

Green Public Procurement: a look into the past to meet future challenges

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Abstract: *This paper is focused on the importance of the environment in the public procurement field. Thanks to the growing attention dedicated to said theme by the European Institutions, the Italian legislator has renovated the discipline over time, and today the National Recovery and Resilience Plan gives new impetus to a “Green Revolution and Ecological Transition”, which produces its effects in the discipline of green public procurement.*

Contents: 1. Introduction - 2. Defining Green Public Procurement - 3. Sensitivity to Green Public Procurement in the EU landscape - 4. Italian legislation on Green Public Procurement from the 1990s to the present - 5. Green Public Procurement and the National Recovery and Resilience Plan.

1. Introduction

As will be seen in this dissertation, procurement and environmental protection have been considered, for many years, separate issues. In fact, the regulations on public procurement were initially focused on the pursuit of economic objectives, and particular consideration was given to the Protection of Competition² and, with it, to the guarantee of adequately promoted, transparent, impartial and correctly motivated procedures, with no provision for environmental issues³.

The procurement and environmental issues have converged since the signing of the Maastricht Treaty, which, among its many objectives, aimed to ensure a balanced development of economic activities and sustainable growth, compatible with environmental protection⁴. In this regard, there

¹ Paragraphs §1, 2, 3 were edited by Chiara Sagone, paragraphs §4, 5 were edited by Ida Angela Nicotra.

² For a general overview of the topic, M. CLARICH, *Considerazioni sui rapporti tra appalti pubblici e concorrenza nel diritto europeo e nazionale*, in *Diritto Amministrativo*, 1-2, 2016, pp. 71-92.

³ A. DI GIOVANNI, *L'ambiente sostenibile nel nuovo Codice degli appalti: green public procurement e certificazioni ambientali*, in *Il diritto dell'economia*, vol. 31, 1, 2018, pp. 157-180.

⁴ On environmental sustainability, also from a comparative perspective, G. CORDINI,

seems to be no doubt that «actions concerning environmental protection (...) necessarily have a “transversal” character, in the way that other policies (...) necessarily produce their effects on the environment; indeed, from this point of view, experience has shown that often the greatest risks for environmental protection derive precisely from the implementation of actions concerning other policies»⁵.

Constitutional jurisprudence has confirmed the accuracy of this consideration, qualifying the environment as a “transversal matter” or “non-subject matter”, as it implies «a set of tasks and functions, identifiable not by the content, but by the purpose to be pursued»⁶.

Today, when it is finally possible to achieve the idea of some constitutional environmental protection, through the long-awaited reform of Articles 9 and 41 of the Constitution⁷, the opportunity appears appropriate to

Qualità della vita e sostenibilità ambientale: principi costituzionali e regole, in *Il Politico*, 2009, year LXXIV, n. 3, pp. 139-167; V. PEPE, *Lo sviluppo sostenibile tra diritto internazionale e diritto interno*, in *Riv. giur. ambiente*, 2, 2002, pp. 209-242.

⁵ G. GARZIA, *Costituzione europea e tutela dell'ambiente: riflessioni e problemi aperti*, in www.giuristiambientali.it.

⁶ I. NICOTRA, *L'ingresso dell'ambiente in Costituzione, un segnale importante dopo il Covid*, in *Federalismi.it*, 30 June 2021, p. 3. Emblematic, in this regard, the sentences of the Constitutional Court n. 407 of 2002; 259 of 2004; 214 of 2005. There is an extensive bibliography on the subject, including: F.S. MARINI, *La Corte Costituzionale nel labirinto delle materie “trasversali”: dalla sent. n. 282 alla n. 407 del 2002*, in *Giur. cost.*, 4, 2002, pp. 2951 ff.; F. SCALIA, *Il carattere di «materia trasversale» della tutela dell'ambiente e dell'ecosistema e la potestà legislativa regionale in materia ambientale (osservazioni a margine della sentenza Corte cost. 12 aprile 2017, n. 77)*, in *Rivista DGA*, 3, 2017, pp. 1-24; C. DE BENETTI, *L'ambiente nella giurisprudenza della Corte costituzionale: dalla leale collaborazione alla sussidiarietà*, in *Diritto all'ambiente*, 1, 2002, pp. 1-21; P. DELL'ANNO, *La Tutela dell'Ambiente come “Materia” e come Valore costituzionale di Solidarietà e di Elevata Protezione*, in *Lexambiente*, 2001; M. MICETTI, *La tutela dell'ambiente nella giurisprudenza della corte costituzionale*, in *VV.AA., Scritti in onore di Antonio D'Atena*, Giuffrè, Milano 2015, pp. 1895-1935; M. BELLOCCI, P. PASSAGLIA, *La giurisprudenza costituzionale relativa al riparto di competenze tra Stato e Regioni in materia di «ambiente» e «beni culturali»*, in www.cortecostituzionale.it, April 2009; I. NICOTRA, *Ambiente, sicurezza, generazioni future: i nuovi diritti, oggi*, in *Percorsi costituzionali*, 1, 2010, pp. 89-100.

⁷ On June 9 2021, the Assembly of the Republic's Senate approved with 224 votes in favour, 23 abstentions and no votes against, a draft law for a constitutional revision containing amendments to Articles 9 and 41 of the Constitution, concerning environmental protection. It is intended, thus, to add a third paragraph to art. 9 («[The Republic] protects the environment, biodiversity and ecosystems, also in the interest of future generations. The State law regulates the ways and forms of animal protection»), as well as modifies the

reflect once again on the importance of the environment in the public procurement field. Furthermore, this is also in light of the huge opportunity arising from the National Recovery and Resilience Plan, which provides a large amount of resources for achieving ecological transition, also focusing on public contracts.

2. Defining Green Public Procurement

The *Green Public Procurement* (GPP) locution refers to the set of legal instruments aimed at integrating environmental interests within the legislative framework of public contracts⁸.

Certainly, this expression does not refer to a specific type of contract, as it can be applied to all types of procurements whereby public administrations focus on goods, works and services with a lower environmental impact.

In the notion at issue, there seems to be an objective profile, attributable to public procurement, and a teleological one, namely the objective of paying attention to environmental protection⁹.

The public procedures in question are focused on various profiles: such as *green design* and *manufacturing*, i.e. the design and production process with reduced environmental impact; *green distribution*, i.e. the type of packaging and the adoption of environmentally sustainable logistics; and the evaluation of raw materials to be used, recycled, reused, or final disposal of the product¹⁰.

provisions of the second and third paragraphs of art. 41 Cost. according to the following formulation: «Private economic initiative is free. / It cannot be carried out in contrast with social utility or in such a way as to damage health, the environment, security, freedom, human dignity. / The law determines the programs and the appropriate controls so that public and private economic activity can be directed and coordinated for social and environmental purposes». For further reading, G. SANTINI, *Costituzione e ambiente: la riforma degli artt. 9 e 41 Cost.*, in *Forum di Quaderni Costituzionali*, 2, 2021; I. A. NICOTRA, *L'ingresso dell'ambiente in Costituzione, un segnale importante dopo il Covid*, cit.

⁸ G. QUINTO, *Le variabili ambientali nella disciplina degli appalti pubblici*, in *ambienteditto.it*, 1, 2020, p. 4; for a very recent analysis of green public procurement, T. MÜLLER, *Green public procurement*, in C. PAGLIARIN, C. PERATHONER, S. LAIMER (eds), *Contratti pubblici e innovazione. Una strategia per far ripartire l'Europa*, Milano, 2021, pp. 45-62.

