

How Will the Adoption of Mandatory GPP Criteria Change the Game?

Lessons from the Italian Experience

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With the 2003 Communication on Integrated Product Policy¹, the European Commission started focusing more on 'greening' Member States' public procurement law, by encouraging the adoption of National Action Plans (NAPs). Subsequently, with the 2008 Communication², green public procurement (GPP) criteria were developed. Since then, the Commission has developed more than 20 standard GPP criteria, which are currently applied voluntarily. Recently, the EU Commission indicated that they are working on mandating GPP criteria and several legislative proposals³ are foreseeing the setup of mandatory EU GPP criteria for all Member States. Some domestic legislations have already introduced mandatory GPP criteria. In particular, the Italian legislator followed up the Commission's initiative on NAPs, and adopted mandatory minimum environmental criteria (MECs) for 18 purchasing categories. This article aims to describe and compare the evolution of GPP criteria in the EU and Italy to illustrate and anticipate possible outcomes for the forthcoming mandatory GPP at the EU level. By doing so, the paper emphasises the prominent role played by the Italian Council of State in ensuring the mandatory minimum for environmental criteria in Italian law. Finally, it argues that the Italian approach, which uses the ineffectiveness of the contract as a general and well-established remedy, has proven successful in ensuring the enforcement of MECs.

Keywords: GPP criteria; sustainable public procurement; mandatory minimum environmental criteria; Italian public procurement law; ineffectiveness of public contract

I. Introduction

In the European Union (EU), public procurement represents at least 14% of the gross domestic product.⁴ Therefore, governments' purchasing power can play

a pivotal role in making production and consumption more sustainable. In this respect, the term 'green public procurement' (GPP) deals precisely with the government's environmentally-friendly purchasing, and is one of the critical drivers for a circular economy.⁵

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1 European Commission, 'Integrated Product Policy, Building on Environmental Life-Cycle Thinking' COM(2003) 302 final.

2 Commission, 'Public procurement for a better environment,' COM (2008) 400 final.

3 See for example: Commission, 'Establishing a framework for setting ecodesign requirements for sustainable products and repealing directive' COM (2022) 142 final; Commission, 'Proposal for a Regulation concerning batteries and waste batteries',

COM (2020) 798/3; and Commission, 'Proposal for a Regulation of the European Parliament and of the Council on packaging and packaging waste', COM (2022) 677 final.

4 Commission, 'A new Circular Economy Action Plan For a cleaner and more competitive Europe' COM (2020) 98 final.

5 The circular economy is a new economic model aimed at switching from the previous and dominant linear economy based on the extraction of raw materials, making goods through industrial processes, and throwing them in landfills, a so-called 'take-make-use-dispose' model of production and consumption. Through this circular switch, the value of products, materials, and resources are to be maintained on the market for as long as possible while minimising or eliminating waste production. The circular economy entails, therefore, many 'Re' activities: Recycling, reusing, remaking, reducing, remanufacturing, rethinking, et cetera. On

So far, the EU Commission has developed more than 20 GPP criteria in different sectors, from cleaning products to furniture, public space maintenance and textiles. The criteria consider the environmental performance of products; alternatively, they focus on supporting environmental and innovation goals. The GPP criteria might be integrated into the authority's tender documents. Specifically, they can be inserted into selection criteria, technical specifications, award criteria and contract performance clauses. Nevertheless, GPP criteria are applied voluntarily, meaning that contracting authorities can decide what to purchase and whether to apply said criteria.⁶ Many Member States have transposed GPP criteria into their national laws.⁷ Italy, in particular, has enacted mandatory minimum environmental criteria (MECs). This decision has led to positive national outcomes.⁸ The uptake of GPP requirements increased, and when mandatory requirements were provided, courts declared noncompliance and the re-launch of the public tender.

This article – divided into three parts – focuses on the evolution of the EU's GPP criteria and the Italian MECs, showing how the latter experience positively evolved in implementing GPP requirements.

The first part analyses the historical evolution of GPP criteria in EU law. The second part focuses on the Italian adoption of MECs in public procurement, comparing them to the EU's GPP criteria. In this con-

text, the paper pays particular attention to a recent ruling which declared the ineffectiveness of a stipulated contract, which had followed a flawed procedure lacking mandatory MECs. Finally, the third part concludes with some remarks on mandatory GPP criteria and their possible future developments.

II. EU GPP Criteria: Background and Current Setting

GPP is a tool that contributes to minimising the environmental impact of public purchases.⁹ The EU definition indicates that, in a GPP, the 'public authorities seek to purchase goods, services, and works with a reduced environmental impact throughout their life-cycle compared to goods, services, and works with the same primary function which would otherwise be procured'.¹⁰

When looking back at the policy background of the GPP, one can see that increasing international¹¹ and EU interests in environmental issues has had a prominent role in such policies' development.

At the EU level, the Commission often intervened to spur green purchasing. Several communications have been aimed at stimulating the dissemination and development of greener products, facilitating access and awareness in public procurement.¹² A more integrated approach was launched with the 2003

the topic: Jonas Voorter et al, 'The concept "Circular Economy": towards a more Universal Definition' (2022) 2-2021 *Ius Publicum Network Review*; Ellen MacArthur Foundation, *World Economic Forum and McKinsey & Company, Towards the circular economy. Accelerating the scale-up across global supply chains* (2014) 3.

