



GRAGE

Grey and Green in Europe: elderly living in urban areas



This project has received funding from the European Union's Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie grant agreement No 645706.

Scientific paper on Greener Procurement

D3.2

GRAGE: *Grey and green in Europe: elderly living in urban areas*

Project title	Grey and green in Europe: elderly living in urban areas
Project acronym	GRAGE
Contract No	645706
Call identifier	H2020-MSCA-RISE-2014
Start of project	1st December 2014
Duration	48 months
Deliverable no	D3.2
Deliverable name	Scientific paper on Greener Procurement
Deliverable filename	GRAGE_D3.2
Work package no	3
Authors	Dr. Chiara Feliziani
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Nature¹	R
Dissemination²	PU
Due date of deliverable	30/11/2016
Actual submission date	30/11/2016

¹ R= Document, report; DEM =Demonstrator, pilot, prototype ; DEC Websites, patent fillings, videos, etc.
OTHER

² PU= Public; CO= Confidential, only for members of the consortium (including the Commission Services)



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I. PRELIMINARY CONSIDERATIONS

The financial crisis that in the recent years has affected the economies of the most developed Countries has had a significant impact on social sustainability from several aspects. In particular, it has highlighted the inadequacies of the present model of production from both environmental and economic point of view.

In fact, the crisis has shown that a market pivoted on the production of rapidly obsolescent and non-recyclable goods is not capable to ensure nor an adequate level of environmental sustainability nor a successful economy, preventing therefore the consolidation of fair and sustainable communities (F. DE LEONARDIS).

Thus, also for this reason, since some years the European institutions are pointing out the need of adopting a more sustainable economic model: the "*green economy*" and, more recently, the "*blue (or circular) economy*".

An important example of this shift can be seen in the public procurements' field as public contracts have gradually moved from being a fundamental tool in the development of the European single market to acting as a mean for protecting the environment, albeit indirectly (S. VILLAMENA).

Since some years, in fact, green public procurement (GPP) has increasingly been a crucial topic in both the legal and the economic debate. Finally, GPP has had great prominence in the 2014 directives on public contracts³, where it clearly emerges that European institutions are aware that public administrations (or, more generally, public authorities) - being the largest buyers of goods and services - could be able to steer the market to a more sustainable production.

* The present paper is one of the results of Grace "Grey and green in in Europe: Elderly Living in Urban Areas", a research project conducted by the University of Macerata and held by the European Commission (Horizon 2020). The author is very grateful to prof. Francesca Spiegarelli and prof. Francesco de Leonardis for the support in the research activity.

³ Directive 2014/23/UE of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 *on public procurement and repealing Directive 2004/18/EC*.

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 sectors and repealing Directive 2004/17/EC*.



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Thus, also in the light of the recent legislative changes, the paper would like to investigate how much "green" and "blue" the new European directives are. Moreover, it is also aimed to formulate more general considerations on the trend lines along which the European policy (and consequently the national ones) on public contracts is moving in order to understand if and to what extent green procurements could play an important role in the building of a more sustainable economic model.

II. AT THE BEGINNINGS OF GREEN PUBLIC PROCUREMENT

However, before examining the contents of the most recent legislation, it could be useful to briefly reconstruct the origins of green public procurement and its evolution in time.

On this point, it is important to point out that the topic is essentially very "young". In fact, still at the beginnings of the '90s European institutions - as well as scholars and national legislators - did not pay great attention to the possibility of protecting the environment through green procurements.

Although a little bit slowly, things have started to change in the middle of Nineties. The Green Paper "*Public Procurement in the European Union: Exploring the Way Forward*"⁴ of 1996 was the first document - albeit of soft law - dedicated to this topic. Here, however, the environmental profile appeared still recessive, as the Communication was primarily based on economic considerations.