⁹ O. H. KASSIM, *I criteri di sostenibilità energetica e ambientale negli appalti pubblici. L'emersione dell'istituto degli "appalti verdi" nel panorama europeo e nazionale*, in *Italiappalti.it*, 14 February 2017, p. 2.

¹⁰ L. VENTURA, *Public procurement e sostenibilità. Convergenze trasversali dei*

As will be seen below, GPP intends to evaluate the entire “life cycle”, aiming at a long-term waste and expenditure reduction, considerably affecting the production system and markets.

In light of these considerations, the Green Public Procurement phenomenon has been defined, at an institutional level, as the «approach whereby public administrations integrate environmental requirements into all phases of the purchasing process, by encouraging the diffusion of environmental technologies and the production of eco-friendly products, through research and the choice of results and solutions that have the lowest impact on the environment throughout the entire life cycle»¹¹.

Recently, interest in environmental profiles in public procedures has arisen.

For a long time, the public administration adopted the “lowest price” criterion in order to safeguard the public interest in cost savings; subsequently, the commitments undertaken by States in terms of promoting fair and sustainable economic growth have reduced the importance of this parameter.

In Western legal systems, it was realised that the “lowest price” criterion was not the only way to achieve a good “value for money”: due to the increasing attention to sustainability and the growing awareness of the potential, not merely economic, of *public procurement*.

For this reason, the lowest price criterion has been supported or sometimes replaced by the “economically most advantageous offer” (or “*best value for money*”)¹². Therefore, a multi-criteria approach has emerged in which, in addition to price, other dimensions, including environmental and social ones, have been specifically mentioned in the technical specifications¹³.

In summary, the Green Public Procurement issue involves «the set of purchasing policies held, action taken, and relationships formed in response to concerns associated with the natural environment»¹⁴. Sensitivity to the

sistemi giuridici contemporanei, in *Rivista del commercio internazionale*, 1, 2020, p. 251.

¹¹ Action Plan for Environmental Sustainability (NAP GPP), point 1.1., Interministerial Decree 135/2008, version updated by Ministerial Decree 10 April 2013.

¹² Concerning the economically most advantageous offer criterion L. GILI, *La nuova offerta economicamente più vantaggiosa e la discrezionalità amministrativa a più fasi*, in *Urbanistica e Appalti*, 2017, pp. 24-25.

¹³ L. VENTURA, *Public procurement e sostenibilità. Convergenze trasversali dei sistemi giuridici contemporanei*, cit., p. 253.

¹⁴ Definition by G.A. ZISIDIN - S.P. SIFRED, *Environmental Purchasing: A*

issue has changed over time, due to the plurality of regulatory acts of EU and national origin that it is appropriate to analyse, to understand the developments and possible future outcomes.

3. Sensitivity to Green Public Procurement in the EU landscape

A first manifestation of uniform procurement rules at Community level is represented by Directives 92/50/EEC, 93/36/EEC and 93/37/EEC.

Of course, there was no environmental protection interest in said Directives. On the contrary, any environmentally friendly design by competitors would have had an adverse effect on them because of the high costs involved¹⁵.

With the signing and entry into force of the Treaty of Maastricht, the European Community has assumed the task of ensuring a balanced development of economic activities and sustainable growth, reconcilable with environmental protection. Similarly, the Treaty of Amsterdam of 1997, introducing the so-called integration principle, imposed Institutions on the Community institutions to weigh and balance environmental interests within all other policies to be pursued¹⁶.

These two references are sufficient to understand how the environmental protection interest was gradually acquiring a pivotal role in the European Community policies, becoming a fundamental principle. The importance of the issue inevitably had repercussions on the procurement sector, as can be verified by analysing several legal rulings, but also by examining the debate that has arisen at an institutional level¹⁷.

From this point of view, the European Commission, adopting a purely interpretative approach - due to the absence of specific references to environmental protection in the regulations in force at the time - has tried to

Framework for Theory Development, in 7 *Eur. J. Purch. Supply Mang.*, 2001, p. 69: «the set of purchasing policies held, action taken, and relationships formed in response to concerns associated with the natural environment».

¹⁵ O. H. KASSIM, *I criteri di sostenibilità energetica e ambientale negli appalti pubblici. L'emersione dell'istituto degli "appalti verdi" nel panorama europeo e nazionale*, cit., p. 3.

¹⁶ For further details, M.C. CAVALLARO, *Il principio di integrazione come strumento di tutela dell'ambiente*, in *Riv. Ital. Dir. Pubbl. Comunitario*, 2, 2007, pp. 467-483.

¹⁷ O. H. KASSIM, *I criteri di sostenibilità energetica e ambientale negli appalti pubblici. L'emersione dell'istituto degli "appalti verdi" nel panorama europeo e nazionale*, cit., p. 4 ff.; F. SCHIZZEROTTO, *I principali provvedimenti europei ed italiani in materia di Green Public Procurement*, in *Rivista giuridica dell'ambiente*, 6, 2004, vol. 19, pp. 967-973.

reconcile environmental application with the regulations governing public contracts by adopting several Communications. An example is the Green Paper *Public Procurement in the European Union: Exploring the Way Forward*¹⁸ of 1996, followed, as early as 1998, by the Communication known as the White Paper on Public Procurement in the European Union¹⁹.

The latter document, in chapter 4 entitled «Complementing and achieving synergy with other Community policies», dedicates a specific paragraph to environmental protection, aware that it «is increasingly becoming an important component of any modern economic policy». According to the Commission, «Community law and, in particular, the directives on public procurement offer numerous possibilities for taking environmental protection into account in public purchasing»²⁰, while being aware that the objective of public procurement remained essentially economic.

The issue of reconciling market dynamics and environmental protection in the procurement sector was subsequently taken up in the Communications of the European Commission no. 263 of June 8, 1999

¹⁸ COM (96) 583 of 27 November 1996.

¹⁹ COM (98) 143 of 11 March 1998.

²⁰ COM (1998) 143 def., pp. 27 f.: «In general, any administration which so wishes can, in defining the goods or services which it intends to purchase, choose the products and services which correspond with its pre-occupations for the protection of the environment. The measures taken must, of course, comply with the rules and principles of the Treaty, particularly that of nondiscrimination. • The rules of the public procurement directives allow, in certain instances, the exclusion of candidates who are in breach of national environmental legislation. • Purchasing organisations can draw up technical specifications concerning the characteristics of works, supplies and services, which are the object of public procurement, which take account of environmental values. They can from now on encourage the development of a positive approach by companies to the environment, in accepting tenders offering products, which meet the requirements, defined in the specifications. • The directives allow the inclusion of the objective of protection of the environment in the criteria of selection of candidates in so far as these criteria are aimed at testing their economic, financial and technical capacity. • As regards the award of contracts, environmental elements can serve to identify "the most economically advantageous offer", in cases where these elements imply an economic advantage for the purchasing entity, attributable to the product or service which is the object of the procurement. In evaluating tenders, a purchasing organisation can, for example, take account of costs of maintenance, treatment of waste or recycling. • A contracting authority can require the supplier, whose tender has been accepted, that the deliverable, which is the object of the contract, be provided with due regard to certain constraints aimed at safeguarding the environment. These conditions of execution must be known in advance by all the tenderers».

