REGULATING
SUSTAINABLE PUBLIC PROCUREMENT IN TURKEY
IN THE CONTEXT OF THE EUROPEAN UNION MEMBERSHIP

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Abstract

This thesis examines the regulation of sustainable public procurement in the Republic of Turkey in the context of Turkey's membership negotiations with the European Union. Sustainable public procurement is the procurement whereby contracting authorities take account of all three pillars of sustainable development (economic, social and environmental) when procuring goods, services or works.

The thesis aims to clarify whether and to what extent sustainable development concerns can be taken into account under the Public Procurement Act numbered 4734, which is the main legal framework of public procurement in Turkey. Furthermore, it aims to identify possible options for improving sustainable development-oriented public procurement regulation in Turkey. The thesis essentially uses black letter and comparative legal research methods in order to achieve its objectives.

This thesis argues that the correlation between public procurement and sustainable development is strong in the EU, whereas such a correlation shows a weak profile in Turkey. In that regard, this thesis proposes the rules that need to be improved for establishing a sustainable public procurement system in Turkey, taking into account the local dynamics of the Turkish public procurement system, and in the context of the membership negotiations with the EU. This thesis argues that the existence of a clear mandate for sustainability concerns, putting forward a strong political backing, establishing a coherent institutional framework and laying down a consistent and clear legal framework and an effective enforcement/remedy system are the essential peripheral conditions for promoting sustainable public procurement in Turkey.

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List of Abbreviations

CJEU	:	The Court of Justice of the European Union
EAP	:	Environmental Action Programme
EIA	:	Environmental Impact Assessment
EMAS	:	The Eco-Management and Audit Scheme
EU	:	The European Union
FLO	:	The Fair-trade Labelling Organisation
Goods Regulation	:	The Turkish Regulation on Implementation of Goods Procurement
GPA	:	The WTO Agreement on Government Procurement
GPP	:	Green Public Procurement
IMF	:	The International Monetary Fund
ISO	:	The International Organisation for Standardisation
Labelling Regulation	:	The Turkish Regulation Pertaining to Labelling and Standard Product Information of Energy and Other Resource Consumptions of the Products
LCC	:	Life-cycle costing
MEAT	:	The most economically advantageous tender
PP Board	:	The Turkish Public Procurement Board
PP Communication	:	The Turkish General Communication of Public Procurement
PP Contracts Act	:	The Turkish Public Procurement Contracts Act
Public-Sector Directive	:	EU Directive 2004/18/EC
Review Regulation	:	The Turkish Regulation on Administrative Applications against Procurements
SA-8000	:	The Social Accountability 8000
SCP/SIP Plan	:	The Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan
SD Strategy	:	Sustainable Development Strategy
SEEs	:	State economic enterprises
Services Regulation	:	The Turkish Regulation on Implementation of Services Procurement
SMEs	:	the small and medium sized enterprises
SPP	:	Sustainable Public Procurement
TEU	:	The Treaty on the European Union
TFEU	:	The Treaty on the Functioning of the European Union
TPP Act	:	The Turkish Public Procurement Act numbered 4734
TPP Authority	:	The Turkish Public Procurement Authority
TS Institution	:	The Turkish Standards Institution
UN	:	United Nations
UNFCCC	:	The United Nations Framework Convention on Climate Change
Utilities Directive	:	EU Directive 2004/17/EC
Works Regulation	:	The Turkish Regulation on Implementation of Works Procurement
WTO	:	The World Trade Organisation

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CHAPTER 1

Introduction

1.1 Background

1.1.1 Public procurement and sustainable development: an important and complex partnership

Public procurement can be simply defined as the process where goods, services or works are acquired by public bodies to carry out their primary functions.[1] Public procurement is normally regulated by both domestic legislation and international and regional trade agreements that influence domestic rules.[2]

The regulation of public procurement is a dynamic area since the changing circumstances or requirements to meet certain objectives at national and international level requires the adoption of new rules or modification of existing rules. For instance, the significance of public procurement for international trade is increasing due to the size of the public procurement markets, which leads to development of international and regional public procurement regimes that aim to improve public procurement systems to liberalise public procurement markets.[3]

One of the issues that substantially influence the regulation of public procurement at both national and international levels is the concept of sustainable development. The concept of sustainable development has been primarily shaped by the initiatives taken within the United Nations. The most widely quoted definition of sustainable development is "*development that*

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[1] For the components of definition see, Sue Arrowsmith, *The Law of Public and Utilities Procurement* (London: Sweet & Maxwell, 2005), p. 1.

[2] For a comprehensive examination of regulation of public procurement see Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (New York: Oxford University Press, 2004), p. 27 et seq.

[3] Public procurement expenditure represents about 16 per cent of the EU's GDP. See, European Commission, Impact and Effectiveness of EU Public Procurement Legislation (Commission Staff Working Paper) SEC(2011)853 Part 1; The Organisation for Economic Co-operation and Development (hereafter 'the OECD') estimates the size of public procurement markets on average at 10-15% of GDP across the world. See, OECD, *OECD principles for integrity in public procurement* (Paris: OECD, 2009), p. 9.

meets the needs of the present without compromising the ability of future generations to meet their own needs".[4] Sustainable development has received a considerable amount of attention from the international community and there has been an increasing recognition of sustainable development as an objective of the international community in various international and regional instruments.[5]

Sustainable development, in its simplest definition, is the process of finding equilibrium between economic development, protection of the environment and social development. In that regard, it has a conceptual breadth and magnitude that goes far beyond the protection of the environment. Despite the recognition of sustainable development in various international and regional instruments, sustainable development is argued to be a contested and complex concept.[6] Indeed, the meaning and substance of sustainable development depend on the legal context in which it is applied. It is important to note that different contexts could bring different pillars or themes of sustainable development forward and could give more concrete normative values to different pillars or themes.

[4] Report of the World Commission on Environment and Development: Our Common Future UN Doc A/42/427 available at <www.un-documents.net/our-common-future.pdf>

[5] For instance, the 1994 Marrakesh Agreement establishing the World Trade Organisation (hereafter 'the WTO') under its Preamble cites sustainable development as the framework of "*optimal use of the world's resources*". For the references to sustainable development in a wide range of international agreements see, Christina Voigt, *Sustainable development as a principle of international law resolving conflicts between climate measures and WTO law* (Leiden; Boston: Martinus Nijhoff Publishers, 2009), p. 20-21.

[6] For the discussions on the meaning and legal status of sustainable development see, Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable development law : principles, practices, and prospects* (Oxford, UK: Oxford University Press, 2004), p. 4; H. M. Osofsky, 'Defining Sustainable Development After Earth Summit 2002' (2003) 26 *Loyola of Los Angeles International and Comparative Law Review* 111, p. 104; Tatyana P. Soubbotina, *Beyond economic growth : an introduction to sustainable development* (Washington, D.C.: World Bank, 2004), p. 8; Andrea Ross, 'Modern Interpretations of Sustainable Development' (2009) 36 *Journal of Law and Society* 32, p. 34; Voigt, note[5], p. 39; Philippe Sands, 'Environmental Protection in the Twenty-First Century: Sustainable Development and International Law' in Revesz Richard L., Philippe Sands and Richard B. Stewart (eds), *Environmental law, the economy, and sustainable development : the United States, the European Union, and the international community* (Cambridge [England]; New York: Cambridge University Press, 2000), p. 374; Michael Decleris, *The law of sustainable development : general principles (A report prodeuced for the European Commission)* (Luxembourg: Office for Official Publications of the European Communities, 2000), p. 33.

The core element of sustainable development is the principle of integration (or so-called integrated decision-making).[7] Economic development, the protection of the environment and social development are interdependent and mutually reinforcing pillars of sustainable development. The principle of integration, in that regard, requires simultaneous and coherent incorporation of economic, social and environmental concerns into developmental decision-making.

It is noteworthy that the policy documents that conceptualise sustainable development have considered public procurement as an important instrument that needs to be used effectively in order to achieve sustainable development. Such policy documents lay down the overall framework of the correlation between sustainable development and public procurement and leave the details of implementation to the local context. Furthermore, in order to guide its members on this matter, the United Nations initiated the Marrakesh Process in 2003 with the active participation of various national governments, development agencies and civil society.[8] In this context, a separate task force entitled 'Sustainable Public Procurement' was established in order to provide a practical methodology for designing and implementing policies on sustainable public procurement and to propose recommendations for the implementation of sustainable public procurement in different legal contexts.[9]

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[7] See, Cordonier Segger and Khalfan, note[6], p. 102; Voigt, note[5], p. 35 and p. 129; Tracey Strange and Anne Bayley, *Sustainable development : linking economy, society, environment (OECD Insights)* (Paris: OECD, 2008), p. 25; Alan E. Boyle and David Freestone (eds), *International law and sustainable development: past achievements and future challenges* (Oxford; New York: Oxford University Press, 1999); John C. Dernbach, 'Sustainable Development: Now More Than Ever' (2002) 32 *ELR* 10003, p. 10010-10015; Decleris, note[6], p. 60-125; Rajendra Ramlogan, *Sustainable development: towards a judicial interpretation* (Leiden; Boston: Martinus Nijhoff Publishers, 2011), p. 64.

[8] For background and activities of the Marrakech Process see <http://esa.un.org/marrakechprocess/about.shtml>

[9] The Marrakech Task Force on Sustainable Public Procurement is composed by the following countries and institutions: Africa: Ghana; Asia: China, Philippines, Indonesia, South America: Argentina, El Salvador, Sao Paulo; North America: USA; Europe: UK, Norway, Czech Republic, Switzerland, Austria; Organisations: UNDESA, UNEP, ICLEI, The European Commission, ILO, OECD; In Consultation: WTO, World Bank.

The European Union (hereafter 'the EU') has participated in the international initiatives that have led to the conceptualisation of sustainable development.[10] The concept of sustainable development has finally been incorporated into the Treaty on the European Union (hereafter 'the TEU')[11] and the Treaty on the Functioning of the European Union (hereafter 'the TFEU')[12] (hereafter together 'the EU Treaties'), and various regulatory and policy frameworks have been put in force by the EU in order to implement the social, environmental and economic pillars of sustainable development. The concept of sustainable development in the EU Treaties has led to the adoption of a wide range of secondary regulations and policies. It is noteworthy that these instruments (e.g. the Sustainable Development Strategy,[13] the Sixth Environmental Action Programme,[14] the Energy Efficiency Plan,[15] the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan[16] and the Europe 2020 Strategy[17]) have underlined the potential of public procurement as a tool to implement and promote sustainable development policy objectives, which has influenced to certain extent EU procurement rules and practices. In that respect, the term "sustainable public procurement" is widely used in EU by EU institutions, Member States and academics.[18]

[10] For simplicity, the abbreviation "the EU" will be used consistently in this thesis, replacing the earlier "EC· (European Community)" where relevant.
[11] See, Preamble to the TEU and Articles 3 and 21.
[12] See, Articles 11 and 191; See also, Article 37 of the Charter of Fundamental Rights of the European Union.
[13] European Commission, Mainstreaming sustainable development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development, COM(2009)400.
[14] Decision No 1600/2002/EC of the European Parliament and the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, OJ 2002 L 242/1.
[15] European Commission, Energy Efficiency Plan 2011 COM(2011)109.
[16] European Commission, Communication on the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan COM(2008)397.
[17] European Commission, A strategy for smart, sustainable and inclusive growth COM(2010)2020.
[18] See, Roberto Caranta, 'Sustainable Public Procurement in the EU' in Caranta Roberto and Martin Trybus (eds), *The Law of Green and Social Procurement* (Copenhagen: DJØF Publishing, 2010), p. 17; Christopher McCrudden, 'Using public procurement to achieve social outcomes' (2004) 28 *Natural Resources Forum* 257, p. 1; Rolf H. Weber, 'Development promotion as a secondary policy in public procurement' (2009) 4 *Public Procurement Law Review* 184, p. 186.

The European Commission defines sustainable public procurement as procurement "*whereby contracting authorities take account of all three pillars of sustainable development (economic, social and environmental), when procuring goods, services or works*".[19] UK Sustainable Procurement Task Force defines the concept of sustainable public procurement as "*a process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits not only to the organisation, but also to society and the economy, whilst minimising damage to the environment*".[20]

Sustainable public procurement, in its simplest form, is the use of public procurement as a policy tool. Indeed, the use of public procurement as a policy tool within the EU is not a new phenomenon and public procurement historically has not been completely isolated from different policy motivations.[21] The legal framework on public procurement in the EU, which comprises Directive 2004/18/EC (hereafter 'Public-Sector Directive') and

[19] See, The European Commission, Sustainable Public Procurement, available at <http://ec.europa.eu/environment/gpp/glossary_en.htm>

[20] DEFRA, *Procuring the future: Sustainable procurement national action plan: recommendations from the Sustainable Procurement Task Force* (London: DEFRA, 2006), p. 10.

[21] For adoption of the EU Member States such policies see, European Commission, Impact and Effectiveness of EU Public Procurement Legislation (Commission Staff Working Paper) SEC(2011)853 Part 1, note[3], p. 76; See also, P.A. Geroski, 'Procurement policy as a tool of industrial policy' (1990) 4 *International Review of Applied Economics* 182; Sue Arrowsmith, 'Public procurement as an instrument of policy and the impact of market liberalisation' (1995) 111 *Law Quarterly Review* 235; Sue Arrowsmith and Peter Kunzlik, *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009); Sue Arrowsmith, John Linarelli and Don Wallace, *Regulating public procurement: National and International Perspectives* (The Hague: Kluwer Law International, 2000), Ch. 5; Peter Kunzlik, 'From suspect practice to market-based instrument: policy alignment and the evolution of EU law's approach to "green" public procurement' (2013) 3 *Public Procurement Law Review* 97. For the practice of the OECD countries see, Amalia Ochoa, Vivien Führ and Dirk Günther, 'Green Purchasing in Practice - Experiences and new approaches from the pioneer countries' in Erdmenger Christoph (ed), *Buying into the environment : experiences, opportunities and potential for eco-procurement* (Sheffield: Greenleaf, 2003); Caranta, note[18]. In particular, the United Kingdom has a long-standing practice on that matter. See, Martin Trybus, 'Sustainability and Value for Money: Social and Environmental Considerations in United Kingdom Public Procurement Law' in Caranta Roberto and Martin Trybus (eds), *The Law of Green and Social Procurement* (Copenhagen: DJØF Publishing, 2010); For a case study with regard the pursuit of sustainability concerns throughout local government procurement see, Lutz Preuss, 'Addressing sustainable development through public procurement: the case of local government' (2009) 14 *Supply Chain Management: An International Journal* 213; See also Andrew Erridge and Sean Hennigan, 'Sustainable procurement in health and social care in Northern Ireland' (2012) 32 *Public Money & Management* 363.

Directive2004/17/EC (hereafter 'Utilities Directive'),[22] confers a certain degree of discretion upon the contracting authorities to address social and environmental concerns throughout the public procurement process. In that regard, contracting authorities in the EU have been pursuing various environmental or social objectives that are not necessarily related to the functional objective of procurement, which is "*the purchase on competitive terms of a product, work or service meeting particular functional need*".[23]

The European Parliament adopted a resolution on 25 October 2011 on the modernisation of public procurement whereby it is underlined that "*the effective functioning of sustainable public procurement requires clear and unambiguous EU rules precisely defining the framework of Member States' legislation and implementation*".[24] In this context, the European Parliament pointed out "*the need to strengthen the sustainability dimension of public procurement by allowing it to be integrated at each stage of the procurement process*" and called on The European Commission to "*encourage governments and contracting authorities to increase the use of sustainable public procurement*".[25] In this context, on 20 December 2011 The European Commission published its proposals for new procurement directives.[26] The new proposals aim to improve the efficiency of procedures and allow for greater strategic use of public procurement.

The EU's approach highlights the important partnership between public procurement and sustainable development. However, this partnership is also complex. The complexity

[22] See, Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L134/114; Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 2004 L 134/1.
[23] Sue Arrowsmith and Peter Kunzlik, 'Public procurement and horizontal policies in EC law: general principles' in Arrowsmith Sue and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009), p. 9 and 13.
[24] European Parliament resolution of 25 October 2011 on the modernisation of public procurement (2011/2048(INI)), para. 3. Emphasis added.
[25] Id., para. 14 and 19. Emphasis added.
[26] See, European Commission, Proposal for a Directive on public procurement, COM(2011)896; European Commission, Proposal for a Directive on procurement by entities operating in the water, energy, transport and postal services sectors, COM(2011)895.

emanates from the diversity of the concept of sustainable development which is shaped according to Member States' prevailing political, historical, cultural and ecological circumstances; the complexity of the public procurement rules; as well as their overlapping but different objectives.

