated against and not being able to receive the tax benefits as the nationally based companies, was the point that the non-national RES producers were not invited/offered to have their RES 'goods' verified for origin. This case reaffirmed the important principle established in *Dundalk* that firms national or non-national should receive equal treatment under The FMR and are under authorities are under a duty of offer equivalent standards or others.

(26) *Preussen v Elektra* [2001 ECR I-2099 (reconsider the case in light of the FMR)

Under Article 30 TFEU MS are prohibited from levying any duties on goods crossing a border, both goods produced within the EU and those produced outside. Once a good has been imported into the EU from a third country and the appropriate customs duty paid, Art 39 TFEU dictates that it shall then be considered to be in free circulation between MS.

(27) - *EVN-Wienstrom* [2003] ECR I-14527 this case is contains the most ambitious interpretation of 'the link to the subject matter' (key concept in PP law. It deals specifically with green electricity.

Weighting – In *EVN* the Court held that the authority concerned was justified in awarding a criterion of 45% in favour of electricity produced from RES. This is now reaffirmed in The New PP Directive at Art 67 (5) 'contract award criteria. *EVN* was also a case dealing with whether environmental performance can be used to evaluate tenders under The Old PP/Utilities Directives. This case also helped to establish the principle of verification, open access to competition and scientific validity. All of which are crucial to RES uptake. The principle of verifiability and transparency of information for customers and stakeholders alike can be found at Art 67(4) of The New PP Directive. More recently a new duty is has been emphasized; duty of precision and clarity when setting out award criteria.

2009 (28) The RES Directive 2009 Guarantee of Origin at Article 15

(28) Directive 2014/24/EU Annex VII (1) (b) Definition of Certain Technical Specifications

Peter Kunzlik Social and Environmental Policies in EC Procurement Law New Directives and New Directions (eds) Sue Arrowsmith and Peter Kunzlik (CUP) 2009 Chapter 9 'The Procurement of Green Energy pg 390)



PG 4

(29) Peter Kunzlik Social and Environmental Policies in EC Procurement Law New Directives and New Directions (eds) Sue Arrowsmith and Peter Kunzlik (CUP) 2009 Chapter 9 'The Procurement of Green Energy' pg 390

(30) 'Renewable Energy: a major player in the European energy market' (COM (2012 0271) identified the areas in which efforts should be stepped up between now and 2020 and beyond, in particular for RES technologies to be less costly, more competitive and ultimately market-driven (with support schemes being dedicated to less mature technologies and through various incentive schemes. November 2013 the Commission provide further guidance on renewable support schemes as well as on the use of cooperation mechanisms to achieve renewable energy targets at a lower cost (COM 2013) 7243). It announced a complete overhaul of the subsidies that Member States are allowed to offer the renewable energy sector, preferring tendering\*, feed-in premiums and quota obligations to commonly used feed-in tariffs.

[http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuld=FTU\\_5.7.4.html](http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuld=FTU_5.7.4.html)

(31) and Communication on Public Procurement for a Better Environment DATE? )

(32) this is in line with RES Directive 2009's NREAP's and the renewables final energy consumption targets for RES-E (electricity) and RES H/C ("heating and cooling") with 20% target for 2020 and Transport (10% target for 2020).

(33) Peter Kunzlik From Suspect Practice to Market Based Instrument: Policy Alignment and The Evolution of EU Law's Approach to 'Green Public Procurement' 2012 Issue 3 P.P.L.R)

Annex XIII 68 (3) Directive 2014/24/EU Directive 2009/33/EU mandatory requirement to adopt 'common methodology for calculation of lifecycle costing – EU GPP transport

(34) - Higher-than-harmonized-standards are standards that are higher than the general standards required for the lawful marketing of the product in the EU. The concept is that in these specific sectors subject to harmonized procurement standards the fragmentation of public procurement demand will be overcome since the purchases of all contracting authorities will have to meet or exceed the harmonized standards (Peter Kunzlik From Suspect Practice to Market Based Instrument: Policy Alignment and The Evolution of EU Law's Approach to 'Green Public Procurement' 2012 Issue 3 P.P.L.R))