(*Internal Market and Environment*); no. 576 of September 20, 2000 (*Reconciling Needs and Responsibilities. The integration of environmental issues into economic policy*); May 15, 2001, no. 264 (*Sustainable development in Europe for a better world: A European Union strategy for sustainable development*); July 4, 2001, no. 274 (*Community law on public procurement and the possibilities for integrating environmental considerations into public procurement*); and, finally, in the Sixth Community Environment Action Program, adopted with Decision no. 1600/2002/EC of the European Parliament and the Council of July 22, 2002 (*Our future, our choice*). Although these are soft law acts, they clearly show a desire to include ecological criteria among the components to be considered in the contractor's selection process²¹.

The Commission reiterates that Community procurement law was primarily intended to contribute to the completion of the internal market. By doing so, it created the competitive conditions that allow the non-discriminatory award of public procurements and a better use of public money. Therefore, contracting entities may well define the procurement content in the way they consider most appropriate to meet environmental requirements if this does not result in unlawful restrictions of competition or discrimination against certain competitors on a national basis.

Through the inclusion of environmental requirements, the objectives of greater environmental protection could be directly pursued, while at the same time aiming to steer other buyers towards more sustainable products and services. This observation seems to be corroborated by the most recent Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 11 December 2019, which states, precisely, that «public authorities, including EU institutions, should set an example by ensuring that their procurement is based on green criteria». Moreover, it is evident how a green request can act as an incentive for companies to invest in production conversion, leading to a market transformation²².

²¹ F. FRACCHIA, S. VERNILE, *I contratti pubblici come strumento dello sviluppo ambientale*, in *Rivista Quadrimestrale Di Diritto Dell'Ambiente*, 2, 2020, p. 8; S. VILLAMENA, *Appalti pubblici e clausole ecologiche. Nuove conquiste per la "competitività non di prezzo" anche alla luce della recente disciplina europea*, in *Il diritto dell'economia*, 2, 2015, pp. 355-388, emphasizes that there was a certain reluctance to include ecological clauses in contracts. There was a fear of incurring accounting liability, since these were soft law acts.

²² In a similar sense, Interpretative Communication of the Commission, cited above,

In introducing evaluation criteria suitable for awarding higher scores to companies that pay more attention to environmental value, the European institutions have highlighted the importance of having environmental certifications or the use of production processes with reduced polluting impact. However, as these standards could have a negative impact on the cost-effectiveness of the order, the principles of proportionality and adequacy were maintained.

The incidence of such diverse components in public contracts has led to the need for the EU Court of Justice to rule on the possibility for contracting authorities to introduce ecological criteria in public contracts already under Directives 92/50/EC and 93/38/EC.

The first ruling on green procurement is judgment C-318/94²³, in which the Court stated that the contracting authority's powers included the possibility of taking into account criteria linked to environmental protection.

In its well-known judgment of September 17 2002, case C-513/99, *Concordia Bus Finland Oy Ab. vs. Helsingin Kaupunki HKL Bussilikenne*, the Court recognised the possibility of introducing ecological criteria in public procedures. These criteria, however, had to be linked to the subject of the contract, bearing in mind the nature, purpose and characteristics of the contract. Secondly, the Court highlighted that this possibility was granted in compliance with Community principles, with reference to the principle of non-discrimination. Finally, environmental clauses should not provide the authorities with unconditional freedom of choice and should have been expressly mentioned in the tender specifications or in the call for tenders²⁴.

in OJEC of November 28, 2001, C 333, 12 ff.: «given the considerable purchasing power of contracting authorities, the latter are called upon to assume the responsibility of acting as a driving force in the process of ecological management and in the reorientation of consumption towards more ecological products».

²³ Judgment of the Court of Justice of the European Communities Commission v. Germany.

²⁴ The case relates to an invitation to tender for the supply of buses for local public transport in Helsinki. The contracting authority, by providing for additional points to be awarded to tenderers with specific environmental requirements, had caused a reaction from a company claiming that it could not win the tender because of these requirements. The Court stated that the award criteria do not need to be of purely economic nature, in accordance with the principle of integration in Article 6 of the EC Treaty. The legality of the assessment of environmental and social criteria was subordinated to the condition that they were relevant to the subject matter of the contract, published in advance, adequately publicised and in compliance with the fundamental principles of Community law, such as the free movement of goods, freedom of establishment and freedom to provide services, equal treatment, non-

The subsequent EVN AG decision²⁵, confirming the approach taken in the Concordia Bus ruling, recognised that the administration can include ecological *standards* among the qualitative criteria for assessing the tender. The breakthrough in case law consists in the specification that «contracting authorities may not only choose freely the contract award criteria, but also determine the weighting of these criteria, provided that this weighting allows a summary evaluation of the criteria used to identify the most economically advantageous tender».

The case law undertaken has the virtue of reconciling environmental protection and competition by balancing the different interests at stake. Without any binding legislative sources specifically dedicated to environmental protection in the field of procurement, it was made clear that integrating and enhancing environmental variables in procurement procedures did not automatically lead to the prevalence of this interest to the detriment of other Community policies²⁶.

The increasing focus on green procurement, highlighted by the multiple Communications from the Commission and case law referred to above, has led to the adoption of mature green procurement achievements by binding acts. In particular, two Directives were issued (2004/17/EC and 2004/18/EC). The first one, concerning the coordination of the procurement procedures of entities supplying water and energy and entities providing

discrimination, transparency and proportionality. For further details, M. BROCCIA, *Criteri ecologici nell'aggiudicazione degli appalti*, in *Urbanistica e Appalti*, 2003, p. 168; M. LOTTINI, *Appalti comunitari: sulla ammissibilità di criteri di aggiudicazione non prettamente economici*, in *Foro amm.* CDS, 2002, p. 1936.

²⁵ In the «EVN AG» judgment of December 4, 2003, the Court addressed the question of the relevance of environmental criteria in the choice of the economically most advantageous tender. According to the Court, contracting authorities were not only free to choose the contract award criteria, but also to determine the weighting of these criteria. The weighting applied must, however, allow a summary assessment of the criteria adopted to identify the economically most advantageous tender and should not have led to unreasonable discrimination between all the participants in the tender procedure. On these issues, D.U. GALETTA, *Vizi procedurali e vizi sostanziali al vaglio della Corte di giustizia*, in *Riv. it. dir. pub. com.*, 2004, p. 317; G. GARZIA, *Bandi di gara per appalti pubblici e ammissibilità delle clausole c.d. ecologiche*, in *Foro Amm.*, 2003, p. 3515; V. DE FALCO, *L'utilizzo di fonti di energia rinnovabili come criterio di valutazione dell'offerta economicamente più vantaggiosa*, in *Dir. pub. comp. eur.*, 3-4, 2004, p. 889.

²⁶ G. QUINTO, *Le variabili ambientali nella disciplina degli appalti pubblici*, in *ambientediritto.it*, 1, 2020, p. 7. On these issues, F. GAVERINI, *Attività contrattuale della p.a. e protezione dell'ambiente: gli appalti verdi*, in *Rivista giuridica dell'edilizia*, 5-6, 2009, pp. 153-169.

transport and postal services; and the second one, concerning the coordination of the procedures for the award of public works, supply and service contracts. These directives introduced the possibility for contracting authorities to include non-economic criteria in tender procedures²⁷.

Among these, environmental criteria have been expressly provided for, in the forms and within the limits defined by the case law of the Court of Justice and the Commission documents. With these directives, the European legislator has clarified that contracting authorities can contribute to the protection of the environment and the promotion of sustainable development and, at the same time, obtain the best value for money for their procurement²⁸.