- 6 See: Kleoniki Pouikli, 'Towards mandatory Green Public Procurement (GPP) requirements under the E.U. Green Deal: reconsidering the role of public procurement as an environmental policy tool' (ERA Forum, 28 October 2020); Peter Kunzlik, 'Green Public Procurement- European Law, Environmental Standards and "What To Buy" Decisions' (30 May 2013) Oxford University Press; Marta Andhov, 'Contracting Authorities and Strategic Goals of Public Procurement – A Relationship Defined by Discretion?' in Sanja Bogojevic et al (eds), *Discretion in EU Public Procurement Law* (Hart Publishing 2019).
- 7 Commission, 'GPP National Action Plans' COM (2022) <https://ec.europa.eu/environment/gpp/action_plan_en.htm> accessed 13 March 2023.
- 8 See: 'Collection of statistical information on Green Public Procurement in the EU Report on data collection results', by PricewaterhouseCoopers, Significant and Ecofys (January 2009); EU Commission, *Buying Green! - A Handbook on green public procurement* COM (2016).
- 9 The EU considers public procurement vital in achieving smart, sustainable and inclusive growth and supporting societal goals. 'Strategic' and 'horizontal policies' of public procurement are the

terms used to indicate that the procurement pursues environmental or social objectives, and not only economic ones. On this topic, see also: Chris Bovis, 'Editorial' (2018) 13(2) *European Procurement & Public Private Partnership Law Review* 87; 'Strategic public procurement: Facilitating green, inclusive and innovative growth' (2017) 12(3) *European Procurement & Public Private Partnership Law Review*, 219; Albert Sanchez-Graells, 'Truly Competitive Public Procurement as a Europe 2020 Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?' *European Public Law* (2016) 2, 377; Sue Arrowsmith and Peter Kunzlik, 'Public procurement and horizontal policies in EC law: general principle' (2009) 9 *Social & Environmental Policies in EC Procurement Law: New Directives, New Directions*.

- 10 Commission, 'Public procurement for a better environment' COM (2008) 0400 final.
- 11 The interest emerged in several international summits, to name a few: World Commission on Environment and Development, 1987; the United Nations Conference on Environment and Development in Rio, 1992; the World Summit on Sustainable development, 2002, the Rio 20+ Summit, 2012, and most recently, the Paris Agreement, 2015.
- 12 Among others: Commission, 'Green paper on integrated product policy' COM (2001) 68 final; Commission, '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) 271 final.

communication on Integrated Product Policy.¹³ The latter encouraged the adoption of National Action Plans (NAPs). The NAPs were aimed at greening the Member States' public procurement. As the contents of the NAPs were not predetermined at the EU level, Member States could set more or less ambitious targets for adopting them.¹⁴ However, the NAPs were conceived of as a means of providing political impetus and raise awareness of GPP. Member States could maintain vast discretion regarding the best-suited political framework, as long as they were facilitating the uptake of GPP.¹⁵

Regrettably, five years after the launch of the communication, only 14 Member States had adopted a NAP. This unsatisfactory result caused the Commission to enact a new communication.¹⁶ This new approach focused on the relevance of public procurement to reduce environmental impact and on how to use the GPP to stimulate innovation. It also set core considerations for public procurement and outlined the limits of applying a GPP at the EU level.¹⁷ These considerations paved the way to reflecting again, and in greater depth, about topics such as life cycle costing, ecolabels and environmental criteria for products and services. Today, these are all subjects scholars trace back to the circular economy.

Undoubtedly, one of the main goals of the 2008 communication was to enact common GPP criteria. A GPP criterion indicates a level of quality commonly established for a product or a service group. Compliance with such guidelines is necessary to attain the objective and qualify the procurement as a green public procurement.

Thus, GPP criteria were designed to become a central tool in green public purchasing. The criteria were initially linked to minimum technical specifications to be complied with by all bids, but were then extended to cover the selection, awarding and contracting of performance clauses. Moreover, the Member States and relevant stakeholders were cooperating to establish common, EU-recognised GPP criteria, avoiding market distortion or the narrowing-down of the competition.

Nonetheless, GPP criteria were not deemed mandatory, as the EU strategy was to invite Member States to introduce them to their NAPs, effectively nudging their national strategies accordingly. To date, such stipulations are still optional.

Since the 2008 communication, the Commission has developed more than 20 common GPP criteria.

Several priority sectors have been chosen. The most recent are the computer, monitors, tablets and smartphones criteria and the road transport criteria. These rules are regularly updated to ensure that the most recent technological and market developments are considered.¹⁸

At the beginning of 2022, the EU Commission gave signals that work is ongoing to render the GPP criteria mandatory. In particular, with the newly-launched initiative for sustainable products,¹⁹ the Commission has been considering several key points of intervention. One introduces a new proposal for a regulation aimed at repealing the Eco-design Directive²⁰ and the setup of mandatory GPP criteria. It is submitted that such a choice is desirable, and will address hindrances to and boost 'green' purchasing. In fact, the impact of GPP criteria has been reduced due to the limitations of voluntary approaches.²¹ By rendering GPP criteria mandatory, the Commission hopes to maximise leveraging public purchasing to demand better-performing products, works and supplies.²² On the other hand, the proposal should also highlight the hindrances that such mandatory provisions might bring up, both at the European level and in national systems. These omissions are not a trivial issue and will undoubtedly face criticism, given that

13 Commission, 'Integrated Product Policy – Building on Environmental Life-Cycle Thinking' COM (2003) 0302 final; 'Green paper – Public procurement in the European Union: Exploring the way forward' COM (1996); 'Public procurement in the European Union' COM (1998)143 def.

14 As of 2022, NAPs or equivalent documents have been adopted in 23 Member States, available online at: <https://ec.europa.eu/environment/gpp/action_plan_en.htm> accessed 30 March 2023.