Public procurement, in the simplest way, aims at acquiring goods, services and works at the most competitive price, i.e. aims to achieve the best value for money. The integration principle of sustainable development requires the consideration and evaluation of various social and environmental factors (sometimes simultaneously) into economic decision-making. These factors could be non-economic factors or factors that might not directly relate to the subject-matter of contracts, which could add extra costs to the public procurement proceedings. As highlighted by Trepte, the regulation of procurement consists of different costs.[27] Arrowsmith also points out that implementing policy objectives through public procurement could generate different costs such as paying higher prices, costs emanating from granting a wide margin of discretion to the officers implementing a policy, i.e. discretion costs, disruption and costs of compliances or legal disputes arising from the implementation of the policies, and monitoring and evaluation costs.[28]

As strongly emphasised by Arrowsmith, the main purpose of the Procurement Directives is to promote the internal market and they seek to do this by three means: prohibiting discrimination, implementing transparency and removing barriers to access.[29] In that regard, a delicate balance needs to be established that would avoid discrimination, implement

[27] Trepte, note[2], p. 122.
[28] Sue Arrowsmith, 'A taxonomy of horizontal policies in public procurement' in Arrowsmith Sue and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009), p. 129.
[29] See, Sue Arrowsmith, 'The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies' in Barnard Catherine, Markus Gehring and Iyiola Solanke (eds), *Cambridge Yearbook of European Legal Studies 2011-2012* (Oxford: Hart Publishing, 2011-2012).

transparency and remove any possible barriers to access to public contracts and minimise the cost of pursuing sustainable development through public procurement.

EU Public Procurement Directives have foreseen the possible conflicts that could occur while promoting sustainable development through public procurement. According to the Recitals of both Directives:

> "This Directive therefore clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts" (Emphasis added) [30]

Case-laws of the Court of Justice of the European Union (hereafter 'the CJEU') also create a dynamic context for discussion of regulation of sustainable public procurement in the EU.

Besides the EU, the concept of sustainable procurement is also at the forefront of the World Trade Organisation's agenda. As a part of the WTO Agreement on Government Procurement (hereafter 'the GPA') renegotiation process, the Committee on Government Procurement in the Ministerial-Level Meeting of the Committee on Government Procurement in December 2011 brought the concept of sustainable procurement to the forefront of the GPA's agenda for the first time.[31] Notably, the promotion of the use of sustainable procurement practices, consistent with the Agreement, is one of the agreed future work programmes of the WTO.[32]

It is clear that sustainable public procurement is on the agenda of international and regional legal framework such as the EU, the WTO and the UN and instruments adopted under these regimes offer certain guidance. However, for a national government to pursue sustainable public procurement, many important issues such as the objectives of sustainable procurement, the ways in which the concept of sustainable procurement can be integrated

[30] Public-Sector Directive, Recital(5); Utilities Directive, Recital(12).
[31] Ministerial-Level Meeting of the Committee on Government Procurement (15 December 2011), GPA/112 available at <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/PLURI/GPA/112.doc>
[32] Id. at, Annex 7.

into national and sub-national procurement policies, the ways in which sustainable procurement can be practised in a manner minimizing the cost to 'value for money', and compliance with international trade obligations all require consideration of the dynamics of both public procurement and sustainable development, which are influenced by the peripheral conditions and local context of each country.

For the purpose of this thesis, the Republic of Turkey has been chosen as the target to assess how these issues have been and should be addressed in domestic law taking into account the experiences of international and regional regimes, in particular, the EU.

1.1.2 Public procurement and sustainable development in Turkey: evolution of legal rules, awareness of sustainable development, major problems

The Republic of Turkey has been actively involved in the international conferences and summits that have led to the conceptualisation of sustainable development. However, the legal and policy framework on sustainable development has evolved mostly under the political influence of the EU.[33] The membership negotiations and the Customs Union between Turkey and the EU have provided significant reform momentum in Turkey for the acknowledgement of sustainable development.

The concept of sustainable development is currently articulated in four main pieces of legislation which are the Environment Act numbered 2872, the Act on Soil Preservation and Land Utilization numbered 5403, the Municipality Act numbered 5393 and the Metropolitan Municipality Act numbered 5216. The concept is also specified under various secondary regulations and policy documents. The legal and policy framework of sustainable

[33] For the evolution of the Turkish sustainable development policy see, Rana İzci, 'Europeanisation of Turkish Environmental Policy with Special Reference to Sustainability Discourse' in Nas Çiğdem and Yonca Özer (eds), *Turkey and the European Union - Processes of Europeanisation* (Farnham: Ashgate, 2012), p. 182 and 185; Nükhet Turgut Yılmaz, *Çevre Politikası ve Hukuku* (Ankara: İmaj Yayınevi, 2009), p. 42; OECD, *OECD Environmental Performance Reviews - Turkey* (Paris: OECD Publishing, 2008), p. 112.

development indicates that sustainable development has a conceptual breadth and magnitude that goes far beyond the protection of the environment in Turkey, as it is in the EU.

It is noteworthy that the policy documents that conceptualised sustainable development in Turkey also consider public procurement as an economic instrument that needs to be used effectively in order to achieve sustainable development. For instance, according to the 10th Development Plan, public procurement is considered as an efficient tool to foster innovation and increase green production capacities of the national economic operators.[34] The Turkish Energy Efficiency Strategy and Plan lays down more specific action plans in order to realise the prescribed targets. Public procurement is also considered as an area that particularly needs to be reformed in order to achieve the target of using energy effectively and efficiently in the public sector.[35] Furthermore, the Turkish National Climate Change Action Plan lays down the objective to decrease annual energy consumption in the buildings and the premises of public institutions by 10% by 2015 and by 20% by 2023. The Plan prescribes as an action the carrying out of preparatory works for implementation of the Green Procurement Programme to ensure purchase of more efficient equipment, vehicle and buildings in public institutions.[36]

The current main legal framework governing public procurement in Turkey is the Public Procurement Act, numbered 4734. This piece of legislation was adopted in 2002 in the aftermath of the severe economic crisis that Turkey underwent in 2001. In order to overcome the economic crisis, Turkey applied for long-term loans from the IMF, which were granted to Turkey conditionally. Accordingly, the IMF stipulated substantial financial reforms in

[34] Ministry of Development, *10th Development Plan (2014-2018)* (Ankara: Ministry of Development, 2013).
[35] The strategy available at <www.eie.gov.tr/eie-web/duyurular/EV/EV-Strateji_Belgesi/Energy_Efficiency_Strategy_Paper_2012.pdf>
[36] Ministry of Environment and Urbanization, *Republic of Turkey National Climate Change Action Plan (2011-2023)* (Ankara: Ministry of Environment and Urbanization, 2011).

order to provide more efficient public spending and the promulgation of a new public procurement law.

The public procurement regulations that were in force prior to the Public Procurement Act were argued to be non-transparent, open to abuse, contributing to the low completion rate of projects, contributing to waste and most importantly offering opportunities for corruption in the award of public sector contracts. Indeed, the prevention of corruption has always played a key role in the regulation of public procurement in Turkey and it has historically been the main impetus of the public procurement reforms in Turkey. The Public Procurement Act, which was prepared under a climate of political turmoil caused by allegations of corruption in public spending, adopted a strict approach, limiting the discretion of the contracting authorities substantially. Due to this prevailing attitude, the strategic use of public procurement is not a notion that has been sufficiently implemented within the legal framework and the reforms have not been fully motivated by sustainable development concerns.

The most long-standing way of using public procurement as a policy tool in Turkey is using public procurement preferences to favour national suppliers and domestic goods and closing procurement proceedings to international competition. However, this practice is not strategic since the system is general, not sector-specific or product-specific, and its possible implications in the long term in terms of efficiency are not being questioned sufficiently.

The impact of the membership negotiations with the EU, which led to conceptualisation of sustainable development in Turkey, have positive outcomes in terms of using public procurement strategically. The increasing awareness on that matter, as stated above, is also reflected in the policy frameworks. There is a political determination in Turkey to benefit from the possibilities provided by public procurement to achieve sustainable development. However, sustainable public procurement requires strategic use of public procurement,

which is a relatively new phenomenon in Turkey due the fact that the prevailing paradigm of regulation of public procurement in Turkey has been corruption-prevention. In that regard, there is a need to shift the paradigm of regulating public procurement, as well as to consider a complex set of peripheral conditions and establish new safeguards in accordance with the local context of Turkey.

The policy documents that mention public procurement for the promotion of their prescribed objectives do not lay down any comprehensive methodology about how to conduct this process. Turkey is currently seeking models to draw a roadmap for the public procurement reforms to stimulate sustainable development. Korkmaz points out that a draft public procurement act, which contains certain environmental and social considerations in parallel to the EU law, is being prepared.[37] However, as of 2013, there is not a detailed roadmap with regard to adoption of this draft act and the draft has not yet been made available to the public. There is also an on-going public project called "Yeşil Alım" (Green Procurement), initiated in 2011 in order to increase awareness of the opportunities provided by public procurement in order to promote the environment pillar of sustainable development.[38] The EU's sustainable development laws and practice could be the primary model for Turkey while drawing a roadmap for the public procurement reforms due to the special circumstances of Turkey, which will be outlined in the following section.

1.1.3 The relevance of EU sustainable public procurement laws and practice to Turkey

The reasons why EU sustainable public procurement laws and practice are relevant to Turkey include the following grounds:

[37] Abdullah Korkmaz, *Sustainable Procurement as a Secondary Policy Tool and Turkey Case (IPPC5: Exploring New Frontiers in Public Procurement, Seattle, USA)* (2012), p. 1124.
[38] The project details are available at <http://yesilalim.info>

(1) The membership negotiations of Turkey with the EU

Turkey, although not a member of the EU, has a special relationship with the EU which dates back to the 1960s.[39] Three major developments have reinforced this relationship: the establishment of the Customs Union in 1995, the acceptance of Turkey as a candidate state to join the EU in 1999, and the opening of accession negotiations in 2005.

Turkey and the European Union agreed to create the Customs Union on 31 December 1995, and this came into effect on 1 January 1996.[40] The Customs Union provided significant momentum to initiate reforms to adopt the European norms, particularly in trade and competition areas in Turkey. It is noteworthy that the Customs Union Decision also invited Turkey to review its policies on public procurement. The Decision stated that "*[a]s soon as possible after the date of entry into force of this Decision, the Association Council will set a date for the initiation of negotiations aiming at the mutual opening of the Parties' respective government procurement markets*".[41] In this context, the EC-Turkey Association Council agreed on the initiation of negotiations aiming for the liberalisation of services and the mutual opening of public procurement markets, to begin in April 2000.[42]

The relations between Turkey and the European Union were substantially improved after the establishment of the Customs Union. In that regard, the European Union Helsinki Council held on 10-11 December 1999 recognised Turkey as a candidate State to join the European Union on the basis of the same criteria applied to the other candidate States. This period was a breakthrough in relations between Turkey and the European Union. During the Brussels

[39] For the chronology of Turkey's relations with the European Union see, Joseph S. Joseph, 'EU Enlargement: The Challenge and Promise of Turkey' in Bindi Federiga M. (ed), *The foreign policy of the European Union assessing Europe's role in the world* (Washington, D.C.: Brookings Institution Press, 2010). See also, The European Commission, EU-Turkey relations available at <http://ec.europa.eu/enlargement/candidate-countries/turkey/eu_turkey_relations_en.htm>

[40] Decision 1/95 of the Association Council of 22.12.1995, OJ 1996 L 35.

[41] *Id.*, Article 48.

[42] See, Decision No. 2/2000 of the EC-Turkey Association Council of 11 April 2000 on the opening of negotiations aimed at the liberalisation of services and the mutual opening of procurement markets between the Community and Turkey, OJ 2000 L 138/27.

Summit held on 16-17 December 2004, the EU Council noted that Turkey sufficiently fulfilled the political criteria and decided to open accession negotiations with Turkey on 3 October 2005, which shifted the relationship between Turkey and the European Union into a new phase.

The Council Decision of 2008/157/EC set out the general principles, priorities, objectives and conditions of accession on the basis of the Copenhagen criteria regarding alignment of Turkish legislation with the EU acquis, and public procurement is the fifth out of 35 chapters of official negotiations. [43] Like other candidate states, Turkey is expected to establish a public procurement system that meets the acquis of the EU on public procurement.

The Turkish Government has the political target of adopting the EU's norms. In that regard, the membership negotiations with the EU could bring the Turkish public procurement law in line with the EU and this could facilitate the negotiations and ease the cost of future implementation.

(2) There are significant lessons for Turkey that could be learnt from the EU's experience

The use of public procurement as a policy tool to achieve sustainable development is quite advanced in the EU with extensive legal rules and jurisprudence. Furthermore, there is extensive soft law guidance that forms a valuable benchmark for Turkey, including indication of the way forward and the mistakes to avoid. Turkey, as a candidate country for EU membership, could learn from the EU's experience and establish its own sustainable public procurement system with minimal cost. In that regard, the EU's sustainable public

[43] See, Council Decision 2008/157/EC of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC, OJ 2006 L51/4, 26.2.2008; For the repealed decision see, Council Decision 2006/35/EC of 23 January 2006 on the principles, priorities and conditions contained in the Accession Partnership with Turkey, OJ 2006 L 22/34.

procurement laws and practice creates the overall framework for Turkey, which could be tailored in accordance with the local context of Turkey.

(3) The developing country status of Turkey in the context of EU membership

Turkey, as a developing country, aims to join the European Union. It could be questioned whether more discretion should be given to Turkey in terms of public procurement regulations even after joining the EU given its developing country status. In that regard, the EU sustainable public procurement laws and practice need to be examined from the Turkish perspective and there is a need to identify possible constraints preventing full compliance with the EU law, which could derive from the developing country status of Turkey.

1.2 Research questions and contribution to the literature

The main research question addressed by this thesis is to elucidate the current legal framework for regulating public procurement under the Turkish law, to highlight any problems with this framework, and to identify possible options for improving the regulation. Elucidating the existing regulatory framework constitutes an important part of the research question since it has not been done before in a significant or comprehensive way.

The research question also addresses whether Turkish public procurement law currently permits pursuit of any social, environmental and economic objectives of sustainable development. In that regard, the thesis aims to outline the main barriers to pursuing sustainable development objectives under Turkish public procurement law and examine the procurement rules that should be reformed in order to establish a sustainable public procurement system that meets the EU law.

The issues within this thesis are examined according to the sustainability context of the EU. In order to set the context, this thesis also aims to provide an insight into sustainable procurement according to the EU law, in the light of the recent case-law of the CJEU on that matter. Considering its main aim, which is how public procurement is regulated in Turkey,

this thesis will only provide the broad framework of sustainable public procurement; in this context, the EU law will only be examined to a certain extent and depth.

Whereas the use of public procurement as a policy tool to promote sustainable development has gained increasing attention in academic literature, the case of Turkey, as a distinct subject, has not yet been systematically analysed.[44] Indeed, there exists very limited literature analysing the Turkish public procurement regime.[45] Moreover, the Turkish public procurement law underwent significant revisions in 2008 and 2011, therefore certain aspects of the literature are partially obsolete, which necessitates a review of the literature. Furthermore, very little attention has been paid to the interaction between public procurement and sustainable development, and the sustainability aspect of public procurement has been a largely neglected area of study.

This thesis aims to make a contribution to the literature by elucidating the current Turkish public procurement regime and the interaction between sustainable development and public procurement in Turkey. This thesis also aims to make a contribution by elaborating the recent developments in the EU context on sustainable public procurement. Moreover, this thesis aims to make a contribution by drawing a roadmap for Turkish reform in this area based on the EU's experience, which can also be a guide for other developing countries that aim to incorporate sustainability concerns into their public procurement rules.

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[44] It is impossible to detail the vast literature on the use of public procurement as a policy tool in the EU. Among others see the contributions specified in note[21] above. Furthermore not only is the scope of this thesis limited, but also countless sources exist already that explore sustainable development law in great detail and accuracy. Among others see the contributions specified in note[6] above.

[45] For the literature on the Turkish public procurement law see, Mehmet Bedii Kaya, 'The Legitimacy of Preferential Procurement and International Competition under the Turkish Public Procurement Law' (2012) 5 *Law & Justice Review* 121; Servet Alyanak, 'An overview of the legal rules governing public procurement in Turkey' (2007) 2 *Public Procurement Law Review* 125; Servet Alyanak, 'An overview of legal remedies in public procurement in Turkey' (2006) 5 *Public Procurement Law Review* 286; Sakire Kural and Umit Alsac, 'Public Procurement Procedures in Turkey' (2006) 6 *Journal of Public Procurement* 100; Fuat Ercan and Sebnem Oguz, 'Rescaling as a class relationship and process: The case of public procurement law in Turkey' (2006) 25 *Political Geography* 641; Abdullah Uz, *Kamu Ihale Hukuku* (Ankara: Turhan Kitabevi, 2005); Robert L. Burdsal, 'An overview of Turkish public procurement law' (2002) 1 *Public Procurement Law Review* 56.

1.3 Methodology

This thesis will essentially use black letter and comparative legal research methods in order to achieve its objectives.

This thesis approaches the correlation between public procurement and sustainable development from a legal perspective. The black letter approach was selected based on the aim of the research questions, which is how public procurement is regulated in Turkey and how it should be reformed in light of the EU's sustainable development laws and practice.