The application of environmental criteria was linked to the object of the contract, given that the requirements had to be relevant to it; subjected to express mention in the notice of invitation to tender or in the specifications²⁹; and made possible only in accordance with the fundamental principles of Community law, such as the free movement of goods, freedom of establishment and freedom to provide services, equal treatment, non-discrimination, transparency and proportionality; finally, the prohibition of unconditional freedom of choice for the contracting authority remains as valid today as it was then³⁰.

²⁷ For further analysis of these directives, G. MORBIDELLI, M. ZAPPOLATO, *Appalti pubblici*, in M. P. CAMI, G. GRECO (eds), *Trattato di diritto amministrativo europeo*, Giuffrè, Milano 1998, pp. 426-428; F. LAURIA, *I pubblici appalti: disciplina comunitaria e giurisprudenza italiana*, Giuffrè, Milano 1998; D. SPINELLI, *Aggiudicazione degli appalti più verde con le direttive 2004/17/CE e 2004/18/CE*, in *Ambiente & Sicurezza*, 17, 2004, pp. 23-25; F. SPAGNUOLO, *Il Green Public Procurement e la minimizzazione dell'impatto ambientale nelle politiche di acquisto della Pubblica amministrazione*, in *Rivista Italiana di diritto pubblico comunitario*, 2, 2006, pp. 401-407.

²⁸ Recital 12 Directive 2004/17/EC.

²⁹ Recital 55: To ensure compliance with the principle of equal treatment in the award of procurement contracts, it is appropriate to lay down an obligation – established by case law - to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting entities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. Article 38 Conditions for performance of contracts. Contracting entities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the notice used as a means of calling for competition or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

³⁰ B. FENNI, *Il Green Public Procurement come strumento di sviluppo sostenibile*,

Subsequently, the relevance of GPP has been reaffirmed in several guidance documents of the European Commission: Communication COM (2008) 397 *A European Strategy for Sustainable Consumption and Production*; Communication COM (2008) 400 *Public Procurement for a Better Environment*; finally, Communication COM (2010) 2020 *Europe 2020 Strategy*.

This latter strategy shows an awareness of the significant contribution that public administrations can provide to the achievement of the objectives set out in the text, thanks to their purchasing power which can encourage innovation, induce respect for the environment and the fight against climate change, reduce energy consumption, increase employment, improve public health and social conditions, and promote equality and inclusion.

The Green Paper *On the modernization of EU public procurement policy - Towards a more efficient European Procurement Market*³¹, taking up the forward-looking objectives set out in the Europe 2020 Strategy, identified two methods to use public procurement in line with the policy objectives.

The first method, related to “how to buy”, consists in «providing contracting authorities with the wherewithal to take into account those objectives under procedural public procurement rules». The second method, concerning “what to buy”, imposes «mandatory requirements on contracting authorities» or provide for «incentives to steer their decisions as to which goods and services should be procured»³².

A further step in the recognition of the relevance of environmental profiles in public procurement was taken in 2014: Directive 2014/23/EU on the award of concession contracts; Directive 2014/24/EU on public procurement, repealing 2004/18; and, finally, Directive 2014/25/EU on procurement procedures of entities operating in the water, energy, transport and postal services sectors, thus repealing Directive 2004/17/EC³³.

in *AmbienteDiritto.it*, 2014.

³¹ Communication COM (2011), 15, of 27 January 2011.

³² O. H. KASSIM, *I criteri di sostenibilità energetica e ambientale negli appalti pubblici. L'emersione dell'istituto degli "appalti verdi" nel panorama europeo e nazionale*, cit., p. 9.

³³ F. DE LEONARDIS, *Norme di gestione ambientale*, in *L'Amministrativista*, Bussola of 27.04.2020, §2. For an analysis of the directives H. C. CASAVOLA, *Le nuove direttive sugli appalti pubblici e le concessioni*, in *Giornale di Diritto Amministrativo*, 2014, pp. 1135-1141; F. DI CRISTINA, *Le nuove direttive sugli appalti pubblici e le concessioni*, in *Giornale di Diritto Amministrativo*, 12, 2014, pp. 1160-1167; D. MARESCA, *La modificazione sostanziale dei contratti di concessione di lunga durata durante l'esecuzione: commento alla*

Recital 2 of Directive 2014/24/EC is crucial to understand the objectives of the regulatory intervention, stating that «Public procurement plays a key role in the Europe 2020 strategy... as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds». The reform thus pursues several objectives: a more efficient use of public funds, through the simplification and flexibility of procedures; a greater opening of markets at European level, facilitating the participation of small and medium-sized enterprises and cross-border tender; the promotion of innovation and eco-innovation, to be understood as «any form of innovation that reduces negative impacts on the environment, increases resistance to environmental pressures and enables a more efficient and responsible use of natural resources»; finally, social and environmental protection³⁴.

It is evident from the content of the three directives that public procurement plays a key role in the sustainable growth of Europe³⁵, in accordance with the principle of integrating environmental protection into all activities³⁶.

For this reason, Member States may impose and enforce measures necessary for the protection of health, human and animal life or the preservation of plants and other environmental measures with a view to

direttiva europea 2014/23/UE, in *Il diritto del commercio internazionale*, vol.28, 3, 2014, pp. 749-763; R. CARANTA, D. C. DRAGOS, *La minirivoluzione del diritto europeo dei contratti pubblici*, in *Urbanistica e appalti*, 5, 2014, pp. 493-504; M. RICCHI, *La nuova Direttiva comunitaria sulle concessioni e l'impatto sul Codice dei contratti pubblici*, in *Urbanistica e appalti*, 7, 2014, pp. 741-757; V. FERRARO, *La disciplina della concessione nel diritto europeo: i principi giurisprudenziali e la sistemazione realizzata con la direttiva 2014/23/UE*, in *Riv.It. Dir. Pubbl. Comunitario*, 3-4, 2014, pp. 835-866; M. URBANI, *Le nuove direttive sugli appalti pubblici e le concessioni*, in *Giornale di diritto amministrativo*, 12, 2014, pp. 1158-1159; S. VILLAMENA, *Direttive Europe e Appalti: qualità, innovazione e semplificazione*, in *Cooperative e enti non profit*, 1, 2015, pp. 35-44; P. PIRAS, *Gli appalti pubblici tra trasparenza e innovazione*, in *Urbanistica e Appalti*, 2015; E. FOLLIERI, *I principi generali delle Direttive comunitarie 2014/24/UE e 2014/25/UE*, in *giustamm.it*, 2, 2015, pp. 129-135.

³⁴ B. FENNI, *Il Green Public Procurement come strumento di sviluppo sostenibile*, cit., p. 14.

³⁵ In recitals 2, 47 and 123 of the Procurement Directive 2014/24; in recital 4 of the Special Sectors Directive 2014/25; in recital 3 of the Concessions Directive 2014/23.

³⁶ Recital 91 of the Procurement Directive 2014/24 requires that environmental protection requirements should be integrated «into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development».

sustainable development, provided that these measures comply with EU law³⁷.

The stated objectives correspond to important innovations compared to the previous legal framework, starting with the technical specifications, where contracting authorities are given the possibility to require special labelling.

In addition, it is possible to require the implementation of certain environmental management systems during the procurement execution phase, or to set ecologically sustainable execution conditions.

But the most important innovation is represented by the replacement of the “lowest price” award criterion with the “lowest cost” one. This change allows tenders to be evaluated not only on the basis of the purchase price but also on the basis of the costs of environmental externalities arising from the life cycle of the object of the contract («Life Cycle Costing» or LCA).