15 Commission 'Integrated Product Policy – Building on Environmental Life-Cycle Thinking' COM (2003) 0302 final *op cit*.

16 Commission 'Public procurement for a better environment' COM (2008) 400 final.

17 *Ibid*. Uncertain legal possibilities, lack of political support, lack of knowledge, low awareness on life cycle costing, and limited established green criteria.

18 Currently, the Waste Water Infrastructure GPP criteria and the EEE used in the health care sector pending imminent revision. For more, see: 'EU GPP Criteria' (European Commission) <https://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm> accessed 13 March 2023.

19 Commission, 'On making sustainable products the norm' COM (2022) 140 final.

20 Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting eco-design requirements for sustainable products and repealing Directive 2009/125/EC' COM (2022) 142 final, 2022/0095 (COD).

21 *Ibid*, recital 9.

22 *Ibid*, recital 87.

delegated acts will focus on the EU's ability to harmonise the matter, without paying due attention to the various national systems.²³

As the proposal focuses on product eco-design requirements, public contracts awarded by contracting authorities are necessarily included. Under Article 58 of the proposal, GPP requirements may be adopted in the most appropriate form, such as mandatory technical specifications, selection and award criteria or contract performance clauses and targets.²⁴ These requirements are also supposed to consider additional criteria,²⁵ and will be attained through further delegation.²⁶

While the proposed regulation is subject to the EU's ordinary legislative procedure as connoted by possible amendments, negotiations and length, Italy has already anticipated developments at the EU level.²⁷

III. The Italian MECs

1. Legislative Background

Italy was among the first of the EU's Member States to follow up and transpose the Commission's initia-

tive²⁸ on NAPs. Italian law²⁹ initially provided financing for an action plan to create sustainable consumption in the public administration sector. The plan aimed to guarantee the integration of sustainable requirements in public procurement procedures. Among the objectives was reducing the use of natural resources, waste and environmental risks.³⁰

Subsequently, Italy adopted a NAP for GPP via a government decree³¹ that set out the tools, objectives and regulatory strategies for GPP.³² These strategies included an efficient and reduced use of natural resources, as well as and the minimising of waste and hazardous substances.

The Italian NAP foresaw the introduction of a set of MECs,³³ which employed several ministerial decrees to facilitate the implementation of the GPP policy. This enactment process is peculiar as it opted for a *cascade* procedure,³⁴ leaving the enactment of specific minimum criteria to the central administration.

In 2013, the NAP GPP was revised³⁵ to strengthen the spread of GPP. The target was achieved by involving central purchasing bodies and economic operators in defining the MECs, and by promoting more awareness of MECs, EU Ecolabelling, and LCC. However, at that time, the application of MECs was still optional.³⁶

23 The constant 'Europeanisation' of law is being criticised in different fields of law. One of these is in the contract law sector, which is challenged in its classical and traditional assumptions when subject to amendments pursuant to European directives. On the topic, see: Lucinda Miller, *The emergence of E.U. contract Law: Exploring Europeanization* (Oxford University Press, 2011).

24 Proposal for a Regulation, art 58, para 1.

25 Ibid. Namely, '(a) the value and volume of public contracts awarded for that given product group or for the services or works using the given product group; (b) the need to ensure sufficient demand for more environmentally sustainable products; (c) the economic feasibility for contracting authorities or contracting entities to buy more environmentally sustainable products, without entailing disproportionate costs.' (art 58, para 2).

26 Ibid. Art 4 empowers the Commission to adopt delegated acts to supplement the proposed regulation. This empowerment is also extended to the intervention on mandatory GPP criteria.

27 Treaty on the Functioning of the European Union (TFEU) [2012] OJ C 326, art 294.

28 See (n 10).

29 Law No 296/2006 dated 27 December 2006, Republic of Italy.

30 Ibid, art 1, paras 1126, 1127 and 1128. The environmental sustainability targets covered eleven product categories, including road maintenance and transport, and a committee to monitor them.

31 Inter-Ministerial Decree 11.4.2008 n.135.

32 One of the foreseen tools was establishing a new body, a so-called 'Management Committee'. The body was supposed to monitor and control the document further adopted by the Ministry of the Environment (now Ministry of the Ecological Transition).

33 The Environmental Ministry enacted MECS, now the Ministry of the Ecological Transition. Currently, there are 18 purchase categories of public procurement using those criteria (waste, cleaning, urban planning, public lighting, et cetera). The MEC's documents are available online at: <<https://www.minambiente.it/>>.

34 The legislator lists the categories of goods that are to be part of MECs. Then, the central administration has a *technical discretion* to enact the NAP, and subsequently, the MECs for specific sectors. The central administration (government) decides the content of MECs by ministerial decrees of the Environmental Ministry, more recently renamed Ministry of Ecological Transition. The role of the regions is also relevant, as the NAP expressly invited them to include GPP in their sectoral legislation. For more, see: Francesco de Leonardis, 'Criteri di sostenibilità energetica e ambientale' 185, in Maria Alessandra Sandulli and Rosanna De Nictolis (eds), *Trattato sui contratti pubblici. Soggetti, qualificazione, regole comuni alla procedura di gara* (Giuffrè, Francis Lefebvre 2019).

35 Law-Decree No 102 of 10 April 2013, Official Gazette of the Republic of Italy, 3 May 2013.

36 The only exception concerned the purchasing of vehicles and buses: The European Commission's Directive 2009/33/EU put forth regulations promoting clean and energy-efficient vehicles in road transport. These rules are currently enforced.