The analysis examines the law as set out in the requirements of both the TEU, the TFEU and Public-Sector Directive, as interpreted by the CJEU. In order to get a more complete picture of the legal situation, the analysis also considers the interpretation of the law given in the official guidance by the European Commission. This analysis sets out both the areas in which the law clearly restricts the pursuit of sustainable development objectives and the areas where the law lacks clarity on that issue.

In the same direction, the thesis examines the law set out in the requirements at all levels of national legislation, including laws, secondary regulations, by-laws of central government and relevant regulations of municipal administrations and state economic enterprises, but focusing primarily on the Turkish Public Procurement Act and the Turkish Public Procurement Contracts Act. In order to get a more complete picture of the legal situation, the analysis also considers the interpretation of the law given in the official guidance by the Turkish Public Procurement Authority.

This thesis also uses a comparative legal research method to achieve its objectives. The comparative legal research method provides useful insight while examining how particular problems and issues are addressed by different legal systems and provides a better understanding of the extent of those responses that are deemed to be successful. Considering the relevance of EU sustainable public procurement laws and practice to Turkey, the

comparative legal research method provides the context for drawing a roadmap for Turkish reform based on the EU's experience.

This thesis does not aim to provide an economic analysis of sustainable development, nor will it provide an extensive economic analysis on the implications of the use of public procurement as a policy tool. Furthermore, the research does not include empirical work analysing the impact of those procurement rules and practices in terms of effectiveness.

1.4 Outline of the Thesis

The thesis will be divided into eleven Chapters which will be outlined in the following paragraphs. The first Chapter consists of this introduction, which gives a brief introduction to the topic, the main limitations of the topic, the methodology that will be used and the outline.

Chapter 2 provides an overview of the underpinnings of the EU's approach to sustainable development and questions the degree of normativity that the concept of sustainable development possesses within EU law. This chapter also examines sustainable development law and policy in Turkey. It examines how Turkey approaches sustainable development and what degree of normative value is attached to the concept. This chapter particularly examines the extent of the interaction between public procurement and sustainable development through exploring the policy frameworks that mention public procurement as an instrument to promote sustainable development. This chapter only provides an overview of the discussions surrounding sustainable development, and the objective is to make the concept of sustainable development transparent for the following analysis, without laying claim to a homogeneous definition of sustainable development.

Chapter 3 identifies the benefits, drawbacks and regulatory barriers to sustainable public procurement in the European Union. The main objective of this chapter is to provide the contextual and legal background for later chapters where Turkish law will be examined.

Considering the objectives of this thesis, this chapter only provides the broad framework of sustainable public procurement; in this context, the EU law will only be examined to a certain extent and depth.

Chapter 4 illustrates the historical development of the Turkish public procurement framework to analyse the driving factors that triggered the public procurement reforms and to identify any weak points and inherent problems in the system. The examination of reform dynamics in particular aims to provide a useful insight for understanding the main features of the Turkish public procurement system.

Chapter 5 provides an overview of the regulatory and institutional framework on public procurement in Turkey in order to set the proper context for more specific analysis in subsequent chapters. In this regard, this chapter examines the main features of the current regulatory and institutional framework and analyses the extent to which it is compatible with the EU directives on public procurement. This chapter also aims to answer the question of whether sustainable development has been taken into consideration in the current legal framework, and the question of what is the most significant barrier to pursuing sustainable development throughout the public procurement process under the current framework.

Chapter 6 examines the rules governing technical specifications under the Public Procurement Act and evaluates the extent of compliance and non-compliance of the Public Procurement Act with Public-Sector Directive. This chapter also analyses the legitimacy of addressing sustainability concerns under the technical specifications.

Chapter 7 provides a detailed analysis of the qualification process in public sector procurement, which is governed by the Public Procurement Act. It examines grounds for disqualification and reasons for automatic exclusion and debarment of economic operators. It analyses the economic and financial standing of economic operators, as well as requirements relating to their technical and professional ability. Finally, the chapter provides

a detailed investigation of the qualification of foreign economic operators to take part in public tenders in Turkey. This chapter particularly analyses the legitimacy of addressing sustainability concerns under the qualification criteria.

Chapter 8 examines the general rules governing award criteria under the Public Procurement Act and evaluates the extent of compliance and non-compliance of the Public Procurement Act with Public-Sector Directive. The chapter particularly analyses the legitimacy of addressing sustainability concerns under the award criteria.

Chapter 9 examines the rules governing the performance of contracts awarded according to the Public Procurement Act, which are regulated under the PP Contracts Act. The chapter particularly examines whether any aspect of sustainability is considered throughout the performance of contracts and questions to what extent the contracting authorities have discretion to pursue any sustainability criteria under the contract performance clauses.

Chapter 10 draws a roadmap for Turkish reform based on the EU's experience and lays down reform proposals.

Chapter 11 concludes the thesis.

1.5 Conclusions

This thesis argues that the correlation between public procurement and sustainable development is strong in the EU, whereas such a correlation shows a weak profile in Turkey. The main reason for this low profile of correlation stems from the fact that the use of public procurement as a policy tool is a new phenomenon in Turkey. Although there is a political determination to utilise public procurement to achieve social and in particular environmental objectives, the complexity of public procurement regulations stands as the most substantial barrier. Furthermore, although the discretion of the contracting authorities has been enhanced in Turkey, low awareness of using public procurement as a policy tool and certain

institutional constraints have rendered contracting authorities in Turkey being reluctant to exercise such discretion.

This thesis proposes the rules that need to be improved for establishing a sustainable public procurement system in Turkey, taking into account the local dynamics of the Turkish public procurement system, and in the context of the membership negotiations with the EU. This thesis argues that the existence of a clear mandate for sustainability concerns, putting forward a strong political backing, establishing a coherent institutional framework and laying down a consistent and clear legal framework and an effective enforcement/remedy system are the essential peripheral conditions for promoting sustainable public procurement in Turkey.

CHAPTER 2

Sustainable Development in the European Union and Turkish Context

2.1 Introduction

Sustainable development, in its simplest definition, is the process of finding equilibrium between economic development, protection of the environment and social development. Sustainable development continues to be at the forefront of the international agenda and has been widely endorsed by the international community. The European Union (hereafter 'the EU') has participated to the international initiatives that have led to the conceptualisation of sustainable development. The concept of sustainable development has finally been incorporated into the Treaty on the European Union (hereafter 'the TEU') and the Treaty on the Functioning of the European Union (hereafter 'the TFEU') (hereafter together 'the EU Treaties'), and various regulatory and policy frameworks have been put in force by the EU in order to implement the social, environmental and economic pillars of sustainable development. The evolution of the sustainable development concept under the EU Treaties and the policy framework has been gradual; the integrated decision-making firstly encapsulated the environment dimension, which was followed by the adoption of the social pillar and the reinforcement of the status of the economic pillar. It is noteworthy that various regulatory and policy frameworks have underlined the potential of public procurement as a tool to implement and promote sustainable development policy objectives, which has influenced to some extent the procurement rules and practice.

Turkey has been actively involved in the international conferences and summits that have led to the conceptualisation of sustainable development. However, the legal and policy framework on sustainable development has evolved mostly under the political influence of the EU. In that regard, being party to the Customs Union in 1995, acceptance as a candidate

state in 1999 and the initiation accession negotiations in 2004 are the main dynamics that shaped Turkey's approach to sustainable development.

This chapter provides an overview of the underpinnings of the EU's approach to sustainable development and questions the degree of normativity that the concept of sustainable development possesses within EU law. This chapter also examines sustainable development law and policy in Turkey. It examines how Turkey approaches sustainable development and what degree of normative value is attached to the concept. This chapter particularly examines the extent of the interaction between public procurement and sustainable development through exploring the policy frameworks that mention public procurement as an instrument to promote sustainable development. The chapter will only outline the references to public procurement without entering into the substance of the legitimacy of such policy implementation. The legitimacy of using public procurement as a policy tool to stimulate sustainable development will be fully scrutinised in Chapter 3.

This chapter will only provide an overview of the discussions surrounding sustainable development and the objective is to make the concept of sustainable development transparent for the following analysis, without laying claim to a homogeneous definition.

2.2 The historical background of sustainable development

The concept of sustainable development has been primarily developed by the initiatives taken within the UN. The development of the concept dates back to the end of the 1970s, when environmental and economic development issues started to be evaluated in the same context.[1] This period was a breakthrough in terms of increasing awareness that the concept of development required "*re-formulation*".[2] After gaining the political momentum for

[1] For the political and philosophical background of the concept see, Rajendra Ramlogan, *Sustainable development: towards a judicial interpretation* (Leiden; Boston: Martinus Nijhoff Publishers, 2011), p. 7-28.
[2] Christina Voigt, *Sustainable development as a principle of international law resolving conflicts between climate measures and WTO law* (Leiden; Boston: Martinus Nijhoff Publishers, 2009), p. 13.

opening the development models into discussion, the UN conveyed different international conferences.

For instance, the UN Conference on the Human Environment was held in Stockholm, Sweden in 1972, which is regarded as a starting point of the new, systematic approach to the problem of protecting the environment.[3] Following the Stockholm Conference, the UN established the World Commission on Environment and Development in 1983 for elaborating "*long term environmental strategies for achieving sustainable development to the year 2000 and beyond*".[4] The Commission published its report in 1987, known as the Brundtland Report, whereby 'sustainable development' was furnished as a solution to the world's environmental and development problems.[5] Brundtland Report defined the concept of sustainable development as "*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*".[6] Brundtland Report highlighted that the core of the concept is recognition of inextricable linkage between environmental protection and economic development and suggested that "*economics and ecology must be completely integrated in decision making and law-making processes not just to protect the environment, but also to protect and promote development*".[7] The Report noted that different interpretations of what constitutes sustainable development are possible provided that the interpretations encapsulate certain general features and flow from a consensus.[8]

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[3] Michael Decleris, *The law of sustainable development : general principles (A report prodeuced for the European Commission)* (Luxembourg: Office for Official Publications of the European Communities, 2000), p. 29.
[4] UN, Process of Participation of the Environmental Perspective to the Year 2000 and Beyond, General Assembly Resolution of 19 December 1983, UN Doc A/RES/38/161 para. 8(a).
[5] Report of the World Commission on Environment and Development: Our Common Future UN Doc A/42/427 available at <www.un-documents.net/our-common-future.pdf>
[6] *Id.*, para. 27.
[7] *Id.,* para. 42.
[8] *Id*., Chapter 2, para. 2.

Brundtland Report conceptualised sustainable development and the Report and its contents gained global acknowledgement through endorsement by the UN General Assembly.[9] Although the definition of sustainable development within the Report is argued to be too general and fails to fulfil the demands of legal semantics,[10] the endorsement of the report laid down foundations for discussing the correlation between environmental protection and economic development and maintained momentum for further international initiatives on sustainable development.[11]

In this direction, the UN conveyed the Conference on Environment and Development, which was held in Rio De Janeiro, Brazil in 1992 within the context of the recommendations of Brundtland Report.[12] The most important outcome of the Rio Conference was the Rio Declaration on Environment and Development[13] and Agenda 21[14]. The Rio Declaration reinforced the approach put forward under Brundtland Report through reiterating that "*in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it*".[15]

Agenda 21, on the other hand, provided a context-specific meaning of sustainable development and how it could be implemented in practice.[16] It is noteworthy that Agenda 21, a policy instrument of 1992, mentioned public procurement as an economic instrument that needs to be used effectively in order to achieve the objective of 'changing the production

[9] UN, 'Report of the World Commission on Environment and Development', General Assembly Resolution (11 December 1987), A/RES/42/187.
[10] Decleris, note[3], p. 44.
[11] Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable development law : principles, practices, and prospects* (Oxford, UK: Oxford University Press, 2004), p.19.
[12] UN, 'United Nations Conference on Environment and Development', General Assembly Resolution 44/228 (22 December 1989) RES/44/228.
[13] UN, 'Declaration on Environment and Development', Rio De Janeiro (3-14 June 1992) A/CONF.151/26 (Vol 1).
[14] UN, 'Agenda 21: A Programme for Action for Sustainable Development', Rio De Janeiro (3-14 June 1992) A/CONF.151/26 (Annex III).
[15] Principle 3 and 4 of the Rio Declaration.
[16] Cordonier Segger and Khalfan, note[11], p. 21.

and consumption patterns'.[17] Agenda 21 pointed out that the governments themselves play a role in consumption, particularly in countries where the public sector plays a large role in the economy, and have a considerable influence on both corporate decisions and public perceptions. In that regard, Agenda 21 invited the governments to review the purchasing policies of public agencies and departments to improve, where possible, the environmental content of government procurement policies, without prejudice to international trade principles.

The UN convened the World Summit on Sustainable Development in Johannesburg in 2002 for reviewing the progress made since the Rio Conference.[18] The discussions within the conference were encapsulated under two policy documents: the Johannesburg Declaration on Sustainable Development (hereafter 'Johannesburg Declaration')[19] and the Johannesburg Plan of Implementation (hereafter 'Johannesburg POI').[20] Johannesburg Summit better clarified the components of sustainable development and it was explicitly recognised that environmental protection, economic development and social development are the 'independent and mutually reinforcing pillars' of sustainable development.[21]

Johannesburg POI encourages the states to improve efficiency and sustainability in the use of resources and production processes and reduce degradation, pollution and waste. It is noteworthy that, like Agenda 21, Johannesburg POI also mentions public procurement as an economic instrument that needs to be used effectively in order to achieve the objective of changing unsustainable production and consumption patterns. Johannesburg POI requires public authorities at all levels to incorporate sustainable development principles in the

[17] Agenda 21, para. 4.23.
[18] UN, Ten-year Review of Progress Achieved in the Implementation of the Outcome of the United Nations Conference on Environment and Development, General Assembly Resolution (20 December 2000) A/Res/55/199.
[19] UN, 'Johannesburg Declaration of the World Summit on Sustainable Development', Johannesburg (26 August - 4 September 2002) A/Conf.199/20.
[20] UN, 'Johannes Plan of Implementation', A/Conf.199/20.
[21] Johannesburg Declaration, Principle 5; Johannesburg POI, para. 2.

decision-making of national and local development planning, investment in infrastructure, business development and public procurement, and this incorporation is expected to "*promote public procurement policies that encourage development and diffusion of environmentally sound goods and services and usage of environmental impact assessment procedures*".[22]

Johannesburg POI calls for the development of a 10-year framework of programmes for sustainable consumption and production. The objective of changing unsustainable patterns of consumption and production, indeed, contributed to the initiation of the Marrakesh Process in 2003, led by UNEP and UNDESA with the active participation of various national governments, development agencies and civil society.[23] One of the key objectives of this process is to assist countries in their efforts to green their economies. Following the recommendation of Johannesburg POI with regard to public procurement, a separate task force entitled 'Sustainable Public Procurement' was established in order to provide a practical methodology for designing and implementing policies on sustainable public procurement and to propose recommendations on the implementation of sustainable public procurement in different legal contexts.

The UN Conference on Sustainable Development (also renamed as 'the Rio +20 Conference') was held in Rio De Janeiro, Brazil in 2012 to review the implementation of Agenda 21 and the outcomes of the 2002 World Summit on Sustainable Development.[24] The Rio +20 Conference evaluated the challenges of economic growth, environmental protection and social development within the context of the green economy, which is indeed a relatively new concept in the sphere of sustainable development. On the other hand, the

[22] Johannesburg POI, Section III, para. 19.

[23] For background and activities of the Marrakech Process see <http://esa.un.org/marrakechprocess/about.shtml>

[24] UN, Implementation of Agenda 21, the Programme for the Further Implementation of Agenda 21 and the outcomes of the World Summit on Sustainable Development, General Assembly Resolution (31 March 2010) A/RES/64/236.

Rio +20, as the Johannesburg Summit, called for the development of 10-year framework of programmes for sustainable consumption and production.[25] The Rio +20, in that regard, continued the Marrakesh Process and operationalized the Sustainable Public Procurement Programme as a 10 year programme which implies the importance of public procurement to stimulate sustainable consumption and production patterns is still maintained.[26] It is noteworthy that in the conclusions of Rio +20 it has been recommended to "*[p]romote sustainable public procurement worldwide as a catalyst for sustainable patterns, taking into account the need for a holistic approach to sustainable development and principles for a sustainable and fair economy*".[27]

The phenomenon of sustainable development has received a considerable amount of attention from the international community since the publication of the Brundtland Report in 1987. However, despite the international conferences and summits explained hereto, the concept of sustainable development is argued to be a vague concept and "what sustainable development is" and "where it stands" are argued to be uncertain.[28]

There has been an increasing recognition of sustainable development as an objective of the international community in various international and regional instruments.[29] For instance, the 1994 Marrakesh Agreement establishing the World Trade Organisation (hereafter 'the

[25] UN, 'A 10-year framework of programmes on sustainable consumption and production patterns' (19 June 2012) A/CONF.216/5 available at <https://rio20.un.org/sites/rio20.un.org/files/a-conf.216-5_english.pdf>.
[26] Id., para 8.
[27] See, Rio+20 : The economics of sustainable development, including sustainable patterns of production and consumption available at <www.uncsd2012.org/index.php?page=view&type=1015&nr=9&menu=23>
[28] See, Cordonier Segger and Khalfan, note[11], p. 4; H. M. Osofsky, 'Defining Sustainable Development After Earth Summit 2002' (2003) 26 *Loyola of Los Angeles International and Comparative Law Review* 111, p. 104; Tatyana P. Soubbotina, *Beyond economic growth : an introduction to sustainable development* (Washington, D.C.: World Bank, 2004), p. 8; Andrea Ross, 'Modern Interpretations of Sustainable Development' (2009) 36 *Journal of Law and Society* 32, p. 34; Voigt, note[2], p. 39; Philippe Sands, 'Environmental Protection in the Twenty-First Century: Sustainable Development and International Law' in Revesz Richard L., Philippe Sands and Richard B. Stewart (eds), *Environmental law, the economy, and sustainable development : the United States, the European Union, and the international community* (Cambridge [England]; New York: Cambridge University Press, 2000), p. 374.
[29] For the references to sustainable development in a wide range of international agreements see, Voigt, note[2], p. 20-21; Laura Horn, ''Sustainable Development' - Mere Rhetoric or Realistic Objective?' (2011) 30 *University of Tasmania Law Review* 119, p. 122-124; Ramlogan, note[1], p. 38-64.