The «life cycle» definition is found in Article 2(1)(20) of Directive 2014/24/EU: it includes «all consecutive and/or interlinked stages, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of the product or the works or the provision of the service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilization».

The wider concept of «cost» comes from Recital 96 and Article 67 of the Directive, which states that life-cycle costing «includes all costs over the life cycle of works, supplies or services. This means internal costs, such as research to be carried out, development, production, transport, use, maintenance and end-of-life disposal costs but can also include costs imputed to environmental externalities».

The most economically advantageous tender from the point of view of the contracting authority shall be identified «on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing [...] 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

³⁷ In recital 41 of the procurement directive 2014/24: «Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life, the preservation of plant life or other environmental measures, in particular with a view to sustainable development, provided that those measures are in conformity with the TFEU»; in recital 59 of the Concessions Directive 2014/23; in recital 56 of the Special Sectors Directive 2014/25/EU.

to the subject of the public procurement in question».

Therefore, the regulation enhances the environmental application including the new concept of «cost». Finally, Recital 37 entrusts each Member State and the contracting authorities themselves with the task of taking «relevant measures to ensure compliance with obligations in the fields of environmental, social and labour law» established by European and national law, collective agreements or international agreements or measures, provided that they comply with EU law. The fulfilment of these obligations shall be assessed during the selection and award procedure and the verification of the anomalous tender. Compliance with these obligations shall also be verified where a subcontracting contract has been concluded. The purpose of this provision is to prevent the contracting authority from subcontracting to companies, including those from third countries, which are characterised by lower labour costs, less social protection and lower protection standards than those imposed at European level³⁸.

In addition to the three directives previously mentioned, Directive No. 33 of 23 April 2009 on road transport vehicles is of great importance. Article 1 of this Directive «requires contracting authorities... to take into account lifetime energy and environmental impacts, including energy consumption and emissions of CO₂ and of certain pollutants, when purchasing road transport vehicles with the objectives of promoting and stimulating the market for clean and energy-efficient vehicles».

By reason of this provision, administrations are obliged, and not merely entitled, to purchase green, clean and energy-efficient vehicles, under penalty of cancellation of the award.

Besides vehicles, the European legislator explicitly encouraged the use of mandatory green procurement in specific sector legislation, stating that this legislation should set «mandatory objectives and targets according to the particular policies and conditions prevailing in the relevant sector and to promote the development and use of European approaches to life-cycle costing as a further underpinning for the use of public procurement in favour of sustainable growth»³⁹.

At this point, it seems appropriate to check Italy's sensitivity to environmental issues arising from procurement legislation.

³⁸ B. FENNI, *Il Green Public Procurement come strumento di sviluppo sostenibile*, cit., p. 19.

³⁹ See recital 95 of the Procurement Directive 2014/24 and recital 100 of the Utilities Directive 2014/25.

4. Italian legislation on green public procurement from the 1990s to the present

In Italy, the issue received insufficient attention in the 1990s, as evidenced by the fragmented environmental provisions in public administration contracts. Among these, Article 19, paragraph 4 of the so-called Ronchi Decree (D.Lgs. no. 22 of 5 February 1997) introduced certain obligations for the Public Administration to purchase and consume certain goods, such as recycled paper and retreaded tyres; article 5, paragraph 1, of Ministerial Decree of March 27, 1998, concerning «sustainable mobility in urban areas», required public administrations to use low-emission vehicles with the objective of reaching 50% of them in 2003.

CIPE resolution no. 57 of 2002, dedicated to the «Environmental action strategy for sustainable development in Italy», is considered a wider-ranging provision. Article 1, paragraph 2, qualifies the protection and enhancement of the environment as «transversal factors of all sectoral policies, related programming and consequent interventions», stating for the first time the importance of the sustainable development concept.

Subsequently, Ministerial Decree no. 203 of 2003 constitutes the first expression of the *Green Public Procurement* discipline. The decree at issue aimed to create trade in environmentally friendly materials, despite the limitation represented by the scope of application. It only dealt with the disposal of the product, neglecting the other phases of the life cycle.

The legal framework changed considerably with D. Lgs no. 163 of 2006, in which the focus on green procurement emerges in eight articles (Articles 2, 40, 42, 44, 68, 69, 83, 93).

It is the result of the implementation of the aforementioned Directives 2004/17/EC and 2004/18/EC and is characterised by a *green* interest not limited to the planning stage.

Article 2(2) of the 2006 Contracts Code sets out the principles of economy, effectiveness, promptness and fairness, free competition, equal treatment, non-discrimination, transparency, proportionality and publicity⁴⁰. At the same time, it is provided that the principle of cost-effectiveness may be subordinated, to the extent, expressly permitted by the rules in force and by the code, to criteria, provided for in the call for tenders, inspired by social requirements, as well as the protection of health and environment and the

⁴⁰ Art. 2, D. Lgs. 163/2006.

promotion of sustainable development.

In this regard, the Ministry of the Environment has drawn up an interpretative document entitled «Green purchasing for the public administration: the state of the art, regulatory developments and methodological indications», where it has clarified that «it is legitimate to prioritize the need to safeguard the environment and human health, to promote sustainable development and to protect social needs, even at the expense of not always guaranteeing a convenient relationship between the results obtained and the resources used, provided that this is done in compliance with transparency, *par condicio* and competition».

From the explanatory text it emerges that the environmental protection requirements cannot negatively affect the principles of proportionality, transparency, equal conditions and non-discrimination; on the other hand, as regards the principle of economy, the public administration is obliged to respect it provided that it does not impede the pursuit of other public objectives, including environmental protection⁴¹.

Under Article 81 of Legislative Decree 163/2006, the criteria of the most economically advantageous offer and the lowest price play an equal role and can be used as alternatives⁴².

⁴¹ B. FENNI, *Il Green Public Procurement come strumento di sviluppo sostenibile*, cit., p. 8.

⁴² For an analysis of award criteria: P. DE NICTOLIS - R. DE NICTOLIS, *Il criterio del prezzo più basso e il criterio dell'offerta economicamente più vantaggiosa*, in M.A. SANDULLI, R. DENICTOLIS, R. GAROFOLI (eds), *Trattato sui contratti pubblici*, vol. III, Giuffré, Milano 2008, p. 2118 ff.; F. SAIITA, *Appalti e contratti pubblici: Commentario sistematico*, Cedam, Padova 2016; C. LAMBERTI, S. VILLAMENA, *Nuove direttive appalti: "sistemi di selezione" e "criteri di aggiudicazione"*, in *Urbanistica e appalti*, 2015, p. 873 ff.; C. DE MASI, *Criteri di aggiudicazione e offerte anomale*, in *Riv. trim. appalti*, 2016, p. 212 ff.; D. SENZANI, *Discrezionalità della pubblica amministrazione ed offerta economicamente più vantaggiosa*, in *Riv. Trim. degli appalti*, 2013, p. 900 ff.; M. PIGNATTI, *Le metodologie per la determinazione dell'offerta economicamente più vantaggiosa, nota a Cons. Stato, Ad. Plen., 10 gennaio 2013, n. 1*, in *Foro amm, CDS*, 2013, p. 1526 ff.; L. TORCHIA, *La nuova direttiva europea in materia di appalti servizi e forniture nei settori ordinari*, in *Dir. amm.*, 2015, pp. 291 ff.; A. PAJNO, *La nuova disciplina dei contratti pubblici tra esigenze di semplificazione, rilancio dell'economia e contrasto alla corruzione*, in *Riv. it. dir. pubbl. comunitario*, 2015, pp. 1127 ff. For further information about these criteria under the D. Lgs. n. 163/2006: F. MASTROVITI, *Commento agli articoli 81, 82 e 83*, in G.F. FERRARI, G. MORBIDELLI (eds), *Commentario al codice dei contratti pubblici*, Giuffré, Milano 2013, p. 1101 ff.; P. PIVA, *Criteri di aggiudicazione*, in R. VILLATA, M. BERTOLISSI, V. DOMENICHELLI, G. SALA (eds), *I contratti pubblici di lavori, servizi e forniture*, Cedam, Padova 2014, I, pp. 779 ff.; G. FONDERICO, *La selezione delle offerte e la verifica*

Whichever criterion is chosen, since the principle of economy relates both to the stage of the contract award and to its performance, the balancing of that principle with the requirements of environmental protection must concern both stages. In other words, the provision of Article 2(2) refers not only to the public phase of the contract award but also to the private phase of its performance⁴³.