Since then, however, European institutions have adopted the White Paper "*Public Procurement in the European Union*"⁵ in 1998 and then the interpretative Communication on the "*Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement*"⁶ in 2001. Moreover, there were explicit references to green public procurement in the subsequent Commission communications

⁴ Green Paper "*Public Procurement in the European Union: Exploring the Way Forward*" COM(96)0583.

⁵ White Paper "*Public Procurement in the European Union*" COM(1998)143 final.

⁶ Interpretative Communication of the Commission on the "*Community Law Applicable to Public Procurement and the Possibilities for Integrating Environmental Considerations into Public Procurement*" COM(2001)274.

Moreover, in the same year the EU Commission adopted the Interpretative Communication on the "*Community Law Applicable to Public Procurement and the Possibilities for Integrating Social Considerations into Public Procurement*" COM(2001)0566.



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respectively named "*Integrated product policy (IPP) - building on environmental life cycle thinking*"⁷ and "*Thematic strategy for the urban environment*"⁸.

Undoubtedly, the importance of these documents lies in the fact that they have opened a breach in the public contracts' subject, emphasising the opportunity to integrate the environmental component in a sector that has always been considered of crucial importance for the construction of the European single market. However, from a practical point of view, the main function of such provisions was to "awaken public administrations about the use of environmentally friendly clauses" in contract notices. In fact those documents still had a soft law value and they were not accompanied by binding rules (S. VILLAMENA).

Thus, for this reason - as well as for economic reasons - up to the early years of the new millennium only in sporadic cases environmental clauses have been included in contract notices.

In this regard, an interesting example is given by the *Concordia Bus* case⁹ of 2002 where for the first time the European Court of Justice has stated that "*where, in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria, such as the level of oxide nitrogen emissions or the noise level of the buses*"¹⁰, provided it is in accordance with certain conditions. In particular, Luxembourg judges pointed out that such criteria must "a) *be linked to the subject-matter of the contract, b) do not confer an unrestricted freedom of choice on the authority, c) be expressly mentioned in the contract documents or the tender notice and d) comply with all the fundamental principles of Community law, in particular the principle of non-discrimination*"¹¹.

⁷ Communication from the Commission to the Council and the European Parliament on the "*Integrated Product Policy (IPP) - Building an Environmental Life Cycle Thinking*" COM(2003)0302 final.

⁸ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on a "*Thematic Strategy on the Urban Environment*" COM(2004)60 final.

⁹ ECJ 17 September 2002, *Concordia Bus Finland*, C-513/99.

¹⁰ p. 69 of *Concordia Bus* case.

¹¹ p. 69 of *Concordia Bus* case.



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Moreover, judgments to the same effect were made in relation to some subsequent cases, such as the *EVN AG and Wienstrom GmbH* case¹² and the *Commission c. Federal Republic of Germany* case¹³.

III. THE NEW MILLENNIUM: A NEW ERA FOR GREEN PUBLIC PROCUREMENT

Later, the principles held by the Luxembourg decisions have been transposed and crystallised by the European legislator. This happened in 2004, when directives 2004/17/EC¹⁴ and 2004/18/EC¹⁵ on public procurements have been adopted. From that moment, therefore, a new season has started for public contracts. A season finally characterised by binding rules.

In fact, the directives adopted in 2004 for the first time explicitly acknowledged the possibility for contracting authorities (i.e. public administrations) to take into account non-economic factors, including those aimed at protecting the environment (as well as social needs), in the selection of contractors.

More specifically, these provisions made it possible to include environmental considerations in all stages of a public tender – that is to say, in the definition of the subject matter of the contract, in the selection of contractors, in the awarding of the contract - and even during the execution of the contract. Moreover, the European legislator has also taken care to clarify that such secondary legislation could find a precise legal foundation in the EU primary law, particularly in the principles of sustainable development and integration as posited in Articles 2, 3 and 6 of the EU Treaty.

Furthermore, these directives were accompanied by a handbook adopted by the Commission and titled "*Buying green! A handbook on environmental public procurement*"¹⁶. In

¹² ECJ 4 December 2003, *EVN AG et Wienstrom GmbH*, C-448/01.