WTO') under its Preamble cites sustainable development as the framework of "*optimal use of the world's resources*".[30] However, the concept of sustainable development is not reflected in any other parts of the WTO agreements, which necessitates interpretation within the context of the preamble of the Marrakesh Agreement. Voigt, who defines sustainable development as a concept of integration, maintains that "*sustainable development provides the framework in which the links between the WTO law and other non-economic issues simultaneously*".[31] The argument is further supported by the fact that the concept of sustainable development enshrined in the Preamble of the Marrakesh Agreement has been employed by the WTO's dispute settlement system.[32] Actually, at the WTO meeting in Doha, Qatar in 2001, the trade ministers of the WTO member states agreed to launch the Doha Development Agenda, a new round of trade and economic liberalisation, and the Ministerial Declaration of this meeting reaffirmed the commitment of the WTO to the concept of sustainable development.[33]

Despite the repetitious references to sustainable development under different instruments, the legal status of sustainable development remains controversial.[34] While Marong identifies sustainable development as "*legitimate expectation*" that serves a guide to practical reasoning in diverse decision-making contexts[35], Cordonier-Segger and Weeramantry consider sustainable development as a substantive part of international law in a very real

[30] See, Marrakesh Agreement Establishing the World Trade Organization available at <www.wto.org/english/docs_e/legal_e/04-wto_e.htm>
[31] Voigt, note[2], p. 129.
[32] United States: Import prohibition of certain shrimp and shrimp products - Report of the Appellate Body (15 May 1998) WT/DS58/R; Brazil: Measures affecting Imports of Re-treaded Tyres - Report of the Appellate Body (3 December 2007) WT/DS332/AB/R [151]. It would be beyond the scope of this study to attempt any extensive analysis of these decisions. For the substance of these cases see, ibid, p. 135 et seq.
[33] Doha Ministerial Declaration WT/MIN(01)/DEC/1 (20 Nov. 20001) available at <www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>
[34] For the discussions see, Voigt, note[2], 160 et seq.
[35] A. B. M. Marong, 'From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development' (2004) 16 *Georgetown international environmental law review* 21, p. 76.

sense.[36] Moreover, Voigt considers the repetitious references to sustainable development throughout a multitude of international and domestic laws, regulations, conventions and non-binding documents as evidence of its general acceptance as a normative concept.[37] Decleris, in the same context, puts forward a stronger approach with regard to the legal status of sustainable development and identifies sustainable development as a new area of law that have distinct features.[38]

Sustainable development has a conceptual breadth and magnitude that goes far beyond the protection of the environment, and this has been underlined since Brundtland Report. The concept of sustainable development is a dynamic concept and the continuous evolution of the world community requires a dynamic interpretation of the concept shaped by the changing circumstance of social, economic and environmental contexts. The meaning and substance of sustainable development, however, depends on the legal context in which it is applied. It is important to note that different contexts could bring different pillars or themes of sustainable development forward and could give more concrete normative values to different pillars or themes. For the purpose of this study, however, the meaning and legal status conferred by the EU and Turkey to the concept of sustainable development is important, and this will be analysed in the following sections.

2.3 The evolution of sustainable development in the European Union

Sustainable development has followed the same process of evolution in the EU as it has taken in international law and the transition of sustainable development to the EU's legal and policy framework has been gradual.[39] In this regard, firstly the environment pillar of

[36] Marie-Claire Cordonier Segger and C. G. Weeramantry, *Sustainable justice : reconciling economic, social and environmental law* (Leiden; Boston: Martinus Nijhoff Publishers, 2005), p. 45.
[37] Voigt, note[2], p. 145.
[38] Decleris, note[3], p. 33.
[39] For the chronology on the transition of sustainable development in the EU see, Nigel Haigh, 'Introducing the concept of sustainable development into the Treaties of the European Union' in O'Riordan Timothy and Heather Voisey (eds), *The transition to sustainability : the politics of Agenda 21 in Europe* (London: Earthscan Publications, 1998).

sustainable development was acknowledged by the EU, and this was followed by endorsement of the social pillar and recognition of the economic, social and environmental pillars having equal importance.

2.3.1 Sustainable development in the EU Treaties

The Treaty of Lisbon, which entered into force on 1 December 2009, consolidated the EU's commitments on sustainable development. The Treaty of Lisbon, in that regard, granted a considerable value to sustainable development, and a result the concept has been disseminated into different articles of the TEU and the TFEU.

The Member States are determined under the TEU "to promote economic and social progress for their peoples, taking into account *the principle of sustainable development* and within the context of the accomplishment of the internal market and of reinforced cohesion and *environmental protection,* and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields" (the Preamble to the TEU). The EU aims to "work for *the sustainable development of Europe* based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment" (Article 3(3) of the TEU) and sets target to "contribute to peace, security, *the sustainable development of the Earth*" [emphasis added]. (Article 3(5) of the TEU) In the same direction, the EU, in its external relations aims to "help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order *to ensure sustainable development*" (Article 21(2)f of the TEU) [emphasis added] which adds a global dimension to the sustainable development. The TFEU also maintains the provision introduced by the Treaty of Amsterdam which requires that "environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in

particular with a view to *promoting sustainable development*" (Article 11 of the TFEU) [emphasis added].

The Charter of Fundamental Rights of the European Union, to which Article 6(1) of the TEU grants the same legal value as the Treaties, also states that "The Union (…) seeks to promote balanced and *sustainable development*" and requires that "a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with *the principle of sustainable development*" (Article 37) [emphasis added] which is in line with Article 11 of the TFEU. [40]

Considering the explicit and multiple references to sustainable development made by the TEU and the TFEU, it could be said that sustainable development is a normative principle comprising an integral part of the EU law. However, some commentators are sceptical with regard to the applicability of sustainable development in practice. Krämer, for instance, argues that the term sustainable development has been used inconsistently and has reached an inflationary level of use.[41] In the same direction, the integration principle, which is underlined through Article 11 of the TFEU and which reinforces the normative value of sustainable development, is criticised by Jans due to lack of focus and proliferation of integration principles under the TFEU.[42] This challenge is briefly expressed as "*everything has to be taken into account with everything*".[43] In the same context, Lee maintains that the Treaty of Lisbon made the integration principles "*less visible than before*" on very similar grounds put forward by Jans.[44]

Indeed, the concept of sustainable development in the EU Treaties has been mainstreamed into a wide range of secondary regulations and policies. A detailed examination of these

[40] Charter of Fundamental Rights of the European Union, Dec. 7, 2000, OJ 2000 C 364/1.
[41] Ludwig Krämer, *EC environmental Law* (London: Sweet & Maxwell, 2007), para 1-14, p. 11.
[42] Jan H. Jans, 'Stop the Integration Principle?' (2011) 33 *Fordham International Law Journal* 1533, p. 1544.
[43] Ibid, p. 1545.
[44] Maria Lee, 'The Environmental Implications of the Lisbon Treaty' (2008) 10 *Environmental Law Review* 131, p. 134.

policy instruments might provide a better understanding of the substance of the concept of sustainable development in the EU.

2.3.2 Sustainable development at the secondary level regulations and policy frameworks

2.3.2.1 The Sustainable Development Strategy

The EU initiated the reform process known as 'the Cardiff Process' in 1998 to merge the integration of environmental concerns into sectoral policies.[45] In conjunction with this process, at the Gothenburg Summit in June 2001 the EU leaders initiated the process of preparing a common sustainable development strategy based on a proposal from The European Commission.[46] The EU Council called upon the Member States to draw up their own national sustainable development strategies. This strategy proposed by the Commission after mentioning the necessity of new, safer and cleaner technologies for the promotion of sustainable development outlined as an action that "*Member States should consider how to make better use of public procurement to favour environmentally-friendly products and services*".[47] Although, the Gothenburg Summit was a significant development in terms of the acknowledgement of sustainable development, the EU leaders could not achieve a consensus regarding the details and the strategy proposed by The European Commission was not approved by the EU Council. The failure of the EU leaders to reach a consensus on the SD Strategy Proposal is explained by Steurer *et al* as the lack of coherence with the Union's other policy frameworks, particularly the Lisbon Strategy, which aims at increasing competiveness, economic growth and enhancing job creation throughout the EU.[48]

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[45] Presidency Conclusions of the Cardiff European Council, 15 and 16 June 1998, SN 150/1/98 REV 1.
[46] European Commission, A Sustainable Europe for a BetterWorld: A European Union Strategy for Sustainable Development (Commission's proposal to the Gothenburg European Council) COM(2001)264.
[47] Ibid, p. 10.
[48] Reinhard Steurer, Gerald Berger and Markus Hametner, 'The vertical integration of Lisbon and sustainable development strategies across the European Union: How different governance architectures shape the European coherence of policy documents' (2010) 34 *Natural Resources Forum* 71.

The European Commission initiated a broader public consultation in 2004 and, considering the criticism brought in terms of lack of coordination between policies, presented a revised Sustainable Development Strategy (hereafter 'the Revised SD Strategy') in December 2005 which was adopted by the EU leaders at the EU Council of 15th-16th June 2006.[49] Notably, the Revised SD Strategy clarified its relationship with the Lisbon Strategy. The Revised SD Strategy underlined the importance of economic growth in facilitation of the transition to sustainable development and referred to the Lisbon Strategy.

Public procurement, which was considered as a policy instrument under the initial proposal, is also outlined under the operational objectives and targets in order to promote more sustainable consumption and production patterns.[50] In this regard, the Revised SD Strategy set the target to achieve by 2010 an EU average level of green public procurement. Furthermore, the Revised SD Strategy points out that any policy instruments can be used in order to achieve the sustainable development objectives that it lays down provided that the suitability of economic instruments are judged against an established set of criteria, including their impact on competiveness and productivity.[51]

The repeated references to public procurement in the Revised SD Strategy need to be evaluated in conjunction with the principle of integration introduced by the Treaty of Amsterdam. In 2002 the EU adopted its Sixth Environmental Action Programme (hereafter 'the Sixth EAP')[52] to address key environmental objectives and priorities of the Union.[53] The Sixth EAP was prepared according to the integration principle that was introduced to the TEU by the Treaty of Amsterdam, which requires the integration of environmental

[49] European Commission, On the Review of the Sustainable Development Strategy - A Platform for action, COM(2005)658.
[50] Ibid, p. 12.
[51] Ibid, p. 24.
[52] Decision No 1600/2002/EC of the European Parliament and the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, OJ 2002 L 242/1.
[53] The Sixth EAP, Recital(7).

protection considerations into the preparation, definition and implementation of all Community policies. In this context the public procurement policy of the EU was also taken into consideration under the Sixth EAP, which sets its target as "*promoting a green public procurement policy, allowing environmental characteristics to be taken into account and the possible integration of environmental life cycle, including the production phase, concerns in the procurement procedures while respecting Community competition rules and the internal market, with guidelines on best practice and starting a review of green procurement in Community Institutions*".[54]

In parallel with the enlargement of the EU, the initiatives on climate change and the promotion of low-carbon economies in the context of the Lisbon Strategy, The European Commission reviewed the revised sustainable development strategy (hereafter 'the SD Strategy') in July 2009 and the review was adopted by the EU Council in December 2009.[55] While the SD Strategy has set the main framework of sustainable development at the European level, the Member States have adopted their own national sustainable development strategies according to their own local contexts depending upon their prevailing political, historical, cultural and ecological circumstances.[56]

2.3.2.2 The Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan

As explained previously, changing sustainable consumption and production is one of the main themes of sustainable development. In order to provide harmony of the industrial policies on that matter in the internal market, the Sustainable Consumption and Production

[54] The Sixth EAP, Article(3(6)).
[55] European Commission, Mainstreaming sustainable development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development, COM(2009)400.
[56] It would be beyond scope of this study to examine the national sustainable development strategies of the Member States. For the national sustainable development strategies of the Member States see, <http://ec.europa.eu/research/sd/index_en.cfm?pg=member-states-sds>

and Sustainable Industrial Policy Action Plan (hereafter 'the SCP/SIP Plan')[57] was prepared by The European Commission and was then endorsed by the EU Council.[58] The SCP/SIP Plan is inspired by the global developments concerning increasing resource efficiency and promoting sustainable consumption and production patterns, mostly driven by the UN Marrakesh Process.[59]

As discussed in the previous section, public procurement is considered under the SD Strategy as a policy instrument to operationalize the objective of promotion of sustainable consumption and production patterns. The SCP/SIP Plan also considers public procurement as an important policy tool to achieve sustainable production and consumption due to its share in the European GDP and recommends benefiting from the potential of public procurement to stimulate markets on energy and environmentally performing products.[60] These actions in the long term are expected to boost resource efficiency, support eco-innovation and enhance the environmental potential of industry. The SCP/SIP Plan requires that the actions it sets out should be amplified and supported by consistent data and methods on products and should promote green public procurement. In order to overcome the fragmentation of the policies, the SCP/SIP Plan is accompanied by the Communication on the Green Public Procurement[61], which provides the methodology for the promotion of the protection of the environment through public procurement.

2.3.2.3 The Europe 2020 Strategy

The Europe 2020 Strategy for smart, sustainable and inclusive growth prepared by The European Commission was adopted in 2010 by the EU Council to re-set the social, economic

[57] European Commission, Communication on the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan COM(2008)397.
[58] Council of the European Council, Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan - Council conclusions, 5 December 2008, 16914/08.
[59] Section(2.2).
[60] SCP/SIP Plan, p. 4.
[61] See, European Commission, Public procurement for a better environment COM(2008)400. This communication will fully be analysed in Chapter 3.

and environmental objectives of the EU, to increase the competiveness of the EU during the economic crisis.[62] This strategy aims to provide a framework for recovering from the economic crisis whilst ensuring balance with social and environmental policies. It is noteworthy that public procurement has been outlined as a policy area to be utilised to accomplish the actions set throughout the frameworks and action plans.

The Europe 2020 Strategy requires that "*public procurement policy must ensure the most efficient use of public funds and procurement markets must be kept open EU-wide*".[63] Accordingly, under the Innovation Union flagship initiative, the EU considers strengthening knowledge and innovation as the key priority of the transformation and requires action on innovation, education, training and the dissemination of information and communication technologies.[64] In this regard, The European Commission is expected to improve framework conditions for businesses to innovate and make full use of demand side policies such as public procurement.

Under the Resource efficient Europe flagship initiative the EU has set the target to be a resource efficient and low-carbon economy, which requires the reconsideration of resource and energy use, reduction of emissions, enhancing competiveness and promotion of energy security.[65] For that purpose, The European Commission is expected to work on the enhancement of a framework for the use of market-based instruments such as encouraging wider use of green public procurement, and the Member States at a national level are required to deploy market-based instruments like procurement to adopt sustainable production and consumption methods. The Resource Efficient Europe flagship is implemented under the Energy Efficiency Plan 2011[66], where the energy efficiency in public spending is considered

[62] European Commission, A strategy for smart, sustainable and inclusive growth COM(2010)2020.
[63] Ibid, p. 26.
[64] Ibid, p. 12.
[65] Ibid, p. 15.
[66] European Commission, Energy Efficiency Plan 2011 COM(2011)109.

as a core action to promote the Europe 2020 goals. In this context, it is envisaged that it will enhance high standards of energy efficiency which will be implemented systematically by the public authorities while purchasing goods, services and works.[67]

Lastly, under the Industrial Policy for the Globalisation Era flagship, the EU addresses the need to enhance the situation of the SMEs, the economic operators who are worst affected by the economic crisis, in accordance with the objective of being a low-carbon economy.[68] In this regard, The European Commission is expected to establish a horizontal approach to industrial policy through integrating different policy instruments such as smart regulation, public procurement, competition rules and standard settings and the Member States at a national level are required to enhance their business environments through public procurement to support innovation incentives.