The importance of this provision can be justified by the fact that, in national law, the economic sphere, shaped in order to save public administration money, has been overcome.

To do so, however, a provision expressly stipulating that the principle of economy must be flexible on other interests, including environmental ones, to be accepted is necessary.

In the same direction, Article 1(1126) of Law No 296 of 27 December 2006 provided for the implementation and monitoring of an «Action Plan for the environmental sustainability of consumption in the public administration sector», drawn up by the Ministry for the Environment and the Protection of Land and Sea, in agreement with the Ministers for the Economy and Finance and for Economic Development, and with the regions and autonomous provinces of Trento and Bolzano.

The Plan provides for the adoption of measures aimed at integrating environmental sustainability requirements concerning procurement procedures for goods and services of the competent administrations, based on the following criteria: a) reduction in the use of natural resources; b) replacement of non-renewable energy sources with renewable ones; c) reduction of waste production; d) reduction of polluting emissions; e) reduction of environmental risks.

dell'anormalità, in M. CLARICH (ed), *Commentario al codice dei contratti pubblici*, Giappichelli, Torino 2010, pp. 451 ff.; M. AMEDEI, M. COZZIO (eds), *Appalti di servizi e criteri ambientali. Aspetti giuridici e tecnici*, Tangram, Trento 2013, pp. 17 ff.; R. C. CONTESSA, *L'offerta economicamente più vantaggiosa: brevi note su un istituto ancora in cerca di equilibri*, in www.giustizia-amministrativa.it, 2010; R. DIPACE, *Le procedure di scelta del contraente e i criteri di aggiudicazione*, in C. FRANCHINI (ed), *I contratti di appalto pubblico*, Giappichelli, Torino 2010, pp. 647 ff.; M. LIPARI, *L'offerta economicamente più vantaggiosa*, in *Urb. e App.*, 1, 2007, pp. 7 ff.; F. COCCOLI, *Criteri di selezione delle offerte e verifica delle offerte anormalmente basse*, in M. SANINO (ed), *Commento al codice dei contratti pubblici relativi a lavori, servizi e forniture*, Giappichelli, Torino 2008, pp. 339 ff.

⁴³ G. FIDONE, *Gli appalti verdi all'alba delle nuove direttive: verso modelli più flessibili orientati a scelte eco-efficienti*, in *Riv. Ital. Dir. Pubbl. Comunitario*, 5, 2012, p. 838.

This provision was drawn up in accordance with the invitation by the European Commission, in Communication 2003/302, «to draw up and make available to the public appropriate action plans for the integration of environmental requirements in public procurement».

The process described led to Interministerial Decree 135/2008, updated by Ministerial Decree 10 April 2013, containing the National GPP Action Plan (GPP NAP).

In its original version, the plan was intended to be a non-binding act that would be reviewed every three years. The revision, which took place with Ministerial Decree of 10 April 2013, specified the procedure for the establishment of the so-called minimum environmental criteria (MEC)⁴⁴.

According to art. 3 of the Ministerial Decree of 10 April 2013, they represent environmental requirements for the different stages of the public procurement procedure, which are defined by decree of the Minister of the Environment. The minimum environmental criteria have been well defined as the «technical indications» of the GPP NAP and consist of «measures aimed at integrating the environmental sustainability requirements into the purchasing procedures for goods and services of the administrations in charge». They are qualified as minimums because they represent basic criteria for environmental protection, which are able to withstand market changes and certainly are admissible. For this reason, contracting authorities can impose even stricter environmental requirements.

The provision about the role of public authorities, which are obliged to identify their own needs and to draw up a specific internal program for the implementation of green procurement actions, is very interesting.

Although they were initially non-binding, the relevance of the environmental criteria was twofold. Firstly, as already mentioned, contracting authorities could benefit from MEC as guiding parameters for the rules of tender; secondly, from a judicial point of view, they represented a parameter for verifying the legitimacy of the discretionary choices made by the contracting authority in the selection of tenderers, in the definition of the object of the contract and in the definition of particular performance conditions.

Law no. 221 of 28 December 2015 (the so-called Environmental Annex to the 2014 Stability Law), through the introduction of Article 68-bis in Legislative Decree no. 163/2006, made the application of minimum

⁴⁴ For further information F. DE LEONARDIS, *Norme di gestione ambientale*, cit., §3.

environmental criteria mandatory⁴⁵.

In addition, several facilities and bonus measures have been introduced for those with environmental certification, and new environmentally conscious parameters have been introduced to assess the economically most advantageous tender.

D.Lgs. 50/2016, implementing Directives 2014/23/EU, 2014/24/EU and 2014/25/EU⁴⁶, in Article 30, paragraph 1, provides that «the principle of cost-effectiveness may be derogated, within the limits in which it is expressly allowed for in current legislation and in this Code, by criteria, provided in the call for competition, inspired to social needs, as well as to the safeguard of health, environment, cultural heritage and the promotion of sustainable development, also under an energy standpoint»⁴⁷.

This provision was already established by the previous procurement code of 2006; the new element, instead, consists of the varied system of legal provisions in the new code referred to environmental protection. As a result, the statutory reserve is no longer considered a limitation, but rather an incentive to include environmental clauses in public procurement contracts. For instance, for certain contracts where the economically most advantageous offer is considered, it is reasonable to include environmental clauses which, if contradictory, will prevail over the economic efficiency principle⁴⁸.

According to Article 4, «public contracts concerning works, services

⁴⁵ The Minister of the Environment and Protection of Land and Sea's decree of 11 October 2017 established the minimum environmental criteria to be complied with in the field of construction. ANAC, after receiving reports from several economic operators, has drawn up Guidelines with the aim of reconciling the principle of *favor participationis*, with reference to micro, small and medium-sized enterprises, with the environmental protection principle. These are the ANAC Guidelines «Application of the Minimum Environmental Criteria referred to in the Decree of the Minister for the Environment and the Protection of Land and Sea of 11 October 2017 (Minimum Environmental Criteria for the award of design services and works for the new construction, renovation and maintenance of public buildings)».

⁴⁶ For some considerations about this implementation, E. PROIETTI, *L'adozione delle nuove direttive sui contratti pubblici in Italia*, in *giustamm.it*, 2, 2016.

⁴⁷ *Commento all'art.30*, in F. CARINGELLA, M. PROTTO (eds), *Il nuovo Codice dei contratti pubblici*, in *italiappalti.it*, 6 September 2016; M. C. ROSSI TAFURI, I. SORRENTINO, *Commento sub. art.30*, in M. CORRADINO, S. STICCHI DAMIANI (eds), *I nuovi appalti pubblici. Commento al d.lgs 18 aprile 2016, n. 50*, Giuffrè, Milano 2017, pp. 76 ff.