(35) by aggregating together the purchasing activity of several authorities (even cross border and even as owners now of their own RES-E "siting and installations" – see definitions Annex on 'public supply contracts'

(FMR This is part of the "enabling approach" concept where a GPP Training toolkit led by The Commission in collaboration with best performing Member States regular assessing best practice/first-in class innovation and cost-effectiveness (including reducing transaction cost per unit)

(36) Sue Arrowsmith/Kunzlik Social and Environmental Policies in EC Procurement Law CUP 2009

(37) The Green Power Directive 2001

(37b) Which spreads lifetime costs of products and services over their entire lifetime arguing it is "cheaper" after the environmental/climate impacts have also been factored including extraction of raw materials used in product or caused by the product itself or its manufacturing (Factsheet on GPP European Commission

[http://ec.europa.eu/internal\\_market/publicprocurement/modernising\\_rules/reform\\_proposals/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals/index_en.htm))

(38) Dutch Coffee (C-368/100) Commission v The Netherlands 10 Ma 2012

This is an important case dealing with to extent to which an authority can specify an eco-label in respect of complying with minimum standards in the award of regulated contracts. The case confirms that compliance with the principles of equality of treatment, non-discrimination and transparency involves an obligation for clarity and precision. The court held that use of MEAT criteria to specify eco-labels (fair trade) will be unlawful if insufficiently precise. Dutch Coffee, says Kunlik, interpretation of the duty of precision was too burdensome; 'it goes beyond Concordia regarding an unrestricted freedom choice, giving defined evaluation credit to bids offering to provide goods bearing a specific eco-label. This does not confer an unrestricted freedom of choice for the authority; either the goods bear the label (awarding credit) or they do not. such criteria would comply with the no discretion rule in Concordia but but the burdensome duty in Dutch Coffee. If an authority were to use MEAT favouring bids bearing a given eco-label this would not have such an absolute exclusionary effect [as it would at the technical specifications stage]. The point is that if an authority can take the more restrictive approach of using technical specifications that require the thing to be purchased must bear a given eco-label, it ought to take the less restrictive approach of using MEAT criteria favouring such purchases. See Article 75 The New PP Directives for the newest rules.

(37-38)

FMR This is part of the "enabling approach" concept where a GPP Training toolkit led by The Commission in collaboration with best performing Member States regular assessing best practice/first-in class innovation and cost-effectiveness (including reducing transaction cost per unit)

As part of EU GPP monitoring of progress, through NREAP's (National Renewable Action Plans) MS do sector specific feed reports back to The Commission to update of GPP uptake progress. Currently this covers the RES-E, RES H/C and RES-Transport 2020 target public sector related product groups. Alignment is sketch due to prolonged recession and the voluntary/optional nature of the GPP regime (exception of EU GPP-Transport which has seen "significant increase" as a consequence of mandatory measures in place seen 2009 Clean/EE Directive/RES Directive/Old PP Directive)

(39) Voluntary targets for GPP are based on the uptake of the "core" (and "comprehensive") elements of those criteria (see Annex on 'Best Performers').

(40) If no common EU method exists for the calculation of life-cycle costs such methods can be established at national, regional or local level. However, they have to be general and not exclusively designed for one specific public procurement procedure reasonably arrived at.

(41) Article 67 (2) (x) it provides that *'from the point of view of the contracting authority...on the basis of the price or cost using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68 and may include the best price-quality ratio which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract...Member States may provide that authorities may not use price only as the sole award criterion or restrict their use to certain categories or certain types of contracts.'*

(42) Dieter Helm The Carbon Crunch The Carbon Crunch: How We're Getting Climate Change Wrong - and How to Fix it)

(43) Kunzlik last wrote on the basis of The Proposed Directive but the changes/reforms contain new terminology such as 'best-price-quality ratio' and the all important "factors do not form part of their material substance" to which he has made no mention. (Peter Kunzlik From Suspect Practice to Market Based Instrument: Policy Alignment and The Evolution of EU Law's Approach to 'Green Public Procurement' 2012 Issue 3 P.P.L.R)