¹³ ECJ 10 April 2003, *European Commission c. Federal Republic of Germany*, C-20/01 and C-28/01.

¹⁴ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 *coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors*.

¹⁵ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 *coordinating the procurement procedures for the award of public works contracts, public supply contracts and public service contracts*.

¹⁶ Commission staff working document of 18 August 2004 SEC (2004) 1050.



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other words, it consisted of guidelines addressed to public administrations and aimed to explain them how they could concretely make their purchases more "green".

Then, in 2009 the European legislator made a further step forward in this direction. In fact, the advent of Directive 2009/33/EC¹⁷ on the promotion of clean and energy efficient vehicles for road transport has marked a transition "from optionality to compulsory" in the field of green public procurement (F. DE LEONARDIS). According to article 1 of the directive, in fact, public authorities are required *"to take into account lifetime energy and environmental impacts, including energy consumption and emission of CO2 and certain pollutants, when purchasing road transport vehicles with the objectives of promoting and stimulating the market for clean and energy-efficient vehicles and improving the contribution of the transport sector to the environment, climate and energy policies of the Community"*¹⁸.

Looking at these measures as a whole, what deserves to be emphasised is that green procurements have not been placed outside the competition's rules by the European legislator (as well as by the ECJ). On the contrary, environmental interests have been integrated with market's values. Green public procurements, therefore, have been intended as "a tool to enable public administrations to buy ecologically oriented works, services and supplies. [In fact] through environmental oriented choices public administrations are able to put in place a virtuous cycle that encourages, through the market, companies to embrace environmentally friendly modes of production" (G. FIDONE).

IV. GREEN PROCUREMENT INTO THE NATIONAL LEGAL ORDERS. THE ITALIAN EXPERIENCE

Then, the above-mentioned European legislation, as well as the contents of the ECJ case law, has been inevitably transposed into national legal orders.

As far as the Italian legal system is concerned, it should be remarked that, even before the advent of 2004 European directives, several law provisions required public administrations to buy goods and services according to strict environmental rules.

¹⁷ Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 *on the promotion of clean and energy - efficient road transport vehicles*.

¹⁸ Art. 1, Directive 2009/33/EC.



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Nevertheless, they were "special" rules (F. DE LEONARDIS), as they were referred to very specific issues, such as waste¹⁹ or urban mobility²⁰. Conversely, there were no provisions or group of provisions generally concerning green public procurements as a whole.

From that point of view, 2006 represented a real turning point. At that time, in fact, the Italian legislator has adopted both the Environmental Code (legislative decree n. 152/2006²¹) and the Public Procurement Code (Italian Law n. 163/2006²²), as well as paragraph 1126 of Article 1 of Law n. 296 of 27 December 2006 (well known as Finance Act 2007).

If the Environmental Code has not regulated green public procurement in general terms, providing just two *ad hoc* rules in its Part IV dedicated to waste management²³, more information can (or rather, could) be found in the Public Procurement Code.

In fact, the latter - adopted to transpose the 2004 European Directives - already in Article 2, paragraph II, marked the definitive emancipation of public contracts from a merely economic logic, positing that both the quality of goods and services covered by the contract and the award procedures must take into account goals like the environmental protection and the promotion of sustainable development.

Moreover, the environmental aspect has been taken into consideration from a number of provisions aimed to regulate both the technical capability of the tenderer²⁴ and the reasons for exclusion from the tender²⁵, as well as the evaluation of tenders and the subsequent awarding of the contract²⁶. Finally, ecological clauses were allowed in the notices for both technical specifications²⁷ and procedures for the performance of contracts²⁸.

¹⁹ Art. 19 d. lgs. 5 febbraio 1997 n. 22, *Attuazione delle direttive 91/56/Cee sui rifiuti, 91/698 sui rifiuti pericolosi e 94/62/Ce sugli imballaggi e sui rifiuti da imballaggio*.