The EU considers the environmental aspect of sustainable development as leverage to stimulate economic growth. The EU's ultimate agenda is set to be green economy and disseminate eco-industries.[69] The EU targets increasing global market share in the field of environmental technologies and eco-innovations as laid down under the Lisbon and SD Strategies and reiterated under the EU 2020 Strategy; these currently correspond to over 2.5% of the overall EU GDP. As discussed, the EU, from the very first stages, has approached sustainable development from its potential to unleash a new wave of technological innovation and investment and generate growth and employment. The Europe 2020 Strategy provides a new insight and has created new momentum with regard to dissemination of policies and action plans on eco-innovation.[70]

[67] Ibid, p. 4.
[68] European Commission, A strategy for smart, sustainable and inclusive growth COM(2010)2020, p. 16.
[69] European Commission, Rio+20: towards the green economy and better governance COM(2011)363, p.4.
[70] See particularly, European Commission, Innovation for a sustainable Future - The Eco-innovation Action Plan (Eco-AP) COM(2011)899.

2.4 The evolution of sustainable development in Turkey

The Republic of Turkey has been actively involved in the international conferences and summits that have led to the conceptualisation of sustainable development (i.e. 1972 UN Conference on the Human Environment; 1992 UN Conference on Environment and Development; 2002 UN World Summit on Sustainable Development; 2012 UN Conference on Sustainable Development). However, the legal and policy framework on sustainable development has evolved mostly under the political influence of the EU. In that regard, being party to the Customs Union in 1995, acceptance as a candidate state in 1999 and the initiation accession negotiations in 2004 are the main dynamics that shaped Turkey's approach to sustainable development.

2.4.1 The constitutional background of sustainable development

The Turkish Constitution does not explicitly mention or refer to either sustainable development or sustainability under the preamble or the main text.[71] Algan and Mengi criticise lack of a reference to sustainable development as a shortcoming of Turkish law, failing to comply with the EU law.[72] Indeed, the Turkish Constitution was adopted and entered into force in 1982 when the concept of sustainable development had not emerged in the international realm.[73] In that regard, the lack of any reference to sustainable development could be justified. Nevertheless, the legal foundations of sustainable development and its three pillars can be traced within different provisions of the Constitution.

An important provision that can be used to establish the legal foundations for sustainable development is Article 56 of the Constitution entitled 'Health Services and Conservation of the Environment'. Article 56 recognises that 'everyone has the right to live in a healthy,

[71] English translation of the Constitution available at <www.anayasa.gov.tr/index.php?l=template&id=210&lang=1&c=1>
[72] Nesrin Algan and Ayşegül Mengi, 'Turkey's Sustainable Development Policies in the EU Accession Process' (2005) 14 *European Environmental Law Review* 95, p. 96.
[73] Section(2.2).

balanced environment' and mandates that 'it is the duty of the State and the citizens to improve the natural environment, and to prevent environmental pollution'. This provision establishes an explicit normative background for the environmental pillar of sustainable development.

Besides this provision, there exist a wide range of provisions directly or indirectly related to environmental issues. In the same context, the Constitution lays down a fragmented framework for the social issues that could be used to establish the legal foundations for the social pillar of sustainable development. However, these provisions outlined so far are articulated under Chapter Three of the Constitution identifying social and economic rights and duties. According to Article 65, 'the State shall fulfil its duties as laid down in the Constitution in the social and economic fields within the capacity of its financial resources, taking into consideration the priorities appropriate with the aims of these duties'. Article 65 implies that the economic capacity of the Turkish State could limit the implementation of social and environmental policies.

Bozkurt discusses that the measures that need to be implemented in order to protect the environment, in the majority of cases, require certain financial and adoption costs.[74] In that regard, he considers Article 65 as a significant constraint limiting the protection of the environment. Indeed, this is a strict interpretation of Article 65. Giritli *et al*, on the other hand, put forward a more liberal approach with regard to the interpretation of Article 65. Accordingly, they consider that this provision should not be interpreted rigidly and they suggest that Article 65 should be used as a guide by the Turkish State for acting prudently and rationally while it fulfils its duties in economic and social areas, rather than being an excuse for being reluctant to act.[75] A similar approach is adopted by Turgut, particularly

[74] Yavuz Bozkurt, *Avrupa Birliği'ne Uyum Sürecinde Türkiye'de Çevre Politikalarının Dönüşümü* (Bursa: Ekin Yayınevi, 2010), p. 24.
[75] İsmet Giritli, Pertev Bilgen and Tayfun Akgüner, *İdare Hukuku* (İstanbul: Der Yayınları, 2001), p. 27.

with regard to Article 56 on the protection of the environment. Turgut maintains that the protection of the environment is interlinked with the right to life, and further suggests that Article 65 cannot be interpreted as an excuse for the State to be reluctant to fulfil its obligations to protect the environment.[76] Both are well-founded interpretations of Article 65, leaving room for the dynamic and evolving context of sustainable development. Nevertheless, the lack of any direct reference to sustainable development under either the preamble or the main text of the Constitution is a shortcoming of Turkish law considering the precedence of the EU whereby sustainable development is recognised at the treaty level.

2.4.2 The legal framework of sustainable development

The concept of sustainable development is articulated in four main pieces of legislation which are the Environment Act numbered 2872, the Act on Soil Preservation and Land Utilization numbered 5403, and the Municipality Act numbered 5393 and the Metropolitan Municipality Act numbered 5216. The concept is also specified under various secondary regulations.

The Environment Act is the pioneering legislation that introduced the concept of sustainable development into Turkish law. This Act underwent a comprehensive reform in 2006 and the concept of sustainable was introduced during this reform process through the Act numbered 5491.[77] The purpose of the Environment Act is specified under Article 1 as "*to protect the environment, which is the common asset of all the living beings, in line with the principles of sustainable environment and sustainable development*". The explicit recognition of sustainable development as the main governing principle of environmental issues is a breakthrough in Turkey. In the same year the EU Integrated Environmental Approximation Strategy covering the period from 2007 to 2023 was published by the Ministry of

[76] Nükhet Turgut Yılmaz, *Çevre Politikası ve Hukuku* (Ankara: İmaj Yayınevi, 2009), p. 79.
[77] OJ 13.05.2006/26167.

Environment and Forestry to set the context for environmental reforms in Turkey, whereby sustainable development is mentioned as a general principle governing Turkey's environmental transformation.[78] It is important to note that the reform of 2006 that gave rise to the incorporation of sustainable development into the Environment Act was mainly motivated by the climate of 2005 when Turkey was accepted as a candidate country to join the EU.

The Environment Act defines two concepts: sustainable environment and sustainable development. Article 2 of the Environment Act defines sustainable environment as:

> "The process whereby all the environmental values (social, economic, physiologic, etc.,) that comprise the whole environment of present and future generations are improved, protected and developed without endangering the existence and the quality of the resources that the future generations may need."

On the other hand, Article 2 defines sustainable development as:

> "The development and progress that is based on establishing a balance between the environmental, economic and social targets, to ensure present and future generations live in a healthy environment."

The Environment Act further lays down general principles pertaining to the protection and improvement of the environment and the prevention of pollution. Two out of the ten principles explicitly refer to sustainable development. According to Article 3 of the Environment Act, "*The authorized agencies, which decide on the land and resource utilization and conduct project evaluation, take into account the sustainable development principle in their decision making process*" and "*the benefits of the economic activities to be performed and their effects on the natural resources are evaluated on a long term basis within the framework of sustainable development principle*" (emphasis added). In the same context, Article 5 of the Environment Act mandates to the High Commission of Environment

[78] The EU Integrated Environmental Approximation Strategy is available at <http://www.surdurulebilirkalkinma.gov.tr/DocObjects/Download/13762/AB_ENTEGRE_CEVRE_UYUM_STRATEJISI.pdf>

the duty of determining legal and administrative precautions that help to include the environment into economic decisions within the framework of sustainable development. Besides such stipulations, the Environment Act lays down other important principles which indeed fall under the environmental pillar of sustainable development. For instance, the Environment Act recognises that everybody, but primarily the public bodies, chambers of commerce, associations and non-governmental organisations, are responsible for protecting the environment and preventing pollution and they are obliged to adhere to the measures taken and principles established on the subject. In the same direction, Article 3(f) of the Environment Act requires that for the purpose of utilizing the natural resources and the energy in an efficient manner in all the activities undertaken, it is essential to utilize environmentally compliant technologies that reduce the waste at the source and make possible for the recovery of waste. Furthermore, the Act underlines that the right of participation in the establishment of environmental policies is fundamental.

The concept of sustainable development was introduced to the Environment Act through the Act numbered 5491 of 2006. The members of main opposition party in Turkey brought this amendment before the Turkish Constitutional Court and requested from the court to annul the amendment Act.[79] The applicants argued that the concepts of sustainable environment and sustainable development created a significant limitation for the protection of environment, which contradicted with Article 56 of the Constitution whereby the protection of environment is elaborated in the widest context. The applicants contended that these concepts could not be used as norms determining the scope of protection of environment rather they could only be used as a mean guiding the legitimacy of limitations. However, the Court referred to the definitions of the concepts of sustainable environment and sustainable development stated above and highlighted the vastness of their scope. Furthermore, the

[79] The Turkish Constitutional Court, Case No. 2006/99, Decision No. 2009/9.

Court mentioned the international initiatives on sustainable development such as the Our Common Future Report, 1992 Rio Conference and 2002 Johannesburg World Summit which the definitions were inspired from and held that these concepts do not limit the normative scope of the right to live in a healthy, balanced environment.[80]

On the other hand, the method of articulation of sustainable environment under the Environment Act has been criticised. According to Turgut, mentioning the concept of sustainable environment, which is a fundamental pillar of sustainable development, as a separate concept creates contextual ambiguity, which is argued to demote the normative value of sustainable development.[81] İzci also maintains that the method of articulation gives rise to doubts about the perception of the concept at the public level.[82] Indeed, the definitions of sustainable environment and sustainable development are not well-drafted. The definition of sustainable environment is a revision of the famous definition of sustainable development given by the Brundtland Report, whereas the definition of sustainable development highlights the principle that environmental protection, economic development and social development are independent and mutually reinforcing pillars of the overall concept.[83] This implies that the concept of sustainable development is not adequately comprehended.

Nevertheless, the introduction of sustainable development by the Environment Act is a significant legal development in Turkey considering the previous text of the Environment Act before 2006 amendments. Accordingly, the objective of the Environment Act was, under Article 1, "*protecting and improving the environment which is the common asset of all citizens in conformity with economic and social development objectives*". In the same context, the Environment Act under Article 3 had laid down general principles regarding

[80] Id.
[81] Turgut Yılmaz, note[76], p. 105.
[82] Rana İzci, 'Europeanisation of Turkish Environmental Policy with Special Reference to Sustainability Discourse' in Nas Çiğdem and Yonca Özer (eds), *Turkey and the European Union - Processes of Europeanisation* (Farnham: Ashgate, 2012), p. 191.
[83] Section(2.2).

environmental protection and preventing environmental pollution as follows: "in taking decisions and measures for environmental protection and pollution; short and long term assessments should be made by considering the protection of human and other living beings' health, the impact of those measures on development efforts and their cost efficiency" (emphasis added). In other words, the Environment Act had prioritised economic development over protection of the environment. Turgut notes that these rules provided a legal justification for public bodies to dismiss environmental requirements for the sake of their economic development agendas, which had led courts to render decisions in favour of such considerations.[84]

In addition to the Environment Act, the Act on Soil Preservation and Land Utilization numbered 5403 also mentions sustainable development.[85] This Act sets forth the rules and principles for determining land and soil resources and their classification, preparing land utilisation plans, preventing non-purpose utilisation, and defining the tasks and obligations to ensure land and soil preservation according to the principle of sustainable development. The Act, however, neither provides its own definition of sustainable development nor makes reference to other legislation.

Similarly, the Municipality Act numbered 5393 refers to sustainable development.[86] Article 76 mandates the City Councils to be responsible for promotion of urbanisation and citizenship vision, preservation of the rights of the inhabitants and establishing the rules regarding sustainable development, environmental care, social solidarity, transparency, participation in management and stable operation of control mechanisms. In the same context, the Metropolitan Municipality Act numbered 5216 also mentions sustainable

[84] Turgut Yılmaz, note[76], p. 105; See also, İzci, note[82], p. 183.
[85] OJ 19.07.2005/25880.
[86] OJ 13.07.2005/25874.

development.[87] According to Article 7 of this act regulating functions and responsibilities of metropolitan, district and first-tier municipalities, the metropolitan municipalities need to ensure the protection of the environment, agricultural land and waterway catchment areas in accordance with the principle of sustainable development.

2.4.3 The policy framework of sustainable development

The Turkish policy framework on sustainable development is quite fragmented. Despite the explicit call during the Johannesburg Summit for the development of national development strategies, Turkey failed to provide a unified strategy document. Therefore, the sustainable development objectives, targets and themes are blurred under different policy instruments.

2.4.3.1 The Development Plans

Development plans are prepared by the Ministry of Development, which was the State Planning Organization founded in 1960 and reorganized as the Ministry of Development in June 2011.[88] Once a development plan is found appropriate by the Council of Ministers, it is submitted to the Turkish Grand National Assembly for approval. In cases of approval, the development plan is published at the Official Gazette and enters into force. Development plans are binding for the public sector and orient all policies and investments in Turkey.

The 9th Development Plan (covering 2007-2013) has been prepared in the context of accelerated negotiations with the EU and has determined the Turkish development targets and objectives in that regard.[89] The Plan also lays down the foundation for the EU Integrated Environmental Adoption Strategy (covering 2007-2023), which is the main policy framework governing Turkey's pre-accession period.

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[87] OJ 23.07.2004/25531.
[88] Decree Law No. 641, OJ 08.06.2011/27958.
[89] The plan was approved by Turkish Grand National Assembly on 28.06.2006. DPT, *Ninth Development Plan (2007-2013)* (Ankara: Devlet Planlama Teşkilatı, 2006) available at <http://ekutup.dpt.gov.tr/plan/ix/9developmentplan.pdf>

The 9th Development Plan considers that it is essential to develop and extend production processes and technologies that are productive and environmentally friendly in order to increase competitiveness and to ensure sustainable development in the context of directing consumer preferences to environmentally friendly goods and services.[90] The approach of the 9th Development Plan is interpreted by Talu as an integrative approach that takes sustainable development a step forward in Turkey.[91] İzci also considers that the 9th Plan approached the environment as an asset for sustainable economic growth and competiveness, which is interpreted as following the lines of the EU Lisbon Strategy, highlighting the themes of competiveness and good governance.[92]

The 10th Development Plan (covering 2014-2018), which maintains the references to sustainable development, puts forward a new vision for the public procurement.[93] According to the 10th Development Plan, public procurement is considered as an efficient tool to foster innovation and increase green production capacities of the national economic operators.[94] In this context, the Plan requires enhancement of the capacity for preparation and evaluation of technical specifications and dissemination of good practices in the public sector.

2.4.3.2 The Turkish Industrial Strategy

An important policy framework promoting reforms in sustainable development is Turkish Industrial Strategy (covering 2011-2014).[95] The Strategy, prepared by the Ministry of Industry and Trade, was adopted by the Higher Planning Council on 7 December 2010. The concept of sustainable development has been referred to under different parts of the Strategy,

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[90] Ibid, p. 119.
[91] Nuran Talu, *Sürdürülebilir Kalkınma Durum Değerlendirme Raporu* (Ankara: DPT, 2007), p. 106.
[92] İzci, note[82], p. 192.
[93] The plan was approved by Turkish Grand National Assembly on 01.07.2013. Ministry of Development, *10th Development Plan (2014-2018)* (Ankara: Ministry of Development, 2013) available at <www.kalkinma.gov.tr/DocObjects/view/15089/Onuncu_Kalkınma_Planı.pdf>
[94] Ibid, p. 101-102.
[95] Sanayi ve Ticaret Bakanlığı, *Türkiye Sanayi Stratejisi Belgesi (2011-2014)* (Ankara: Sanayi ve Ticaret Bakanlığı,, 2010) available at <www.sanayi.gov.tr/Files/Documents/sanayi_stratejisi_belgesi_2011_2014.pdf>

which sets out specific targets in order to integrate sustainable development into industrial policies. The Strategy sets its vision, targets and objectives in the context of Turkey's membership process with the EU and it bears a remarkable similarity to the EU SCP/SIP Plan.[96]

The Strategy underlines that the implementation of environmental policies in the context of sustainable development objectives is an essential aspect of Turkish industrial policy.[97] In this context the Strategy projects that long term competiveness of the products manufactured in Turkey depends on the usage of environmentally friendly production processes. Furthermore, the Strategy envisages that in conjunction with the rapid growth of the Turkish economy, the Turkish industry is required to ensure the efficient utilisation of energy.