The turning point in the mandatory nature of the MECs was the adoption of a new law in 2015³⁷ containing an environmental annex (hereafter, the Annex). The mandatory nature of MECs was first included in Article 18 of the new law, subsequently repealed. Since 2017, this legislation has been inserted in the Public Procurement Code (PP Code),³⁸ implementing the MECs' new concessions, public sector, and utility directives.

The Annex paved the way for a major environmental switch, moving from a discipline of countless, non-binding statements without practical applications to an innovative and, more importantly, binding discipline. The Annex impacted many aspects of Italian public procurement: It reduced the provisional and final guarantee deposit for economic operators with environmental certifications. It also introduced the Ecolabel certification and the life cycle costing (LCC) among the award criteria based on the most economically advantageous tender (MEAT), as well as the evaluation of greenhouse gas emissions, to be calculated according to the European Commission's recommendation.

The Annex also intervened on a few other provisions of the previous Italian PP code to facilitate the use of GPP, accounting for the latest European regulations³⁹ on eco-management and quality labelling.⁴⁰

In line with the aforementioned, repealed law, the code went a step further than the PP Directive Package.⁴¹ The 2017 amendment to the PP code reiterated the mandatory nature of MECs in its Article 34.⁴²

2. Definition and Characteristics of MECs

The first NAP defined the MECs as the 'technical indications' of the plan. The MECs consist of both general and specific environmental considerations. When possible, the MECs also include ethical and social considerations linked to the different phases of tendering procedures (subject matter of the contract, technical specifications, award criteria and contract performance clauses).

It was established that, if the MECs were included in the PP, the procurement could be classified as 'sustainable'.⁴³ The wording 'minimum' environmental criteria suggest that they are the 'basic' elements for an environmentally-friendly purchase and an adequate response from the market.⁴⁴ It can, therefore, be argued that, by setting limitations only for minimum indicators, nothing precludes a possible *in-meius* derogation, as long as the core principles of public procurement are followed.⁴⁵

As for the EU's GPP criteria, the MECs were first published in priority sectors.⁴⁶ They are periodically

37 Law No 221, dated 28 December 2015, Republic of Italy had an Environmental Annex entitled 'Provisions on environmental matters to promote measures of green economy and for the containment of the excessive use of natural resources'.

38 Legislative Decree 50/2016 dated 18 April 2016, 'Public contract code', Republic of Italy first repealed the provision on minimum environmental criteria. Then, the new article on mandatory MECs was inserted with Legislative Decree 56/2017, modifying the previous one.

39 EU Regulations (EMAS) 1221/2009 on organisations' willing participation in eco-management and auditing [2009] OJ L 342 and (Ecolabel) 66/2010 on participatory labelling of products as environmentally friendly [2010] OJ L 27.

40 See also: Alessandro Massari, *Le novità introdotte dalla L.221/2015 sulla green economy e gli appalti verdi* (Appalti e Contratti 2016).

41 Council Directives 2014/23 of 26 February 2014 on the award of concession contracts [2014] OJ L 94; 2014/24 of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94 and 2014/25 of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94.

42 Art 34, 'Contracting authorities shall contribute to the achievement of the environmental objectives envisaged by the Action Plan for the environmental sustainability of consumption in the public administration sector by including in the tender documentation at least the technical specifications and contractual clauses

contained in the minimum environmental criteria adopted by decree of the Minister for the Environment (...). The minimum environmental criteria defined by the decree in paragraph 1, in particular the award criteria, shall also be taken into consideration when drafting the tender documents for the application of the criterion of the most economically advantageous offer [...]. The obligation outlined in paragraphs 1 and 2 shall apply for tenders of any amount, with regard to the categories of supplies and tenders of services and works subject to the minimum environmental criteria adopted within the Action Plan mentioned above' (author's translation).

43 In 'Action Plan for the Environmental Sustainability of Consumption in the Public Administration', published by the Italian Ministry of Environment, 13.

44 Ibid, 13.

45 Directive 2014/24, art 18. The principles of public procurement are non-discrimination, transparency, proportionality and equal treatment. While at the EU level, the concept of opening up the competition it is still being discussed. It could be seen as a principle, a tool or a purpose in Italian legislation. Case law regarding 'the principle of free competition' is constantly mentioned. On EU PP principles, see: Carina Risvig Hamer and Marta Andhov, 'Public Procurement Principles' 187-207, in Roberto Caranta and Albert Sanchez-Graells (eds), *European Public Procurement Commentary on Directive 2014/24/EU* (Edward Elgar Publishing 2021).

46 A sector is identified as a 'priority' based on the maturity of the reference sector, the volume of public expenditure and the potential for reducing environmental impacts.

updated based on technological and market developments.

The Italian administrative courts also underlined that adopting mandatory MECs responds to many national policy objectives. The MECs are obligations that ensure that the national GPP policy is effective. These obligations do not focus solely on the reduction of environmental impact, but also on promoting more sustainable, 'circular' production and consumption patterns and spreading 'green' employment.⁴⁷ They also maintain the goal of rationalising the consumption and expenditure of the public administration,⁴⁸ whilst enhancing environmental criteria and compliance with social criteria.