²⁰ Art. 5 d. m. 27 marzo 1998, *Mobilità sostenibile nelle aree urbane*.

²¹ D. lgs. 3 aprile 2006 n. 152, *Norme in materia ambientale*.

²² D. lgs. 12 aprile 2006 n. 163, *Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE*.

²³ Artt. 180 and art. 196 d. lgs. n. 152/2006, respectively named *Prevenzione nella produzione di rifiuti* and *Compiti delle Regioni*.

²⁴ See artt. 40, 42 and 44 d. lgs. n. 163/2006.

²⁵ See art. 38 d. lgs. n. 163/2006.

²⁶ See art. 83 d. lgs. n. 163/2006.

²⁷ See art. 68, p. 1, d. lgs. n. 163/2006.

²⁸ See art. 69, p. 2, d. lgs. n. 163/2006.



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V. THE LIFE CYCLE COST'S "REVOLUTION"

The regulatory framework described above has recently been put into question because of the entry into force of the 2014 European directives on public procurements. Moreover, the new directives - implemented by the Italian legislator through the legislative decree n. 50 of 2016²⁹ - also find an ideal complement in some soft law documents recently adopted by European institutions, including of particular note the 2015 Communication "*Closing the loop - An EU action plan for the Circular Economy*"³⁰ and the new 2016 handbook on green purchasing³¹.

As far as the contents of the new legal framework are concerned, it must be pointed out that the 2014 directives have not meant a turnaround if compared to the route traced up by the European legislator and by the Court of Justice till then. Instead, they show of stressing with even more emphasis the importance of integrating environmental (and also social) considerations in public contracts, in so doing underlining the strategic role played by the latter in order to foster sustainable development and growth (S. VALAGUZZA).

More specifically, looking at Directive 2014/24/EU (namely the one referring to the so-called ordinary sectors), on one hand, you can see a confirmation of the "achievements" laid down by the 2004 Directives, especially as far as the seeking of a high level of environmental sustainability is concerned³², and, on the other hand, you can also see that the European legislator has taken further and very relevant steps on the path previously traced.

First of all, such steps can be identified in having elevated the criterion of the most economically advantageous tender to "golden rule" in the awarding of public contracts at the expense of the other well-known criterion of price only³³. Secondly - and mostly - a further step

²⁹ D. lgs. 18 aprile 2016 n. 50, *Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull'aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d'appalto degli enti erogatori nei settori dell'acqua, dell'energia, dei trasporti e dei servizi postali, nonché per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture.*

³⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of the 2 December 2015, *Closing the loop - An EU action plan for the Circular Economy*, COM (2015) 614.

³¹ *Buying green! A handbook on green public procurement*, adopted on April 2016 <http://ec.europa.eu/environment/gpp/pdf/Buying-Green-Handbook-3rd-Edition.pdf>.

³² See p. III, *retro*.

³³ See art. 67 Directive 2014/24/EU, named *Contract award criteria*.



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can be seen in the introduction of the reference to the concept of "life-cycle costing" of the product, service or works³⁴ covered by the contract as a parameter to be taken into account for the purposes of identifying the most economically advantageous tender.

In the context of the new legal framework, in fact, the reference to the concept of "life-cycle costing" – the *ratio* of which can be seen in the principle of prevention or preventive action - has great importance, since it "includes in the concept of price also the value of the time. The cost of a good or service therefore is determined also on the basis of the expenses which precede and follow the purchase of the good or service itself, provided <<their monetary value can be determined and verified >> "(C. LACAVA). In other words - as pointed out by scholars - "the core idea of life cycle costing is the monetisation of the costs of environmental externalities" which are often integrated to the realisation of a product, service or work (R. CARANTA - D. C. DRAGOS). Thus, according to the new public procurement directives the contracting authorities must now take into account those externalities in assessing the most economically advantageous tender.