(44) Labels (such as government bodies, consumers, manufacturers, distributors, and NGO's) Labels (5 conditions; (i) all requirements have to be met to obtain the concerned label must be linked to the subject-matter of the works/goods/services to be purchased i.e they must characterize them. (ii) If the label includes requirements which relate to the company generally, the authority should not include refer to them. Reference can only be made to specific requirements of the label linked to the purchased works/goods/services. (iii) labels must be laid down with transparent procedure by independent bodies with all stakeholders participating (labels) (iv) must be objective, with non-discriminatory criteria and available to all interested parties (open access principle) (v) if a company unable to obtain label on time, equivalent labels or other means of proof must be accepted by authorities.

## SECTION II

Rules , rights, duties and obligations – from a restrictive to an (environmentally) expansive judicial approach

All TFEU Articles use the updated Article TFEU numbers

(45) Internal Market TFEU 2009 single market rules on free movement of goods/services

Article 30 TFEU on custom duties,

Article 110 on discriminatory tax

Article 34 on quantitative restrictions and measures having equivalent effect.

(45 -Daniel Wilsher March 2014 City Law School Seminar 8 'Low Carbon Energy Procurement and Tax within the EU Single Market).

(46) *Campus Oil v Minister for Energy* [1984] ECR 2727 (allowing energy security to justify barriers to trade)

(47)- RES Directive 2009 Article 3 'mandatory overall national targets '

(48) (measures) Article 3 (2) Member States shall introduce measures – support schemes

()TFEU Treaty For The Functioning of The European Union 2009 "The Lisbon Treaty"

(49) Dr Kim Tallus EU Energy Law and Policy Sept 2013 OUP

(50) *Concordia Bus Finland Finland* [2002] ECR I-7213

(51) Article 11 TFEU 'The Integration Requirement'; *"Environmental protection requirements must be integrated into the definitions and implementation of other Community policies in particular with a view to promoting sustainable development."*

(52)- Directive 2014/24/EU Recital (37) The New PP Directive 2014/24/EU).

*'with a view to an appropriate integration of environmental, social...requirements into public procurement procedures it is of particular importance that Member States and contracting authorities take relevant measures to ensure compliance with obligations in the fields of environmental, social...law'* (Recital 37).

()Factsheet GPP The European Commission May 2014) (52) X Factsheet GPP European Commission Public Procurement Reform [http://](http:///)).

(53) *Preussen Elektra* (x Case C-379/98 [2001] para 231

(54) Jacobs stated Article 6 prior to The TFEU 2009

(55) *Preussen Elektra, Concordia Bus Finland, EVN-Wienstrom*.

(56) clashx Recital 123 Directive 2014/24/EU - relating to procedures provided for under Articles 258 and 260 TFEU 'to function as a sole entry point for matters concerning public procurement in the Member State concerned.'

(57) Article 11 (the integration requirement), Article 114 (the internal market harmonization power) and

(59) Article 194 (the energy obligation) TFEU 2009

(58) Article 114 TFEU (6) '*The Commission... approves or rejects the national provisions [as to whether] they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market*'. (x Article 114 (6) TFEU 2009).

(60)- RES Directive 2009 (Recital 2) '*increasing technological improvements incentives for the use and expansion of public transport, the use of energy efficiency technologies and the use of energy from RES in transport are some of the most effective tools by which the Community can reduce its dependence on imported oil in the transport sector, in which the security of energy supply problem is most acute, and the influence the fuel market for transport*.

(61) *Dutch Coffee*) C-368/10 May 10 2012

(62) Art 3 RES Directive 2009

(63) Handbook of Green Power Procurement 2004)

(64) "The PwC Report" 2009)

(65) "GPP RES Electricity – 2011 EU Commission Report"

(66) "GPP Uptake EU27 Report"

(67) *Dutch Coffee* ) 61 (*Dutch Coffee*) C-368/10 May 10 2012