⁴⁸ S. VILLAMENA, *Codice dei contratti pubblici 2006. Nuovo lessico ambientale, clausole ecologiche, sostenibilità, economicità*, in *Rivista Giuridica dell'Edilizia*, 3, 2017, p. 101.

and supplies, as well as active contracts, which are excluded, in whole or in part, from the objective scope of this Code, shall be awarded in compliance with the principles of economy, effectiveness, impartiality, equal treatment, transparency, proportionality, publicity, environmental protection and energy efficiency».

Environmental protection is therefore one of the key principles to be observed in public procurement and concerns contracts that are not governed by the Code⁴⁹.

Besides the principles, the Public Contracts Code includes specific provisions for environmental profiles to play a relevant role in the procedures at issue. Considering Article 95(6) on contract award criteria, which clarifies that «the most economically advantageous tender identified on the basis of the best value for money shall be evaluated on the basis of objective criteria, such as qualitative, environmental or social aspects, linked to the subject-matter of the contract», expressly includes among these criteria: «a) environmental features, containment of energy consumption and environmental resources by the work or product; b) the possession of a label of ecological quality of the European Union (Ecolabel EU) in relation to the goods or services object of the contract, in a measure equal to or exceeding 30% of the value of the supplies or provisions object of the same contract; c) the cost of use and maintenance, also in relation to the consumption of energy and natural resource, pollutant emissions and to the total costs, including external costs and costs of mitigation of climate change impacts, referred to the entire life cycle of the work, good or service, with the strategic objective of a more efficient use of resources and of a circular economy able to promote the environment and employment; d) the compensation of greenhouse gas emissions associated to the organization's activities».

If the evaluation criterion is the most economically advantageous tender, then paragraph 10 bis of Article 95 is also relevant, which provides that the contracting authority sets «a ceiling for the economic score within the limit of 30 per cent». In addition, the provision contained in paragraph 7 of the same Article 95, according to which «The cost element may take the form of a fixed price or cost on the basis of which economic operators will compete on qualitative criteria only», is not negligible. These are provisions that enhance the qualitative elements of the tender⁵⁰.

⁴⁹ F. FRACCHIA, S. VERNILE, *I contratti pubblici come strumento dello sviluppo ambientale*, cit., p. 12.

⁵⁰ S. VILLAMENA, *Codice dei contratti pubblici 2006*, cit., p. 105.

Paragraph 13 of the same article also provides that contracting authorities must indicate the award criteria in the tender notice, which is «the highest score on the offer concerning goods, works or services that have a lower impact on health and the environment».

Environmental protection is relevant not only if the criterion of the most economically advantageous tender is applied in the evaluation of the tender, but also if the price or cost criterion is applicable.

The cost reference, in fact, includes environmental externalities and, in any case, all the profiles connected with the product's life cycle. This is clear from Art. 95(2), which expressly refers to Art. 96 on life cycle costs of products, services and works. In this respect, it was observed that the initial and future costs of a public procurement contract are considered «in a dynamic dimension», as the subsequent effects are also evaluated⁵¹.

However, it should be considered that some difficulties may arise, both for contracting authorities and for bidders, as regards the establishment of the data that must be included in the tender to identify costs, with a consequent prejudice to the principle of proportionality.

In addition, it was observed that the costs and data that companies have to provide would be so complex that only larger companies could provide them. This would preclude small companies from participating in tenders⁵².

Moreover, it should not be overlooked that the link between procurement and the environment, highlighted by the public procurement code, entails the risk that notices and/or tender specifications are too general or vague or not proportionate to the subject matter of the contract. Administrations benefit from the margins of discretion throughout the procedure, from the regulation in the tender notice to the awarding of the relevant scores during the tender evaluation. For this reason, an effort has been made to facilitate the application of the new rules through the Guidelines of the National Anti-Corruption Authority. ANAC has “recommended” to contracting authorities to «clearly and precisely define the award criterion, as well as the evaluation criteria, the methods and formulae for awarding scores and the method for establishing the ranking list, aimed at identifying the economically most advantageous tender». «Unclear or ambiguous wording» should be avoided, «in order to ensure transparency of activity and awareness

⁵¹ Id., p. 106.

⁵² L. DE PAULI, *I “costi del ciclo di vita” nel nuovo codice degli appalti*, in *Urbanistica e appalti*, 2016, p. 630.

of participation»⁵³.

Setting aside the legislation contained in Legislative Decree 50/2016, the provision of Article 1, paragraph 2, of Decree-Law No. 111 of 14 October 2019, contains «Urgent measures for compliance with the obligations laid down in Directive 2008/50/EC on air quality and extension of the deadline referred to in Article 48, paragraphs 11 and 13, of Decree-Law No. 189 of 17 October 2016, converted, with amendments, by Law No. 229 of 15 December 2016», converted, with amendments, by Law No. 141 of 12 December 2019 (the so-called Climate Decree).

It requires each public administration to align its activities with the achievement of the climate change and air quality improvement objectives. It is a provision addressed to the administration in all activities, including the conclusion of contracts.

5. Green Public Procurement and the National Recovery and Resilience Plan

The recent approval of the National Recovery and Resilience Plan also generates its effects on procurement. Hoping that the application issues related to the current Code of Public Contracts can be solved through the actions that will follow the approval of the Plan, it seems appropriate to concentrate on the provisions, contained in it, dedicated to procurement and, more specifically, to green public procurement.

With the emergence of the COVID-19 pandemic, the need for an economic recovery has become more and more urgent in order to avoid the collapse of economic and social systems exhausted by the virus. After years of austerity, public investment has been re-evaluated as a tool for recovery⁵⁴.

⁵³ «Guidelines no. 2, implementing Legislative Decree no. 50 of 18 April 2016, concerning the “Economically most advantageous tender”» of Anac 21 September 2016, no. 1005 where certain calculation techniques are specified to apply the most economically advantageous offer criterion. On this issue, S. VILLAMENA, *Codice dei contratti pubblici 2006*, cit., p. 10 notes that «a stronger European discipline will be needed to regulate such aspects, also in the light of the cross-border value of the discipline in question. In fact, this is a requirement related not only to the subsidiarity principle, here imagined at its highest ascending level in order to avoid discriminations between Member States' systems in an environmental matter that, by definition, goes beyond national borders, but also because Article 68 of Directive 2014/24/EU specifically refers to a series of acts on common methods useful for the evaluation of ecological clauses».

⁵⁴ P. CONIO, *Il futuro verde: GPP e Piano Nazionale di Ripresa e Resilienza*, in <https://www.forumpa.it/riforma-pa/il-futuro-verde-gpp-e-piano-nazionale-di-ripresa-e-resilienza/>, 2021.

For this purpose, resources from the European Next Generation EU (NGEU) package will be used. Out of a total of EUR 50.6 billion (at current prices), EUR 13.5 billion have been assigned to Italy.

The NGEU is divided into two main tools: the Recovery and Resilience Facility (RRF) and the Recovery Assistance for Cohesion and the Territories of Europe (REACT-EU).

The National Recovery and Resilience Plan (NRRP) is the Italian “chapter” of the broader European Plan of EUR 672.5 billion: it aims to increase GDP, employment, launch fundamental reforms quickly and break the gap between the South and the rest of Italy. It represents an investment for the future and for the younger generations, where our country's future and modernisation are at stake. According to the Government's intentions, the NRRP is a broad and ambitious block of investments and reforms capable of unleashing the growth potential of our economy, generating a strong upturn in employment, improving the quality of work and services to citizens and territorial cohesion, and encouraging the ecological transition.