Thus, under Article 34 of the PP code, contracting authorities must carry out the environmental objective of the NAP GPP. This obligation requires the inclusion of the MECs in the preparation and tendering of PP documents. The MECs must *at least* be included in the technical specifications and contract performance clauses. As the Italian Council of State – the highest administrative court – recently held, these provisions are far from mere programmatic rules. In fact, not only are they immediately binding obligations, but they are also applicable independently both above and below the EU thresholds.⁴⁹

The introduction of mandatory MECs has also impacted the decision of the contracting authorities on 'what to buy'.⁵⁰ Whilst PP Directives set out the 'how to buy' rules, leaving discretion to the contracting authorities regarding the definition of their needs, this is now different in the Italian case. Again, the Coun-

cil of State upheld that, when a MEC for a specific public purchasing is enacted, the contracting authority cannot autonomously decide whether to pursue environmental objectives or how to pursue them. Instead, they are to be implemented at least as envisaged by the ministerial decrees.⁵¹

Therefore, contracting authorities must include the MECs in the tendering documents to spur *virtuous* economic operators to offer goods, works and services with less environmental impact.

In light of the above, alongside the EU level, the Italian doctrine and case law are gradually steering public procurement towards sustainability, not only for the specifically-targeted sectors already provided with mandatory MECs, but as an overall conceptualisation.⁵²

Another piece of evidence is given by Article 30 of the PP code. Article 30 enumerates the underpinning principles of public procurement in the Italian system, highlighting that the cost-effectiveness principle may be submitted – insofar as it is expressly permitted – to criteria inspired by social needs and the protection of the environment.⁵³ By doing so, public procurement is brought back to the founding principles of the Italian Constitution, which have recently expressly included the – already implicitly recognised – principle of environmental protection.⁵⁴

The Italian legislator has provided additional tools to guarantee compliance and accurate implementation of the MECs. The first is the provision of Article 211 of the code mandating the Italian Anticorruption Agency⁵⁵ to monitor the uptake of SPP, taking action

47 Point 16.4, Council of State, 5th Section, 5 August 2022, n. 6934.

48 GPP is becoming a tool of a circular economy in which 'system', 'interconnection', 'circularity', 'end of life' and 'blue economy' are key words. See: Francesco De Leonardis, 'Criteri di sostenibilità' (n 35) 193.

49 Legislative Decree 50/2016 (n 39) and Council of State (2021) 972, 5th Section, art 34, para 3.

50 See (n 4).

51 Council of State 972/2021 *op cit*. In this litigation, which concerns the supply energy services for buildings, the Council of State underlined that even when the contracting authority maintains its discretion (eg, the duration of the contract), the choices must be coherent with the applicable minimum environmental criteria.

52 There is a need to deeply reassess and reflect the underpinning legal background in light of the societal challenges and rebuild the normative structure that bears sustainability in mind to guide a more resilient economy. More on the topic: Giovanni Fabio Licata, 'I contratti pubblici come strumento di promozione dell'innovazione', in Andrea Maltoni (ed), in *I contratti pubblici*:

La difficile stabilizzazione delle regole e la dinamica degli interessi (Editoriale Scientifica, 2020) 218; Giuseppe Franchina, 'Contratti pubblici e criteri ambientali minimi' (2022) XXII:2 AmbienteDiritto; Elisa Scotti, 'Poteri pubblici, sviluppo sostenibile ed economia circolare' (2018) 65:98 Il diritto dell'economia 1; Giampolo Rossi, 'Dallo sviluppo sostenibile all'ambiente, per lo sviluppo' (2020) 1 L'ambiente per lo sviluppo. Profili giuridici ed economici 4.

53 It is argued that while before, the public contract was strongly based on the private purchasing component, now its moving to the achievement of generic interests that public administration must continuously pursue, De Leonardis (n 35) 170.

54 Constitutional Law No 2 of 11 February 2022, Republic of Italy modified the Constitution at arts 9 and 41, providing the environmental protection and highlighting both the role of the public institutions and of citizens.

55 The Italian Anticorruption Authority (ANAC) was created to implement art 6 of the United Nations Convention against Corruption (UNCAC). ANAC is an independent authority whose institutional mission is to prevent corruption in all areas of administrative activity.

if needed,⁵⁶ and the second is the collaboration⁵⁷ among public institutions, which follows a recent EU communication.⁵⁸

Ultimately, the question that immediately arises when delving into the mandatory nature of the MECs is whether they must be identified as participation or execution requirements, or if they are to be considered essential elements of the bid. Italian case law opted for the latter, considering the requirements provided in the MECs as essential elements. The Regional Administrative Court of Milan⁵⁹ stated that the provisions contained in the MECs are necessarily part of both the public tender and of the submitted bids, as they represent essential elements forming the will of the contracting authority. Thus, if MECs are not present in public tenders, the submitted bid will not be compliant with the essential requirements of the contracting authority.⁶⁰ The public bodies have an *a fortiori* burden of fairness and of protecting the legitimate expectations of the participants, meaning that the requirements – including the MECs – are prodromic⁶¹ and essential to ensure, on the one hand, the stipulation of the contract, and on the other, the principles of procurement.

Thus, as MECs are essential elements of the public tender, should they lead to the exclusion of the tender requiring a tenderer, under domestic procedural rules, to bring immediate action before administrative courts whenever they are absent in the ten-

der documents? Answering this question has not been trivial, and required the intervention of the Plenary (full) Session of the Council of State.⁶² The crucial point lies in the assumption that immediately challenging a public tender is an exception to the general rule, which states that the public tender shall be appealed along with the final documents harming the appellant. Therefore, exceptions concern cases where the public tender precludes the participant (i.e., economic operator), and the *rationale* lies in guaranteeing that the competition will widen up.⁶³ In conclusion, only if the tender provision has an exclusionary effect must it be immediately challenged. As such, MECs are not impeding the participation in either the award procedure or the formulation of an offer. Consequently, their infringement is correctly challenged only after the enactment of the document awarding the contract.