The Strategy further evaluates the energy problems challenging Turkey in the long term. The Strategy notes the fact that the current energy production in Turkey is mostly dependent on the import of fossil fuels, which creates challenges for Turkey with two dimensions.[98] The first dimension is political and it is argued that the import-oriented energy supply creates a significant political risk of sustainability of the energy supply; any fluctuation in import supply directly affects industrial production in Turkey. The second dimension is environmental and it is argued in the Strategy that the current production method of energy is a significant source of greenhouse emissions, obstructing achievement of Turkey's targets on climate change. In that regard, the Strategy proposes the transition to clean energy production and increasing energy efficiency as the solution for overcoming the challenges of securing energy supply and tackling climate change objectives.[99]

[96] For the SCP/SIP Plan see, Section(2.3.2.2).
[97] Sanayi ve Ticaret Bakanlığı, note[95], para 247.
[98] Ibid, para 250.
[99] Ibid, para 251.

The second part where sustainable development is mentioned is the regional development chapter of the Industrial Strategy. This section underlines the importance of small and medium sized enterprises for regional and sustainable development of Turkey.[100]

2.4.3.3 The Energy Efficiency Strategy

The Energy Efficiency Act numbered 5627 was enacted in 2007 for the purpose of increasing efficiency in using energy sources, avoiding waste, easing the burden of energy costs on the economy and protecting the environment.[101] The year following the introduction of this act, the Turkish Prime Ministry declared 2008 as an energy efficiency year and issued Circular No 2008/2, which required public institutions, organisations, municipalities and trade associations to consider energy efficiency as a priority in their decision making, and to report annually about achievements on energy efficiency.[102]

The Ministry of Energy and Natural Resources issued the Regulation on Increasing Efficiency in the Use of Energy Resources and Energy the same year and stipulated energy efficiency requirements for a wide range of goods (e.g. air conditioners computers, printers, photocopying machines).[103] The introduction of the Regulation Pertaining to Labelling and Standard Product Information of Energy and Other Resource Consumptions of the Products (hereafter 'the Labelling Regulation') in 2011 by the Council of Ministers was a another significant development in terms of achieving energy efficiency.[104] The significance of the Labelling Regulation is that it directly mentions public procurement and lays down rules for technical specifications. Article 10 of the Labelling Regulation provides that the contracting authorities are permitted to lay down conditions in the technical specifications in order to provide the procured goods to comply with the criteria of having the highest performance

[100] Ibid, para 276.
[101] OJ 05.02.2007/26510.
[102] OJ 15.02.2008/26788.
[103] OJ 25.10.2008/27035.
[104] OJ 02.12.2011/28130.

levels and belonging to the highest energy efficiency class. The contracting authorities are also permitted to require higher performance levels than existing energy efficiency classes.

The Energy Efficiency Act and most importantly the strong political determination provided the contextual background for increasing energy efficiency in various sectors in Turkey. Based on the principles set out in this act, the Ministry of Energy prepared the Energy Efficiency Strategy covering the years between 2012 and 2023, which translated the commitments on the promotion of energy efficiency into tangible action plans.[105] The Energy Efficiency Strategy is interlinked with the 9th Development Plan and the Turkish Industrial Strategy which were explained in the previous sections.

The Energy Efficiency Plan lays down more specific action plans in order to realise the prescribed targets. It is noteworthy that public procurement is considered as an area that particularly needs to be reformed in order to achieve Target (6): to use energy effectively and efficiently in public sector. The action entitled 'SP-06/ST-01/A-02' targets 'not to procure goods, services and works using energy which fails to meet minimum efficiency criteria, determined by the Ministry of Energy'. In order to accomplish this target, a reform of public procurement is envisaged and the Ministry of Energy is required to define the minimum efficiency criteria for the procurement of goods and service and construction works, and the necessary changes need be made in the legislation related to public procurement.

2.4.3.4 The National Climate Change Strategy

Climate change, in its simplest definition, is "*the response of the planet's climate system to altered concentrations of greenhouse gases in the atmosphere*".[106] The international

[105] OJ 25.02.2012/28215; The strategy available at <www.eie.gov.tr/eie-web/duyurular/EV/EV-Strateji_Belgesi/Energy_Efficiency_Strategy_Paper_2012.pdf>

[106] For the underlying causes of climate change see, David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (New York: Foundation Press, 2007), p. 631 et seq.

community has showed consensus with regard to the impact of increased levels of carbon dioxide and other greenhouse gases that are causing global warming and changing the earth's overall climate. However, it has taken time for the international community to agree on binding commitments for changing their individual economic patterns and policies that have caused the problems.[107]

The climate change negotiations have been mainly conducted within the context of the United Nations.[108] Such negotiations have been mainly initiated within this context, which has also created the concept of sustainable development. The United Nations Framework Convention on Climate Change (hereafter 'the UNFCCC'), which was opened for signature during the Rio Summit and entered into force on 21 March 1994, was a breakthrough in terms of achieving a consensus on climate change.[109] The majority of the international community, including the member states of the EU, are all party to this convention.[110] It is noteworthy that Article 3 of the UNFCC highlights that 'the Parties have a right to, and should, promote sustainable development'.

The Convention encourages industrialised countries to stabilise greenhouse emissions rather than laying down binding requirements. Nevertheless, the UNFCC created a dynamic context to discuss the climate change issue and initiated annual meetings (also called 'the COP') to assess progress in dealing with climate change. The Kyoto Protocol which was adopted during the COP3 held in Kyoto, Japan in 1997 is a breakthrough in terms of conferring a strong normative value to climate change.[111] The Kyoto Protocol is an international agreement complementing the UNFCC, but standing on its own. However, unlike the UNFCC, the Kyoto Protocol lays down binding requirements for the signatory

[107] For the main reasons of this delay see, ibid, p. 664.
[108] For the development of the climate change regime within UN see, ibid, p. 667.
[109] The UNFCC available at <http://unfccc.int/resource/docs/convkp/conveng.pdf>
[110] The countries party to the UNFCC available at <http://unfccc.int/parties_and_observers/items/2704.php>
[111] The Kyoto Protocol available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf>

parties. The Kyoto Protocol entered into force on 16 February 2005.[112] The Kyoto Protocol, in parallel with the UNFCC, reiterates the ultimate goal of achieving sustainable development.

Turkey's accession to the UNFCC and the Kyoto Protocol has been gradual. When the UNFCC was signed Turkey was evaluated as a developed OECD country, so it was enlisted under Annex I and Annex II of the UNFCC. However, being listed under Annex II created an undesirable situation for Turkey since the countries listed under this annex are required to financially assist developing countries and transfer environmentally friendly technologies to specially developing countries besides reducing their greenhouse emissions. Turkey's hesitation to be party to the climate change regime and reluctance to undertake specific emission targets is argued to have stemmed from the fear that accession to the regime could challenge and undermine achieving economic development targets.[113] İzci notes that there have been strong political debates with regard to the potential benefits and costs of the Kyoto Protocol; certain groups argued that signing the Kyoto Protocol would hamper economic development therefore Turkey should never sign it, whereas other groups argued that Turkey should sign the Protocol only after becoming an EU member state.[114]

The industrialised countries, particularly those in the EU, did not favour the approach of Turkey and focused on promoting greater engagement on the part of a wider group of countries.[115] The EU in particular expected Turkey as a candidate country to undertake the major environmental regimes. However, the reservations put forth by Turkey were accepted and taking into account the special circumstances of Turkey differentiating it from other developed countries, Turkey was deleted from Annex II by an amendment that entered into

[112] The countries party to the Kyoto Protocol available at <http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php>
[113] İzci, note[82], p. 189-190.
[114] Ibid, p. 190.
[115] See, Joanna Depledge, 'The road less travelled: difficulties in moving between annexes in the climate change regime' (2009) 9 *Climate Policy Climate Policy* 273, p. 280-281.

force on 28 June 2002, pursuant to decision 26/CP.7 adopted at COP7.[116] After this amendment, Turkey adhered to the Convention on 24 May 2004.[117]

Turkey subsequently became party to the Kyoto Protocol on 26 August 2009.[118] Turkey did not did not take part in the Annex-B of the Protocol, so it did not undertake any quantitative emission reduction commitments. It is important to note that Article 90 of the Turkish Constitution explicitly recognises that international agreements duly put into effect carry the force of law. In that regard, the UNFCC and the Kyoto Protocol are equal to national legislation in Turkey, so they have a remarkable normative power.

Being party to the UNFCC and the Kyoto Protocol provided a new momentum to adopt a long-term vision for combatting climate change within Turkey's special context. Turkey submitted its First National Communication to the UNFCCC Secretariat on February 2007, and this elaborated Turkey's national circumstances and level of development.[119] It has been highlighted that Turkey, due to its geographical location, is considered highly vulnerable to the impacts of climate change. Furthermore, the Ministry of Environment and Forestry adopted the National Climate Change Strategy covering the years between 2010 and 2020 in May 2010.[120] After the institutional rearrangements conducted in 2011, the Ministry of Environment and Urbanization issued the National Climate Change Action Plan covering the years between 2011 and 2023.[121] Furthermore, monitoring of greenhouse emissions are

[116] The addendum decision available at <http://unfccc.int/resource/docs/cop7/13a04.pdf>
[117] Ratification: 24 February 2004, Entry into force: 24 May 2004.
[118] Ratification: 28 May 2009, Entry into force: 26 August 2009.
[119] Ministry of Environment and Forestry, First National Communication on Climate Change (2007) available at <http://unfccc.int/resource/docs/natc/turnc1.pdf>
[120] Ministry of Environment and Forestry, *National Climate Change Strategy (2010-2020)* (Ankara: Ministry of Environment and Forestry, 2010) available at <http://iklim.cob.gov.tr/iklim/Files/Stratejiler/National%20Strategy.pdf>
[121] Ministry of Environment and Urbanization, *Republic of Turkey National Climate Change Action Plan (2011-2023)* (Ankara: Ministry of Environment and Urbanization, 2011) available at <www.cem.gov.tr/erozyon/Files/faaliyetler/dis_iliskiler/iklim_degisikligi_cerceve_sozlesmesi/Cevre_Bak_Ulusal_Eylem_Plani_ing_2011_2023_2_.pdf>

regulated under a specific regulation issued in April 2012 entitled 'the Regulation on the Monitoring of the Greenhouse Emissions'.[122]

The most important aspect of the National Climate Change Action Plan is its explicit recognition of public procurement as an instrument to achieve its prescribed specific targets. The Action Plan lays down the objective to "decrease annual energy consumption in the buildings and the premises of public institutions by 10% until 2015 and by 20% until 2023".[123] The Plan prescribes as an action "*carrying out preparatory works for implementation of the Green Procurement Programme to ensure purchase of more efficient equipment, vehicle and buildings in public institutions*". The benefits of this action are envisaged to be a decrease in public expenditure and market transformation for energy efficiency devices. In that regard, the Action Plan requires initiation of a reform of public procurement.

2.4.3.5 The Sustainable Development Report

The policy framework explained hereto deals with different pillars or themes of sustainable development. Turkey has not prepared a standalone and comprehensive strategy on sustainable development encapsulating all pillars. Nevertheless, the report, which was prepared by the Ministry of Development and presented during the Rio Conference (hereafter 'the SD Report') was a landmark document that compiled Turkey's approach to sustainable development.[124]

According to the SD Report, Turkey adopts a 'human centred development' approach.[125] Furthermore, it is underlined that the highest importance and priority will be given to

[122] OJ 25.04.2012/28274.
[123] Ministry of Environment and Urbanization, note[121], p. 88.
[124] Ministry of Development, *Turkey's Sustainable Development Report - Claiming the Future 2012* (Ankara: Ministry of Development, 2012) available at <www.uncsd2012.org/content/documents/490Turkey'sSustainableDevelopmentReportClaimingtheFuture2012.pdf>
[125] Ibid, p. 2.

sustainable development vision in the use of current financial instruments of public and private sector.[126] The SD Report identifies Turkey's green growth approach for achieving sustainable development. It is noteworthy that Turkey has adopted a similar approach with the EU and considers green growth as an opportunity to stimulate employment (green jobs) besides its environmental benefits, which is considered crucial in terms of strengthening the social dimension of development.[127] Green growth is perceived by Turkey as "*as an economic development and growth instrument in which natural resources are used efficiently, environmental degradation is prevented, social welfare and employment is increased while reducing poverty, and supporting innovative, efficient and clean technologies*".[128] The SD Report also adopts a comprehensive social agenda in accordance with the UN Millennium Development Goals which were adopted in the UN Millennium Summit in the year 2000 and updated in 2010.[129]

The influence and contribution of the EU on the evolution of environmental policy is explicitly acknowledged by Turkey and it is highlighted.[130] The EU integration process is considered to have enabled important steps to be taken regarding environmental policy and legislation, and in particular, the Customs Union process is considered to have contributed to the private sector's awareness of environmental commitments on the international level in order to maintain its competitiveness.[131]

2.4.4 The evaluation of Turkey's approach to sustainable development

The membership negotiations and the Customs Union between Turkey and the EU have provided significant reform momentum in Turkey for the acknowledgement of sustainable

[126] Ibid, p. 3.
[127] Ibid, para. 18.
[128] Ibid, para. 129.
[129] See, the UN, United Nations Millennium Declaration, General Assembly Resolution (18 September 2000) A/RES/55/2; Keeping the promise: united to achieve the Millennium Development Goals, General Assembly Resolution (19 October 2010) A/RES/65/1; ibid, 89.
[130] Ibid, para. 92.
[131] Ibid, para. 129.

development, which is also acknowledged under the SD Report.[132] Turkey has shown remarkable (but not perfect) progress in different areas related to sustainable development such as the environment, climate change, energy, industrial policy and social development.[133] The EU notes particularly good progress in energy efficiency.[134] The conception of sustainable development in Turkey, though, has certain shortcomings and despite the positive developments explained hereto, Turkey needs to undertake significantly more to comply with the EU.[135]

The protection of the environment has certain distinctive features; legislative reforms are not sufficient alone and the process requires high amounts of capital transfer. In the case of Turkey as a developing country that is endeavouring to raise its environmental standards to the EU level, the adoption cost emerges as a significant obstacle. In that regard, the implementation of sustainable development is still regarded as being costly in Turkey.[136] The environmental performance of Turkey and the transition to a green economy could only be expected to improve in the long term, and the evolution directly depends on the performance of economic growth.[137]

Besides the high adoption costs of compliance, there is a significant psychological barrier that needs to be overcome: the perception that sustainability hampers economic development and competiveness. Turkey mainly approached the environment as an issue that could have adverse effects on economic development and it had been highlighted that environmental considerations should not impede development of the country. As discussed, this approach

[132] Turgut Yılmaz, note[76], p. 42; Bozkurt, note[74], p. 136; OECD, *OECD Environmental Performance Reviews - Turkey* (Paris: OECD Publishing, 2008), p. 112; İzci, note[82], p. 182 and 185.
[133] For the update review by the European Union see, European Commission, Turkey 2012 Progress Report [accompanying the document Communication from the Commission to the European Parliament and the Council Enlargement Strategy and Main Challenges 2012-2013 COM(2012)600], SWD(2012)336.
[134] Ibid, p. 61.
[135] For a detailed review see, OECD, note[132], p. 113-118.
[136] İzci, note[82], p. 198; Algan and Mengi, note[72], p. 107; Turgut Yılmaz, note[76], p. 7.
[137] Algan and Mengi, note[72], p. 108.

was maintained until 2006 when the Environment Act was reformed. In fact, the economic gains of the transition to sustainability and a green economy have not been fully recognised in Turkey. As discussed in this chapter, the EU approaches a green economy in the context of sustainable development as having the potential to stimulate economic growth and create new job opportunities. The Turkish SD Report, published in 2012, for the very first time addressed the green economy in this respect and evaluated the market opportunities and growth possibilities in this context. It could be argued that when the economic gains of sustainable development become visible in Turkey, a greater transition to sustainability will occur.

2.5 Conclusion

Sustainable development, in its simplest definition, is the process of finding equilibrium between economic development, protection of the environment and social development. There is not a predefined template that would provide a prompt transition to sustainability. Each country is unique in its economy, society and environmental priorities and so, they have different challenges and needs. Therefore, the implementation of sustainable development has to be carried out in accordance with local and national dynamics.

It is noteworthy that the European Consensus on Development, which sought to set out a common vision for the development policy of both the EU and the individual member states, reaffirmed in 2006 that sustainable development includes good governance, human rights and political, economic, social and environmental aspects.[138] The membership negotiations and the Customs Union between Turkey and the EU have provided significant reform momentum in Turkey for the acknowledgement of sustainable development. It could be

[138] See, the Joint Statement of European Parliament, Council and Commission, 'The European Consensus on Development', OJ 2006, C46 available at <http://ec.europa.eu/development/icenter/repository/eu_consensus_en.pdf>, para. 7.

argued that sustainable development has a conceptual breadth and magnitude that goes far beyond the protection of the environment in Turkey.