The recovery action is linked to three key strategic priorities for our country, all conformed to the European level: digitalisation and innovation, ecological transition and social inclusion.

The Plan's missions derive from EU Regulation 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility. This Regulation establishes six main areas of intervention, the so-called pillars on which the individual National Plans must focus: green transition, digital transformation, smart, sustainable and inclusive growth, social and territorial cohesion, health and economic, social and institutional resilience, policies for new generations, children and young people.

The Italian Plan approved on 26 April 2021, in accordance with these pillars, provides for six Missions: 1) Digitalisation, Innovation, Competitiveness, Culture; 2) Green Revolution and Ecological Transition; 3) Infrastructure for Sustainable Mobility; 4) Education and Research; 5) Inclusion and Cohesion; 6) Health.

It is easy to understand that the ecological transition represents support in guiding public investments to achieve public interest goals that have been overlooked for too long. Similarly, GPP can play a strategic role in achieving the objectives of the Recovery and Resilience Plan. GPP is, in fact, a response to an approach that allows contracting authorities to take proper account of environmental criteria at every stage of the procurement process, promoting

the circular economy⁵⁵, the optimal allocation of resources and the development of innovation.

In this respect, the National Recovery and Resilience Plan provides for the adoption of minimum environmental criteria for cultural events⁵⁶.

The *ratio* of the provision is to improve the environmental sustainability of cultural events such as exhibitions, festivals, cultural events, music events financed, promoted or organised by public authorities. Also in this case, the systematic and homogeneous application of these criteria will lead to the diffusion of more sustainable technologies and products, encouraging the evolution of the operating model of market operators.

Secondly, the NRRP establishes that the Ministry for Ecological Transition will develop a specific action plan in order to support contracting authorities in applying the minimum environmental criteria set by law to tendering procedures, to overcome delays in authorisation procedures and tenders, specifically referring to the construction of new waste processing plants⁵⁷.

The Plan also includes interventions defined as «enabling reforms» for the «promotion of competition», aimed at «simplifying and rationalising legislation». Among these reforms, «the simplification of rules on public procurement and concessions is an essential objective for the efficient implementation of infrastructure and for the revival of construction activity: they represent essential aspects for the recovery due to the spread of the COVID-19 infection. This simplification should cover not only the awarding phase, but also the planning, programming and design phase»⁵⁸.

In order to achieve the desired simplification, the Plan distinguishes two types of measures: urgent measures and ordinary measures⁵⁹.

⁵⁵ For an analysis of the different aspects of the concept, F. DE LEONARDIS, *Economia circolare: saggio sui suoi tre diversi aspetti giuridici. Verso uno stato circolare?*, in *Diritto Amministrativo*, 1, 2017, pp. 163-207.

⁵⁶ National Recovery and Resilience Plan, Updated text sent to the Senate on Monday 26 April 2021 at 1.57 pm, p. 110.

⁵⁷ National Recovery and Resilience Plan, Updated text sent to the Senate on Monday 26 April 2021 at 1.57 pm, p. 122.

⁵⁸ National Recovery and Resilience Plan, Updated text sent to the Senate on Monday 26 April 2021 at 1.57 pm, p. 65.

⁵⁹ M. BONI, *Piano nazionale di ripresa e resilienza (PNRR): interventi in materia di public procurement*, in <http://www.news4market.it/2021/06/11/piano-nazionale-di-ripresa-e-resilienza-pnrr-interventi-in-materia-di-public-procurement/>, 11.06.2021; V. MAGNANO SAN LIO, *Riforme di contesto ed abilitanti previste dal PNRR per la “promozione della concorrenza” e, in particolare, per la “semplificazione dei contratti pubblici”*, in

The «urgent measures» include those relating to: anti-mafia verifications and legal compliance protocols; fast-track service conferences; limitation of liability for fiscal damage to cases in which the production of the damage is voluntarily intended by the person who has acted, excluding damage caused by omission or inertia; the creation of a technical advisory board; identification of a maximum time limit for the awarding of contracts, with a reduction of the time between notice publication and award; identification of measures for the containment of contract execution times, depending on the type of contract.

Concerning the implementation procedures, the Plan provides for the introduction of a special regulation on public contracts through a decree-law, aimed at reinforcing the simplifications already launched by Decree-Law no. 76/2020, as well as extending their effectiveness until 2023.

The Plan also identified further urgent measures, «which do not require a legislative measure». These measures concern: the start of the work of the Steering Committee for the public contracts coordination already founded by the Presidency of the Council in application of Article 212 of Legislative Decree 50/2016; the reduction in the number and qualification of contracting stations; the «enhancement of the database of all contracts held by the National Anti-Corruption Authority»; the «Simplification and digitalisation of the purchasing entities' procedures and interoperability of related data».

Finally, as regards the “ordinary measures”, the Plan acknowledges the various implementation difficulties caused by the «complexity of the current public procurement code».

The problems encountered have led to envisaging the transposition of the rules of the three EU directives (2014/23, 24 and 25), with an integration only for *non-self-executing* parts, and organising them «in a new discipline that is simpler than the current one, reducing as much as possible the rules that go beyond those required by European legislation, also on the basis of a comparison with the regulations adopted in other EU Member States»⁶⁰. In particular, the Plan establishes that the disciplines adopted in Germany and the United Kingdom will be taken into account for their relevance in terms of simplification, and that action will be taken through an enabling law, whose draft law will be submitted to Parliament by 2021. The legislative decrees

<https://www.scuderimottaeassociati.it/>, 17 May 2021.

⁶⁰ National Recovery and Resilience Plan, Updated text sent to the Senate on Monday 26 April 2021 at 1.57pm, p. 66.

will be adopted in the nine months after the approval of the enabling law. The most important principles and directive criteria of the enabling act are already identified in the Plan itself, and among these the «provision of measures in order to ensure energy and environmental sustainability and the protection of health and labour in the awarding of contracts» has been included.

In accordance with the provisions of the Plan, the President of the Council of Ministers and the Minister of Sustainable Infrastructure and Mobility presented the draft law containing «Enabling Act to the Government on public procurement». The report states that «the reference regulations reform became necessary not only to adapt the public contracts sector to the evolution of the relative case law, but also to solve the implementation problems encountered since the Code of Legislative Decree no. 50 of 18 April 2016 came into force»⁶¹. Among the objectives, there is that of «encouraging the implementation, through procedural simplification, of investments in green and digital technologies, as well as in innovation and research, in order to achieve the Sustainable Development Goals adopted by the United Nations General Assembly on 25 September 2015, to increase the eco sustainability of public investments and economic activities in accordance with the criteria set out in Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020, and also providing for measures to ensure compliance with energy and environmental responsibility criteria in the public procurement and concession contracts award, in particular through the definition of minimum environmental criteria (paragraph 2, point d)»⁶².

⁶¹ Draft Law presented by the President of the Council of Ministers (Draghi) and by the Minister of Sustainable Infrastructures and Mobility (Giovannini) communicated to the Presidency on 21 July 2021 concerning «Enabling Act to the Government on Public Procurement», p. 3.

⁶² Draft Law presented by the President of the Council of Ministers (Draghi) and by the Minister of Sustainable Infrastructures and Mobility (Giovannini) communicated to the Presidency on 21 July 2021 concerning «Enabling Act to the Government on Public Procurement», pp. 5 and 14.