3. Recent Findings from Council of State's Case Law: Noncompliance with MECs Can Lead to Declaration of Ineffectiveness of Public Contract

As the mandatory nature of the MECs is clearly established, the Italian administrative courts have had a prominent role in guaranteeing their effective enforcement. Since the MECs' introduction, a number of Italian cases – both first-instance decisions and ap-

56 Among others, ANAC has been given the power to provide pre-litigation opinions. When in breach of MECs' provisions, whoever has the legal interest can start a pre-litigation opinion by sending a complaint to ANAC. ANAC's opinion is binding and can be brought against the administrative courts. Moreover, ANAC has the legitimate interest to bring an action autonomously before the administrative court when a violation – such as the absence of MECs – has occurred. See: Legislative Decree 50/2016 (n 39) arts 211 and 213.

57 The Ministry of Ecological Transition and ANAC are constantly in collaboration to monitor the implementation of the MECs. The last Agreement, 'Protocollo di Collaborazione', was enacted on 29 October 2021. The collaboration includes a) the monitoring and surveillance of the application of MECs; b) regulatory and steering activities to implement the rules on environmental sustainability in public procurement (eg, guidelines) and c) training activities. However, the collaboration has more impact on paper than in practice. During the research conducted so far, no national measures or tools ensuring practical monitoring of MECs have been found.

58 '[...]. the Commission will propose minimum mandatory green public procurement (GPP) criteria and targets in sectoral legislation and phase in compulsory reporting to monitor the uptake of Green Public Procurement (GPP) without creating unjustified administrative burden for public buyers.' In Commission, 'Circular economy action plan, For a cleaner and more competitive Europe', COM (2020) 98, 5.

59 Regional Administrative Court of Milan, No 685, dated 24 April 2020, Section I.

60 Usually, in order to determine whether an agreement has actually been concluded, it is necessary to inquire whether, in previous negotiations between the parties, the promisor has made a definite offer, and that the promisee has responded with an equally definite acceptance of that offer. For this specific case, the Court explained the public procedure as correspondent to the contract law: The contracting authority recalls a shopkeeper who displays goods while offering the public tender the invitation to treat. On the other hand, the economic operations that decide to submit an offer are the customers who offer to buy the goods. However, the shopkeeper may choose to accept or refuse the offer. On the topic, see: Sir Jack Beatson et al, *Anson's Law of Contract* (Oxford University Press 2010) 29-75.

61 From Greek *prodromos*, precursor, meaning they have to be included.

62 Council of State, Plenary Session dated 26 April 2018, No 4.

63 For example, the choice of the procedure and the award criteria are not immediately harmful elements and do not require direct appeal, as they do not limit participation in the tender.

pellate judgments – have been decided, clarifying the implications of MECs' mandatory nature.⁶⁴

Before the Council of State's ruling n. 8773/2022 ('*Pastore*'),⁶⁵ courts have only decided upon the annulment of the call for tenders and the subsequent award decision.⁶⁶ In *Pastore*, however, the Council of State went one step further, imposing the ineffectiveness of the contract concluded in the meantime, as well as the re-tendering of the public tender.

The *Pastore* case concerned a tender for a contract regarding a full self-service catering service. The company *Pastore* participated in the procedure and, in the end, was ranked fourth. *Pastore* subsequently challenged the ranking before Bari's regional administrative court.⁶⁷ The applicant grounded his appeal on the erroneous application (among others) of Article 34 of the PP code and the violation of the Ministerial Decree of 10 March 2020.⁶⁸ In particular, the applicant alleged that the tender documents were unlawful, as they did not include the requirements of the MEC enacted for the purchase sector. *Ladisa* (the winning bidder and defendant) claimed that the appeal was inadmissible on the grounds that *Pastore* should have challenged the notice directly, and not simply its unfavourable ranking at a later stage. *Ladisa* also claimed a lack of interest in bringing the proceedings, as *Pastore* was not even the runner-up, but fourth place in the ranking.

The Regional Court dismissed the case based on two reasons. Firstly, the Court held that *Pastore* should have challenged the tender notice in a timely manner. The absence of the MECs had to be considered an essential impediment⁶⁹ to participating in the procedure.⁷⁰ Secondly, the Court held that *Pastore* did not have a legal interest in bringing the action, as it submitted neither evidence of having complied with the MECs nor that its placement in the ranking would have been different if it had complied with the MEC. The case was dismissed and the winning bidder, accordingly, stipulated the supply contract with the contracting authority.

Pastore appealed the decision before the Council of State. It contested the regional court's finding, reiterating its original grounds. The Council of State overturned the first instance ruling. Firstly, the Council decided, noncompliance with Article 34 of the PP code by the tender notice does not require the claimant to immediately bring an appeal.⁷¹ Therefore, participating in the tender and appealing only after the award decision cannot be construed as acquiescence to the tender rules.

Regarding the mandatory nature of the MECs, the Council of State highlighted that the MECs are the consequence of the evolution of the function of public procurement contracts. Public contracts go from 'mere instruments of purchasing goods and services to becoming economic policy instruments, in particular, GPPs are to be seen as a part of the circular economy' (author's translation).⁷²

Moreover, *Ladisa* argued that, notwithstanding the noncompliance of the tender notice with the MECs, it had, nonetheless, offered a bid in line with generic MEC requirements (eg, biological products and certifications). The Council of State found that *Ladisa*'s allegation could not suffice to assert that the awarded tender had a result in line with the purpose of the law (ie, MEC), as, in the present case, MECs were totally disregarded. The contracting authority did not lay down one of the essential elements constituting its will, nor to what extent environmentally-friendly requirements were demanded. As a consequence, the bids could have never been correctly and properly evaluated. In addition, the claim that the winning tender was nevertheless in line with the relevant MEC does '*not coincide with the legal framework*', the Court ruled. The environmentally friendly elements of *Ladisa*'s bid were only '*partial, casual, and occasional*'. Above all, they were '*voluntarily*

64 Actions are being brought before the Regional Administrative Courts. Decisions of the Regional Administrative courts are appealed before the Council of State, whose judgments are final. On the topic: Antonello Tarzia, 'Public Administration', in Giuseppe Franco Ferrari (ed), *Introduction to Italian Public Law* (3rd edn, Giuffrè, 2022).