Moreover, the fact that the concept of "life-cycle costing" is no longer relegated in soft law documents but appears in primary law provisions - i.e. Directive 2014/24/EU - certainly represents a first step towards the potential establishment of a green economy model and, may be, even of a blue economy model.

Overall, it is possible to observe that, although these provisions do not repudiate the importance of the principle of competition and non - discrimination (L. TORCHIA), however they definitely mark the distance with respect to the way in which public procurements were originally understood by European institutions. In fact, the European Directives of 2014 clearly show to consider green public procurements as "a <<pulling >> factor for sustaining environmental policies" (as well as for social and innovation ones) (G. D. COMPOTI). And, more generally, from the new legal framework emerges the effort of European institutions of leading "to the realisation of a smart, sustainable and inclusive growth" through the purchasing strategies put in place by public

³⁴ See art. 68 Directive 2014/24/UE, named *Life-cycle costing*.



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administrations and according to the goals programmatically stated in the Strategy "Europe 2020"³⁵. That is in compliance with the idea of building a circular economy model (F. de LEONARDIS).

VI. TOWARDS A CIRCULAR ECONOMY?

To sum up. The paper has tried to highlight the milestones of the "young" story of green public procurement in order to trace the evolutionary lines of the topic. In doing so, it has been seen that the environmental considerations (as well as social considerations) have been gradually integrated in the matter of contracts through a fairly linear progression. Moreover, it has been pointed out that since few years public contracts are considered as a possible tool to protect the environment, thus helping to definitively disprove the (once) supposed antithesis between market and environment (M. CAFAGNO).

The European directives of 2014 - and, consequently, the new Italian Code on public contracts - represent the last stage of this evolutionary process. Here the environmental component crosses the entire procedure of public awarding and even the phase of execution of the contract. But there is more. In fact, the "disruptive" element of the new legislation on public procurements is represented by the inclusion of reference to the "life-cycle costing" of a product, service or work among the elements that must be taken into consideration for the awarding of the contract.

It seems possible to confirm therefore that nowadays, while not ceasing to act as both a key element in the building of the European single market as well as an instrument of economic regulation (F. FRACCHIA - L. TORCHIA), however public contracts are also designed to steer the market and, more generally, the economic development toward more sustainable standards (S. VALAGUZZA). In fact, as pointed out by scholars, the great attention paid to the environment by Directive 2014/24/EU (as well as by Directives 2014/23/EU and 2014/25/EU) clearly indicates that European institutions have recently adopted an approach much more in compliance with the principle of sustainable development.

³⁵ Commission Communication of 3 March 2010 entitled "*Europe 2020, a strategy for smart, sustainable and inclusive growth*". See, for instance, consideration nn. 95 and 96 of the Strategy.



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Undoubtedly, this new approach has great importance especially if considering the impact of public procurements on market and on the economy as a whole (F. DE LEONARDIS). That is taking into account, not only the money flows that directly derive from the purchase of goods or services by public administrations, but also the indirect effects that such purchases are able to produce on the economy, especially as far as the employment and the technical innovation profiles are concerned (M. CALABRÒ).

In fact, by asking for "green" goods and services, public administrations can push the market to "think" and produce in an increasingly sustainable way (G. FIDONE). Moreover, in so doing, they play an important regulative task whose positive effects on the economy, as well as on the environment, can be evaluated especially in the long run (S. VALAGUZZA). As it is fitting in a sustainable development's perspective.

In conclusion, if nowadays - especially in the light of the financial crisis that has recently affected the economies of Western countries - it is not wrong to say that "a good environmental policy can help the economy to better itself" (M. A. SANDULLI) and that "in all likelihood a prudent environmental policy is the only path that will allow us to make a good economy" (F. DE LEONARDIS), it is easy to understand that the importance of green public procurements consists primarily in their ability to steer the market to a high level of sustainability, by the way opening a breach for the establishment of a circular economy model.



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