There is an increasing awareness of the opportunities provided by public procurement to promote sustainable development. The 10th Development Plan, the Turkish Industrial Strategy, the Energy Efficiency Strategy and the National Climate Change Action Plan are significant documents due to their explicit recognition of public procurement as an instrument to achieve their prescribed targets. Korkmaz points out that a draft public procurement act, which contains certain environmental and social considerations in parallel to the acquis of the EU, is being prepared.[139] However, as of 2013, there is not a detailed roadmap with regard to adoption of this draft act and the draft has not yet been made available to the public. There is also an on-going project called "Yeşil Alım" (Green Procurement), initiated in 2011 in order to increase awareness of the opportunities provided by public procurement in order to promote the environment pillar of sustainable development.[140] The project is also at an initial phase. Nevertheless, the draft act and this project reflect the increasing awareness of the use of public procurement as a policy tool in Turkey to promote sustainable development.

[139] Abdullah Korkmaz, *Sustainable Procurement as a Secondary Policy Tool and Turkey Case (IPPC5: Exploring New Frontiers in Public Procurement, Seattle, USA)* (2012), p. 1124.
[140] The project details are available at <http://yesilalim.info>

CHAPTER 3

Sustainable Public Procurement in the European Union

3.1 Introduction

In the previous chapter the concept of sustainable development has been fully analysed within the context of international, regional and national levels. It is noteworthy that public procurement has always been considered as a significant policy instrument to implement sustainable development targets and objectives.

Sustainable development has gained significant policy value in the European Union, and the concept has also entered into the TEU and the TFEU. The policy frameworks on sustainable development have found their manifestation in the procurement rules and practice and have contributed to the emergence of the concept of sustainable public procurement. In this context, the pursuit of sustainable development targets and objectives under the public procurement process is crystallised under the concept of sustainable public procurement.

The pursuit of sustainable public procurement, however, has both benefits and drawbacks. Furthermore, there are different legal barriers standing before the pursuit of sustainable development objectives throughout the public procurement process within the European Union, which has a regulated internal public procurement market that aims to open up the public contracting opportunities in all member states. In that regard, the implementation of sustainable public procurement without discriminating on grounds of nationality and distorting free movement of goods, freedom to provide services and freedom of establishment is quite a complex issue.

This chapter identifies the benefits, drawbacks and regulatory barriers to sustainable public procurement in the European Union. The main objective of this chapter is to provide the contextual and legal background for later chapters where Turkish law will be examined. Considering the objectives of this study, this chapter will only provide the broad framework

of sustainable public procurement; in this context, the EU law will only be examined to a certain extent and depth.

3.2 The use of public procurement as a policy tool

Public procurement can be simply defined as the process where goods, services or works are acquired by public bodies to carry out their primary functions. Public procurement expenditure represents about 16 per cent of the EU's GDP.[1] Two directives mainly govern the legal framework on public procurement in the EU which are Directive 2004/18/EC (hereafter 'Public-Sector Directive') and Directive2004/17/EC (hereafter 'Utilities Directive'). Public-Sector Directive lays down the principles and procedures for the award of public works contracts, public supply contracts and public service contracts while Utilities Directive lays down the principles and procedures for the award of contracts by undertakings operating in the water, energy and transport sectors. The public bodies and entities subject to these directives are collectively referred as 'contracting authorities' within the scope of this chapter.

The TFEU provisions and principles that prohibit discrimination on grounds of nationality and require free movement of goods, freedom to provide services and freedom of establishment also play a key role in conducting public procurement in the EU. Furthermore, there are significant case-law of the Court of Justice of the European Union (hereafter 'the CJEU') on public procurement, which will be addressed in the relevant parts of this chapter.

The use of public procurement as a policy tool within the EU is not a new phenomenon and public procurement historically has not been completely isolated from different policy motivations.[2] The contracting authorities can pursue industrial, environmental or societal objectives that are not necessarily related to the functional objective of procurement, which

[1] European Commission, Impact and Effectiveness of EU Public Procurement Legislation (Commission Staff Working Paper) SEC(2011)853 Part 1.
[2] For the literature on adoption of the EU Member States such policies see, Chapter(1):Section(1.1.1), note[21].

is "*the purchase on competitive terms of a product, work or service meeting particular functional need*".[3] As highlighted by Arrowsmith and Kunzlik, the public authorities have their purchaser autonomy defined by their domestic legal and constitutional framework and, accordingly, they can use their purchasing powers to pursue certain social, economic, industrial or environmental policies.[4] The decision to purchase or not to purchase, or the decision on what to purchase, can also be influenced by certain social, economic, industrial or environmental concerns.

The pursuits of policies which are not directly related to the procurement's functional objective are commonly called 'secondary policies'. Arrowsmith and Kunzlik, though, suggest the term 'horizontal policies' for this context as it is argued that there is not a clear distinction between primary and secondary policies; the term secondary may create connotations that such policies have less importance and may lead to the delusion that such policies are inherently not rational, normal or legitimate.[5]

Public procurement is a process that consists of different stages, i.e. the planning stage whereby goods, services or works to be purchased are decided, the definition of the subject-matter of the contract stage, the preparation of technical specifications stage, the qualification of the economic operators stage and the award of the contract stage. As discussed in Chapter 2, the Sustainable Development Strategy, the Sixth Environmental Action Programme, the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan, the Energy Efficiency Plan and the Europe 2020 Strategy all encourage the contracting authorities within the European Union to address sustainable development objectives within their procurement processes. Procurement whereby sustainable

[3] Sue Arrowsmith and Peter Kunzlik, 'Public procurement and horizontal policies in EC law: general principles' in Arrowsmith Sue and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009), p. 9 and 13.
[4] Ibid, p. 17.
[5] Ibid.

development objectives are addressed could be conceptualised under the heading of sustainable public procurement.[6]

The European Commission also adopts a similar definition and defines sustainable procurement as the procurement whereby "*contracting authorities take into account all three pillars of sustainable development when procuring goods, services or works at all stages of the project*".[7] The definition given by the UK Sustainable Procurement Task Force is worth mentioning which defines the concept of sustainable procurement as "*a process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits not only to the organisation, but also to society and the economy, whilst minimising damage to the environment*".[8] Sustainable procurement is also defined as "*only purchasing goods that are really needed, and buying items or services whose production, use and disposal both minimize negative impacts and encourage positive outcomes for the environment, economy and society*" and sustainability is defined as the "*degree of sustainable development in the context of the organisation*" under the British Standard 8903 ('the BS 8903'), which is the world's first standard on sustainable procurement.[9]

Sustainable public procurement encapsulates the three pillars of sustainable development: economic development, the protection of the environment and social development. The contracting authorities, though, can prefer to highlight a specific pillar of sustainable development throughout their procurement processes. As pointed out by Fisher, diverse

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[6] See, Roberto Caranta, 'Sustainable Public Procurement in the EU' in Caranta Roberto and Martin Trybus (eds), *The Law of Green and Social Procurement* (Copenhagen: DJØF Publishing, 2010), p. 17; Christopher McCrudden, 'Using public procurement to achieve social outcomes' (2004) 28 *Natural Resources Forum* 257, p. 1; Rolf H. Weber, 'Development promotion as a secondary policy in public procurement' (2009) 4 *Public Procurement Law Review* 184, p. 186.

[7] See, The European Commission, Sustainable Public Procurement, available at <http://ec.europa.eu/environment/gpp/glossary_en.htm>

[8] DEFRA, *Procuring the future: Sustainable procurement national action plan: recommendations from the Sustainable Procurement Task Force* (London: DEFRA, 2006), p. 10.

[9] British Standards Institution, *Principles and framework for procuring sustainability (BS8903:2010) - Guide* (London: British Standards Institution, 2010).

issues that have different origins and rationales and which may not easily co-exist are encapsulated by the concept of sustainable procurement.[10] Notably, each pillar of sustainable development has to be treated separately since the action needed to realise it differs from other pillars and may require a different methodology throughout the procurement procedures. Therefore, it is pragmatically necessary to distinguish the pursuit of environmental objectives of sustainable development in public procurement from the pursuit of social objectives. In this context, the term "*green procurement*"[11] is used in the literature to define the procurements where the environmental pillar of sustainable development are emphasised, "*social procurement*"[12] is used to identify procurements where the social pillar of sustainable development are focused and "*sustainable public procurement*" is used as an umbrella concept to define the procurements where any sustainable development element (economic, social or environmental) is addressed as a horizontal policy.

This choice of this terminology is only pragmatic and does not aim to have a definite legal consequence since there is no definite distinction between these three groups of policies. For instance, the reduction of consumption of resources such as water and electricity contributes to environmental protection as much as it promotes economic efficiency. In the same context, policies such as job creation, enhancing labour standards and elimination of discrimination have both economic and social aspects. Sustainable public procurement, inter alia, covers economic issues in procurement other than price such as fostering innovation and enhancing the diversity of supplier markets. Such policies could be stimulated through

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[10] Eleanor Fisher, 'The Power of Purchase: Addressing Sustainability through Public Procurement' (2013) 1 *European Procurement & Public Private Partnership Law Review* 2, p. 3.

[11] Peter Kunzlik, '"Green Procurement" Under the New Regime' in Nielsen Ruth and Steen Treumer (eds), *The new EU public procurement directives* (Copenhagen: Djøf Publishing, 2005), p. 117 et seq. Although, green eco-procurement, environmentally preferable purchasing, environmental public procurement, greener public purchasing is also used in the literature, green procurement is the most common one. See, Lina Carlsson and Fredrik Waara, 'Environmental Concerns in Swedish Local Government Procurement' in Thai Khi V. and Gustavo Piga (eds), *Advancing public procurement: practices, innovation, and knowledge sharing* (Boca Raton: PrAcademics Press, 2006), p. 240.

[12] See, Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement and Legal Challenge* (Oxford: Oxford University Press, 2007).

both green and social procurement. Furthermore, as environmental problems impose external costs on society, the policies related to the protection of the environment can also correlate with social procurement.

3.3 Sustainable development in the Procurement Directives

Both Public-Sector Directive and Utilities Directive mention sustainable development only in their recitals, with no reference in the main texts. The reference to sustainable development in both directives is identical. The Directives provide that:

> "Under Article 6 of the Treaty, environmental protection requirements are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of that Treaty, in particular with a view to promoting sustainable development. This Directive therefore clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts."[13] (Emphasis added)

The articulation of sustainable development alongside the protection of the environment implies that the Directives approach sustainable development as a multidimensional concept that goes far beyond the mere protection of the environment. Another reference to sustainable development in the recitals is as follows:

> "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 or the preservation of plant life, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty."[14] (Emphasis added)

There is a need to clarify the legal status of reference to sustainable development in the recitals. It could be argued that this recital permits the contracting authorities to derogate from explicit restrictions of the directives and they might justify decisions that might be contrary to the Procurement Directives with one of the reasons laid down in the recital.

[13] Public-Sector Directive, Recital(5); Utilities Directive, Recital(12).
[14] Public-Sector Directive, Recital(6); Utilities Directive, Recital(13).

However, the recitals themselves underline that the Procurement Directives do not desire the contracting authorities to have such an unrestricted discretion.[15] Arrowsmith rightfully argues that this recital only guides the relationship between the Procurement Directives and the TEU,[16] while McCrudden identifies the exception introduced by this recital as 'treaty-based exception'[17]. Accordingly, Arrowsmith does not consider that the recital can be subject to a broad interpretation and argues that the Procurement Directives only regulate the equilibrium between certain interests in public procurement, e.g. trade interests and other interests, and there exists an exhaustive and specific harmonised area that demonstrates that there may be certain areas of discretion that the Directives do not aim to harmonise.[18] This argument is supported with the CJEU's approach to horizontal policies in the landmark EVN-Wienstrom decision, where the legitimacy of the horizontal policies were justified in accordance with the restrictions laid down in the Directives rather than questioning the possibility of compliance with the TEU. Furthermore, as these exceptions are not repeated under the main text of the directives, it is contended that it is hardly the intention to subject these restrictions to wide interpretation.

The author favours this approach and these recitals only underline the complex correlation of public procurement with sustainable development, and in the most basic sense they underline to the contracting authorities of adequately evaluating the long-term social, environmental and economic impact of their purchasing activities within the context of explicit restrictions laid down in the Directives. Despite the reference to sustainable development in their recitals, the Procurement Directives are silent on the concept of

[15] Public-Sector Directive and Utilities Directive, Recitals(1).
[16] Sue Arrowsmith, 'Application of the EC Treaty and directives to horizontal policies. a critical review' in Arrowsmith Sue and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009), p. 193.
[17] Christopher McCrudden, 'EC public procurement law and equality linkages: foundations for interpretation' in Arrowsmith Sue and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009), p. 300.
[18] Arrowsmith, note[16], p. 194.

sustainable public procurement or sustainability considerations. Caranta argues that these directives "*failed to clarify all the issues arising from the possible reference to sustainability considerations in public procurement*".[19] Hettne also maintains that the Procurement Directives "*constitute a starting point but not the complete legal framework which can impose limits on sustainable public procurement*".[20]

On the other hand, the European Parliament adopted a resolution on 25 October 2011 on the modernisation of public procurement whereby it is underlined that "*the effective functioning of sustainable public procurement requires clear and unambiguous EU rules precisely defining the framework of Member States' legislation and implementation*".[21] In this context, the European Parliament pointed out "*the need to strengthen the sustainability dimension of public procurement by allowing it to be integrated at each stage of the procurement process*" and called on The European Commission to "*encourage governments and contracting authorities to increase the use of sustainable public procurement*".[22] In this context, on 20 December 2011 The European Commission published its proposals for new procurement directives.[23] The new proposals aim to improve the efficiency of procedures and allowing for greater strategic use of public procurement. Kunzlik maintains that the proposed directives have distinguishing from the current directives and are like "*an instrument of Union economic/industrial policy, being intended to help deliver the Europe 2020*

[19] Caranta, note[6], p. 27.
[20] Jörgen Hettne, 'Sustainable Public Procurement and the Single Market – Is There a Conflict of Interest?' (2013) 1 *European Procurement & Public Private Partnership Law Review* 31, p. 40.
[21] European Parliament resolution of 25 October 2011 on the modernisation of public procurement (2011/2048(INI)), para. 3.
[22] Id., para. 14 and 19.
[23] See, European Commission, Proposal for a Directive on public procurement, COM(2011)896 (hereafter 'Draft Public-Sector Directive'); European Commission, Proposal for a Directive on procurement by entities operating in the water, energy, transport and postal services sectors, COM(2011)895 (hereafter 'Draft Utilities Directive').

Strategy".[24] The proposals, which aim to provide more simplicity and flexibility,[25] maintain the reference to sustainable development in the recitals. In addition to this reference to sustainable development, the new proposals directly mention sustainable procurement under the Title IV section on governance. These directives are expected to facilitate better integration of sustainable development concerns into public procurement.[26]

The new proposals require Member States to appoint a single independent body responsible for the oversight and coordination of implementation activities, which will be renamed the oversight body. In this context, the oversight body is expected to report annually on *"a global overview of the implementation of sustainable procurement policies, including on procedures taking into account considerations linked to the protection of the environment, social inclusion including accessibility for persons with disabilities, or fostering innovation*".[27] The new proposals, though, do not define the concept of sustainable procurement. On the other hand, the underlining of the protection of the environment, social inclusion, accessibility and innovation alongside sustainable procurement alongside sustainable procurement, indicates that sustainable procurement is taken into consideration in the widest context, covering the major environmental, social and economic themes of sustainable development. According to The European Commission, the new proposals aim to provide consistency with the other policies and objectives of the Union, and amongst these policies the Europe 2020 strategy for smart, sustainable and inclusive growth and related policy frameworks comes forward.[28] However, the idea of establishing an oversight body to

[24] Peter Kunzlik, 'From suspect practice to market-based instrument: policy alignment and the evolution of EU law's approach to "green" public procurement' (2013) 3 *Public Procurement Law Review* 97, p. 108.
[25] See further Sue Arrowsmith, 'Modernising the European Union's public procurement regime: a blueprint for real simplicity and flexibility' (2012) 21 *Public Procurement Law Review* 71; Rhodri Williams, 'Commission proposals to modernise public procurement' (2012) 21 *Public Procurement Law Review* 101.
[26] Fisher, note[10], p. 6; Dacian Dragos and Bogdana Neamtu, 'Sustainable Public Procurement: Life-Cycle Costing in the New EU Directive Proposal' (2013) 1 *European Procurement & Public Private Partnership Law Review* 19, p. 22-26.
[27] Draft Public-Sector Directive, Article(84); Draft Utilities Directive, Article(93).
[28] See, European Commission, Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market, COM(2011)15, p. 33.

regulate public procurement in each Member State has been removed from the proposed reforms during the recent re-negotiations.

The overall approach to sustainable procurement could be summarised as follows: sustainable procurement is environmentally friendly, resource-efficient, innovative and socially-responsible procurement. Could public procurement be used to target those sustainable public procurement objectives? Indeed, the legitimacy of such a pursuit depends on the level of sustainability that is desired and the stage whereby sustainability concerns are addressed. In other words, there is not a predefined template for providing the transition to sustainability in public procurement due to the complexity of public procurement procedures and the rules governing them in the European sphere.

In order to better analyse these issues, each pillar of sustainable development needs to be evaluated in a separate context.