65 Council of State, No 8773 of 14 October 2022, section 3.

66 Council of State, No 972 of 3 February 2021, section 5; Council of State, No 6934 of 5 August 2022, section 5.

67 Regional Administrative Court for Puglia, Bari, No 1702 of 23 November 2021, section 2.

68 Minimum Environmental Criteria for the Canteen Service and Food Supply enacted by the Ministry of Environment.

69 MECs are essential elements of the public tender (n 58).

70 The late action would be, according to the Court, an infringement to both the principles of administrative law and good faith and fairness between the conduct of parties of a juridical connection.

71 MECs do not impede the participation in the tender *per se*.

72 Council of State, No 8773 of 14 October 2022, section 3, point 8: '*connota[re] l'evoluzione del contratto d'appalto pubblico da mero strumento di acquisizione di beni e servizi a strumento di politica economica: in particolare, come affermato in dottrina, i cc.dd. green public procurements si connotano per essere un "segmento dell'economia circolare"*'.

“granted” by the tenderer who was – wrongfully and in contradiction with the law – not obliged to include them (author’s translation).⁷³

For these reasons, the Court decided to overturn the judgment under appeal and annulled the contested tender documents. The contract stipulated between Ladisa and the contracting authority was declared ineffective, and the award procedure was repeated.

Regarding the ineffectiveness of the contract, the case illustrates and applies one of the distinctive remedies of the Italian system before the administrative judge.

The Italian administrative procedural code (‘CPA’)⁷⁴ provided for ineffectiveness as a general remedy⁷⁵ going well beyond the cases provided by Article 2d of the Remedies Directive.⁷⁶

More precisely, Article 122 of the CPA states that the same court that declares the annulment of the award procedure also decides upon the ineffectiveness of the contract wrongfully stipulated. Two situations might occur: In the first case, the award of the contract is flawed – as in the present case – mandating, as a direct consequence, the repetition of the tender.

In the second case, this is unnecessary, and the applicant can demand the former contractor. In this case, the court decides – upon the petitioner’s request – whether to replace the contractor in the stipulated contract. The court must consider additional elements such as: The start date of the replacement of the petitioner with the previous contractor; the interests of the parties; the petitioner’s real chance to continue the execution of the contract in light of the infringements found; the state of performance of the contract and the actual possibility of replacement.⁷⁷ This is to say that when re-launch of the tender is not required, the administrative court will decide upon all of the consequences of ineffectiveness.

Courts have been highlighting such assertions, confirming that the administrative court has the possibility of tailoring the ineffectiveness of public contracts, including the coordination of the declaration of ineffectiveness and the obligation to repeat the procedure.⁷⁸

Moving back to the *Pastore* case, the contracting authority stipulated a contract for a 30-month catering supply with *Ladisa* on 17 September 2021. The first instance judgment dismissed the case, but in appeal, the Council of State upheld *Pastore*’s grounds

and applied Article 122 CPA. However, the *Pastore* ruling was given in September 2022 (and published on 14 October 2022), meaning that the contract has been executed by *Ladisa* for over a year. The Court justified the declaration of ineffectiveness on the grounds that the infringement concerned a provision that was protecting *supra-individual* interests. Therefore, replacing the ongoing contract was not a desirable solution.

This is to show that the ineffectiveness is to be considered an ordinary remedy in the Italian system. The protection of the public interest prevailed over both the contractual interests of the parties and the risk that, by complying with the MECs, *Ladisa* may have been awarded the contract anyway, so that a substitution was not foreseeable on the facts of the case.

IV. Concluding Remarks and the Way Forward

The MECs are the result of the strategic use of public procurement in Italy to achieve different objectives from just economic ones.⁷⁹ Unquestionably, it

73 Ibid, point 9: ‘una simile affermazione [...] non coincide[re] con lo schema normativo di riferimento, si connota per essere soltanto parziale, casuale ed occasionale; ma soprattutto, volontariamente “concessa” dall’offerente (che, in base alla legge di gara, a ciò non era tenuto)’.

74 Legislative Decree 1/2010 dated 2 July 2010, Republic of Italy (CPA) arts 121 and 122, n 104.

75 See also: Mario Comba, ‘The Italian System of Remedies’ in Steen Treumer and François Lichère (eds), *Enforcement of the EU Public Procurement Rules* (DJOF Publishing 2011).

76 Council Directive 2007/66 of 11 December 2007 with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L 335.

77 CPA (n 74) art 125 provides an exception to the discretion of the judge. The article states that if strategic infrastructures override national interest, a petitioner cannot replace the contractor who stipulated the first contract. In this instance, the only remedy allowed is to award damages.

78 However, the Italian Courts have considered that some tender procedures might have particular relevance: For instance, the provision of assistance services for disadvantaged persons. In such cases, the appropriate measures were taken when deciding upon the ineffectiveness of the contract (i.e., the ineffectiveness was postponed; the termination of the contract was without prejudice to the service rendered in the meantime; the continuity of the service was guaranteed without interruption). See: Judgment of Regional Administrative Court, Rome 12 May 2021 section 2, n 1737.

79 The Italian doctrine has also referred to an ‘auxiliary function’ of the public procurement, used as a tool for the industrial policy. See: Gabriella M Racca, ‘La contrattazione pubblica come strumento di politica industriale’ in Carlo Marzuoli and Simone Torricelli (eds), *La dimensione sociale della contrattazione pubblica. Disciplina dei contratti ed esternalizzazioni sostenibili* (Editoriale Scientifica 2017).

comes out as a historical revolution and a pioneering approach among the Member States.

It goes without saying that judicial enforcement also plays a pivotal role, paving the way for a more integrated approach to horizontal policies in public procurement. The case discussed here clearly upheld the targets of the MECs, serving their purpose by declaring the ineffectiveness of a contract that was stipulated following a flawed procedure.

The Court has correctly taken steps to rectify an error in the procedure and in the decision of the first instance. Disregarding the winner's pleading – that they had offered a bid in line with MECs, even if not requested by the tender – the Court held that the procedure for the specific product category should have included the MEC from the start. If no bidder had offered an offer of sufficient quality, the tender would have been awarded to an economic operator who would have submitted an offer noncompliant with MEC rules, and the latter would have been breached.

The ranking of the applicant is also worth remarking on. *Pastore* was only the fourth in the ranking process. With unsuccessful results, the winning tenderer tried to argue against *Pastore's* lack of interest in pursuing its action. However, the Court has cor-

rectly stated that *Pastore's* interest and claims were intended to invalidate the entire procedure and stipulated contract – not to bring an action against the other participants who, in the litigation, only had opposed interests. It follows that the final ranking did not limit *Pastore's* possibility to initiate the litigation. Thus, its interest to appeal was legitimate.⁸⁰ Remarkably, the ruling sheds light on the real possibility of economic operators participating in a tender to stand up and require compliance with environmental and social requirements.

Another distinctive aspect of the judgment, however, is that it puts well-deserved emphasis on the MECs. The Court held that MECs have the innovative peculiarity of including environmental requirements whilst defining the contract's subject matter. In other words, the Italian legislature intervened heavily in the discretion of the public buyer when choosing what to buy.⁸¹

Implementing mandatory MECs in Italian law has achieved positive results. As previously said, the MECs are mandatory both above and below the EU thresholds, upheld in the case law. The close cooperation between the Minister for Ecological Transition and the Italian Anticorruption Agency constantly monitors their implementation.⁸² However, some reports⁸³ have also showcased that, in practice, MECs might be affected by a deficiency in their concrete application.⁸⁴

In conclusion, despite the several tools implemented by the Italian legislator and enforced by the Italian courts, I contend that, while mandatory EU GPP criteria will undoubtedly accelerate the achievement of GPP and therefore, sustainability goals, they will not change the game overnight. As the Italian saga illustrates, the introduction of mandatory MECs discloses a legal system that is – in theory – mature and comprehensive enough to protect the environment and to steer public procurement, and which is – in practice – still suffering practical shortcomings that require the intervention of the administrative courts.

The European Union's engagement in adopting mandatory GPP criteria is of unquestionable relevance. However, the Member States will be the main actors in the actual enforcement of these criteria. As the Italian experience showcased, the remedies foreseen by Directive 89/665 – as amended by Directive 2007/66 – might lead to different solutions, depending on the domestic systems implementing them.

80 The Italian doctrine and case law identified a so-called '*pretextual interest*' (*'interesse strumentale'*) to the re-launch of the public tender. Such an interest is held by the economic operator with an unsatisfactory result. Today, he aspires to a more favourable outcome; he does not hold a legitimate interest. However, he is satisfied by the possibility of a better result when the administrative power is exercised in a legitimate way. On the topic, see (in Italian), Council of State, Plenary Session of 26 April 2018 (n 4); and Francesca Trapani and Luigi Randazzo, 'L'interesse strumentale alla riedizione della gara nella fase di esecuzione dell'appalto pubblico, anche con riferimento a mezzi di tutela amministrativi e giurisdizionali' (2022) XIV:11 Registrata presso il Tribunale di Catania.

81 See (n 4).

82 See (ns 53, 54).

83 Eg, Osservatorio Appalti Verdi et al, 'I numeri del Green Public Procurement in Italia, Rapporto 2022' Silvano Fallocco et al (eds), 2022.

84 According to a recent report, only 35 provincial municipalities (out of 111) would apply MECs in 80% of their public procurement. Meanwhile, a few do not apply them at all. The report affirms that the partially higher percentages in the adoption of MECs correspond to bigger cities (eg, Padova with 100%). They suggest that, having a solid bureaucratic infrastructure able to adopt environmental and social criteria, but is not yet too complex to impede the day-to-day implementation of GPP, is helpful. However, compared to previous reports, provincial municipalities adapted to MECs more quickly than other contracting authorities. The report also proposed additional interventions, such as: The development of monitoring activities; strengthening institutional ability; identifying a contact person in all public administrations and extending the MECs by identifying new product sectors.

The Italian remedy of ineffectiveness and the power given by the CPA to administrative courts might be considered as having too much or too little space for movement. Legislations and case law of the Member States will surely intervene to adapt the specific connotation of the EU's new, mandatory GPP criteria. This could also determine a fresh new conceptualisation and design for the Italian MECs.⁸⁵ However,

so far, the Italian approach, using the ineffectiveness of the contract as a general and well-established remedy, has proven successful to ensure the enforcement of MECs.

⁸⁵ They could be intended not as essential elements; rather, they could be challenged in different moments of the procedure, etc.