3.4 Green procurement

The protection of the environment through public procurement constitutes the first essential dimension of sustainable procurement. Indeed, the horizontal policies related to environmental performance of public procurement are not a new phenomenon in the EU. The Member States have taken various initiatives in order to address environmental considerations throughout their public procurement processes and the European Commission issued a communication in 2001 in order to guide the Member States with regard to the possibilities provided by EU law.[29]

The main motivation behind the increasing awareness of incorporating environmental considerations into public procurement has mainly been the need to promote sustainable development. In that regard, the communication issued by the European Commission aimed

[29] See, European Commission, Interpretative Communicaiton on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement COM(2001)274.

to support the Draft Sustainable Development Strategy that was going to be submitted to the European Council in Gothenburg in June 2001. Furthermore, as explained in Chapter 2, the Sixth Environmental Action Programme that was adopted in 2002 to address key environmental objectives and priorities of the Union and the EC Communication on Integrated Product Policy issued in 2003 recommended that the Member States of the EU should develop green public procurement policies and elaborate national action plans that set specific targets accordingly.[30] Malcolm considers that this policy instrument laid down a radical and innovative approach for controlling environmental pollution since it required a preventive approach for each stage of a product, i.e. "*from cradle to grave*".[31]

Despite the political motivation on that matter, due to the lack of a specific provision addressing the possibility of incorporating environmental concerns into the public procurement process under the previous public procurement directives, the legitimacy of such pursuits were mainly resolved by the case-law of the CJEU. The outcomes of the case-law were then integrated into the Public Procurement Directives, which entered into force in 2004. However, due to the complex and dynamic nature of environmental issues and, in the same vein, the complex and dynamic nature of public procurement procedures, the EU Procurement Directives that entered into force in 2004 could not completely disperse the ambiguity over the legitimacy of horizontal policies aimed at the protection of the environment. In that regard, the case-law of the CJEU, which are ruled after the adoption of the new Directives also draws the boundaries of the legitimacy of horizontal policies, not only for environmental aspects but for all sustainability concerns.

The European Commission published a handbook entitled 'Buying Green' in 2004 which was revised in 2011 in order to guide the Member States on the legal possibilities provided

[30] Chapter(2):Section(2.3.2.1).
[31] Rosalind Malcolm, 'Integrated Product Policy - A New Regulatory Paradigm for a Consumer Society?' (2005) 14 *European Environmental Law Review* 134, p. 136.

by the New Directives.[32] The Commission also issued a communication on green procurement in 2008 (hereafter 'the GPP Communication') in accordance with the SCP/SIP Action Plan[33].

The GPP Communication defines green procurement as "*a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured*".[34] Green public procurement (hereafter 'the GPP') can roughly be split into two categories: mandatory requirements and voluntary initiatives.

The pursuit of GPP in principle is a voluntary action and there can be different motivations for the contracting authorities behind pursuing horizontal environmental policies. A contracting authority can opt to target a specific environmental objective throughout the procurement process and can determine the level of sustainability that is desired to be achieved, which all depends on the legal and institutional framework that the contracting authority is subject to. The European Commission mainly provides non-binding recommendations under the GPP Handbook and the GPP Communication that can be applied by any public authority to procurements both above and below the thresholds determining the application of the Procurement Directives.

However, in certain situations, the protection of the environment through procurement can be mandatory; in other words, it is mandatory for the categories of product whether purchased by private or public bodies. Kunzlik lays down examples of such mandatory

[32] See, European Commission, *Buying green!: A handbook on environmental public procurement* (Luxembourg: Office for Official Publications of the European Communities, 2004); European Commission, *Buying green! A handbook on green public procurement: 2nd Edition* (Luxembourg: Publications Office of the European Union, 2011).
[33] See, European Commission, Public procurement for a better environment COM(2008)400.
[34] Ibid, p. 4.

requirements.[35] Accordingly, in cases of work procurement, when the project is conducted within a specified territory, the statutory environmental regulations might require the procurement to comply with certain environmental standards. For instance, the Environmental Impact Assessment ('EIA') requirement deriving from the Directive 85/337/EEC[36] concerns the identification of possible consequences of any decision that plays a significant role in the prevention or minimisation of environmental damage. A similar requirement derives from Directive 2010/31/EU on the energy performance of buildings,[37] which lays down minimum requirements for the energy performance of new buildings and of large existing buildings subject to renovation. The requirements set forth in both directives impose obligations on the contracting authorities to define the subject matter of a contract according to these requirements and impose contract performance clauses that meet the requirements laid down in these directives.

In the same context, Directive 2005/32/EC on Energy End-use and Energy Services[38] requires the contracting authorities to take account of energy efficiency in public procurement. This Directive requires the Member States to implement at least two measures listed under its Annex VI with the reservation that it be "without prejudice to national and Community public procurement legislation" (emphasis added).[39] Kunzlik interprets the wording of 'without prejudice' as meaning that these provisions do change the EC procurement regulations "either expansively or restrictively", and it is argued that there is still a considerable degree of ambiguity with regard to legitimacy of preferring products

[35] Peter Kunzlik, 'The procurement of 'green' energy' in Arrowsmith Sue and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009), p. 381.
[36] Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, OJ 1985 No. L 175 which was substantially amended by the Directive 97/11/EEC, OJ 1997 L 73
[37] Directive 2010/31/EU on the energy performance of buildings, OJ 2010, L 153/13 which re-casted Directive 2002/91/EC on the energy performance of buildings, OJ 2003 L 1/65
[38] Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC, OJ 2006 L 114/64.
[39] Id., Article 5.

which have low energy use throughout their life-cycles.[40] Indeed, the main reason for laying down such a reservation of 'without prejudice' could be related to the possible differences of regulatory frameworks and implementing provisions at the national level of the Member States, and possible different approaches to implementing energy efficiency improvement measures in the public sector through public procurement.[41] Nevertheless, this Directive is a remarkable reflection of the increasing awareness of establishing imperative provisions for considering sustainability issues in public procurement.

Besides these regulations, Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles,[42] imposes mandatory requirements on the procurement of energy-efficient vehicles. Similarly, the European Energy Star Programme[43] requires central government authorities and EU institutions to procure equipment not less efficient than the Energy Star. It is noteworthy that these requirements evolved into mandatory requirements in the course of time, mostly under the influence of initiatives on sustainable development at the EU level. As highlighted by Wiesbrock, the integration requirement elaborated under Article 11 of the TFEU, have a significant impact on this evolution since it is argued that this provision not only created possibilities but also obligations in respect of incorporating sustainability concerns into internal market instruments such as public procurement.[44]

The main legal problems, though, derive from voluntary initiatives of the contracting authorities who aim to increase the level of sustainability to a higher level than the mandatory requirements or the predefined benchmarks. Before analysing the legal barriers that stand

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[40] Kunzlik, note[35], p. 386.

[41] The Report prepared by the Joint Research Centre of The European Commission provides a detailed insight in that regard. See, The European Commission, 'Energy Efficiency in Public Procurement - Member States' experience, barriers/ drivers and recommendations' (May 2010) available at <http://ec.europa.eu/energy/efficiency/studies/doc/2010_05_jrc_ee_public_procurement.pdf>

[42] Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles, OJ 2009 L 120/5

[43] Regulation (EC) No. 106/2008 on a Community energy efficiency labelling programme for office equipment, OJ 2008 L 39.

[44] Anja Wiesbrock, 'An Obligation for Sustainable Procurement? Gauging the Potential Impact of Article 11 TFEU on Public Contracting in the EU' (2013) 40 *Legal Issues of Economic Integration* 105, p. 109 et seq.

before the GPP, which is the main objective of this study, an overview of possible benefits and possible costs will be provided in order to have a better understanding of the GPP.

3.4.1 The possible benefits of the GPP

The GPP has the potential to generate different outcomes.[45] The first important outcome is that the GPP can help the public authorities to reduce the environmental impact of their purchasing activities. Due to the huge share of public procurement in the economy, the importance of GPP becomes more prominent; this means that the public authorities can make substantial changes particularly in the fields of reduction of carbon emissions, waste and recycling, preservation of biodiversity and ensuring sustainability of water consumption and at the same time can reduce the impact of environmental problems. It is contended that compared to the fragmented consumer demand, the GPP could stimulate markets for sustainable goods and services more effectively and, in the long term, smaller benefits could add up to substantial improvements.[46] The minimisation of adverse environmental impacts emanating from public purchasing activities is also argued to set a moral example for private purchasers and to better drive the markets towards sustainability.[47]

The second important outcome is that the GPP can promote savings or eliminate additional costs.[48] In certain areas such outcomes also promote more efficient use of public resources as much as the protection of the environment. For instance, once life-cycle costing of products (hereafter 'LCC'), i.e. all costs associated with a product from production to disposal (e.g. purchase and installation costs, costs during the use phase of products,

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[45] See, European Commission, Public procurement for a better environment: Impact Assessment (Commission Staff Working Document) SEC(2008)2124, p. 23 et seq.; European Commission, note[32], p. 4; European Commission, Public procurement for a better environment COM(2008)400, p. 2.

[46] Christoph Erdmenger (ed) *Buying into the environment : experiences, opportunities and potential for eco-procurement* (Sheffield: Greenleaf, 2003), p. 253.

[47] Donald Marron, 'Greener Public Purchasing as an Environmental Policy Instrument' (2003) 3 *OECD Journal on Budgeting* 71, p. 82.

[48] See, Öko-Institut & ICLEI, Study on costs/benefits of Green public procurement in Europe (2007), available at: <http://ec.europa.eu/environment/gpp/studies_en.htm>, Part 1: Comparison of the Life Cycle Costs of Green and Non Green Products, p. 192.

electricity, fuel, gas, consumables, training, service and maintenance and disposal costs)[49] are evaluated comprehensively, the GPP can provide savings from the consumption of energy and water.

The third significant outcome is that the GPP has the potential to stimulate innovation.[50] Public procurement can play a role in the development of green technologies or less-polluting manufacturing technologies i.e. trigger a new form of competition in the industry, which is in line with the European Commission's strategy that calls for the public authorities to stimulate competitive demand in public procurement to foster market uptake of innovative products and services.[51] Indeed, such an outcome is in line with the EU's target on increasing global market share in the field of environmental technologies and eco-innovations laid down in the Lisbon Strategy and the Sustainable Development Strategy and reiterated under the EU 2020 Strategy.

Another remarkable contribution of the GPP is that it can enhance diversity of markets.[52] The supply constraints can emerge as a key barrier for implementing the GPP since certain industries might need to undergo substantial upgrading before a sustainable procurement policy can be put in place. As pointed out by Arrowsmith, the public authorities can even stimulate the emergence of new markets by setting certain standards for their procurement.[53] For instance, the private sector can consider investment in certain products not to be

[49] For the substance of LCC see, European Commission, Integrated Product Policy Building on Environmental Life-Cycle Thinking COM(2003)302.
[50] See, Öko-Institut & ICLEI, Study on costs/benefits of Green public procurement in Europe, Part 3: Potential of GPP for the spreading of new/recently developed environmental technologies; Marron, note[47], p. 83; See also Luke Brander, Xander Olsthoorn, Frans Oosterhuis and Vivien Führ, 'Triggering Innovation' in Erdmenger Christoph (ed), *Buying into the environment : experiences, opportunities and potential for eco-procurement* (Sheffield: Greenleaf, 2003).
[51] See, European Commission, Putting knowledge into practice: A broad-based innovation strategy for the EU COM(2006)502, p. 12.
[52] See, Sascha Haselmayer, Jakob H. Rasmussen and Acc1Ó, *Navigate change: a guide book: how new approaches to public procurement will create new markets* (Barcelona: ACC1Ó, 2011).
[53] Sue Arrowsmith, 'A taxonomy of horizontal policies in public procurement' in Arrowsmith Sue and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009), p. 135.

profitable and certain products cannot be subject to mass production in the market. Accordingly, the contracting authorities can promote the development and manufacture of affordable goods, subject to mass production for the private sector. This kind of strategic use of public procurement is summarised as "*by creating a demand, the market will react*".[54] It is noteworthy that Directive 2009/33/EC, which mandates compulsory environment and efficiency considerations for the procurement of road transport vehicles maintains that "*Clean and energy-efficient vehicles initially have a higher price than conventional ones. Creating sufficient demand for such vehicles could ensure that economies of scale lead to cost reductions*".[55]

These possible outcomes are non-exhaustively outlined hereunder and can vary. The possible benefits outlined here are mostly valid for social procurement as well.

3.4.2 The main barriers to the GPP

Even though the outcomes of the GPP are prominent, there might be certain obstacles for incorporating the protection of the environment as a parameter into the procurement process. As highlighted by Trepte, the regulation of procurement consists of different costs.[56] As discussed in Chapter 2, the SD Strategy requires that the suitability of economic instruments for the promotion of sustainable development must be judged against a set of criteria, including their impact on competiveness and productivity.[57] In the same context, Arrowsmith maintains that the implementations of horizontal policies in most cases involve certain additional costs that have to be weighed by the contracting authority against the prospective benefits.[58] In fact, the cost for each horizontal policy is so unique that various

[54] Catherine Weller and Janet Meissner Pritchard, 'Evolving CJEU Jurisprudence: Balancing Sustainability Considerations with the Requirements of the Internal Market' (2013) 1 *European Procurement & Public Private Partnership Law Review* 55, p. 58.
[55] Directive 2009/33/EC, Recital 13.
[56] Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (New York: Oxford University Press, 2004), p. 122.
[57] Chapter(2):Section(2.3.2.1).
[58] Arrowsmith, note[53], p. 128.

legal, financial, institutional (administrative) or even psychological barriers might enter into consideration for each stage of procurement where a horizontal policy is pursued.

The European Commission outlines six main barriers that prevent the dissemination of GPP policies throughout the EU. These barriers are: (1) having limited established environmental criteria; (2) insufficient information on life-cycle costing of products and the relative costs of environmentally friendly products and services; (3) low awareness of benefits of environmentally friendly products and services; (4) uncertainty about legal possibilities to include environmental criteria in tender documents; (5) the lack of political support; (6) the lack of coordinated exchange of best practice and information.[59]

The benefits of sustainable procurement can only be achieved if the policies are applied efficiently and promoted effectively.[60] The institutional framework and organisational factors such as institutional norms, routines, cultures, internal and external management differences, organisational priorities, the differences among institutions, the problems related to group adaptation, such as composition of a decision-making group, and adaptation within a wider organisation are significant factors that affect the success of sustainable procurement policies in general.[61] The familiarity of institutions with sustainable procurement policies is a significant factor that contributes to the success of achieving sustainability through public procurement.[62] It is argued that the translation of environmental costs into measurable economic data is not an easy task.[63] Furthermore, the procurement officers need to have the commercial and analytical abilities, competencies and tools to judge

[59] European Commission, Public procurement for a better environment COM(2008)400, p. 4; for obstacles to the mobilisation of the GPP see also Kunzlik, note[24], p. 105-108.
[60] Erdmenger (ed) note[46], p. 257.
[61] See, L. Preuss and H. Walker, 'Psychological barriers in the road to sustainable development: Evidence from public sector procurement' (2011) 89 *Public Administration* 493.
[62] Stephen Brammer and Helen Walker, 'Sustainable procurement in the public sector: an international comparative study' (2011) 31 *International Journal of Operations & Production Management* 452, p. 456.
[63] See, Nicola Lugaresi, 'Measuring the environment through public procurement' in Benidickson Jamie, Ben Boer, Antonio Herman Benjamin and Karen Morrow (eds), *Environmental Law and Sustainability after Rio* (Cheltenham, UK ; Northampton, MA: Edward Elgar Publishing Ltd, 2011), p. 112-114.

the long-term benefits of the GPP and weigh environmental parameters adequately. Indeed, these barriers do not only apply to procurement. As pointed out by Fisher, such barriers found their root in the context of orientation of public sector modernisation over the last three decades.[64]

The price/cost is considered as a significant barrier standing before the implementation of GPP due to the perception that environmentally friendly products are expensive.[65] However, a study which compared the life-cycle costs of green products with those of non-green products revealed that it is not reasonable to make an assumption that green products are more expensive than non-green products.[66] The study also noted that in the long-term the green products can compensate for the price differences occurring during the initial purchase phase. In the same context, it is argued that the GPP in the long-term generates monetary savings and the administrative costs, including the initial cost of setting and implementing a GPP policy and strategy, decreases over time.[67]

On the other hand, in certain cases the green alternatives could be more expensive than traditional products. However it is not the aim of this study to make a comprehensive analysis of the life-cycle costs of green products. It is primarily the individual contracting authority's institutional framework that determines the level of sustainability to be achieved and the price to be paid for achieving this purpose.[68] In other words, even though the green alternatives are more expensive, a contracting authority can opt to prefer green alternatives depending on different motivations.

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[64] Fisher, note[10], p. 4.
[65] Maarten Bouwer and others, *Green Public Procurement in Europe: Status overview* (AJ Haarlem: Virage Milieu & Management bv, 2005), p. 8; Brammer and Walker, note[61], p. 456; Dragos and Neamtu, note[26], p. 28-29.
[66] See, Öko-Institut & ICLEI, Study on costs/benefits of Green public procurement in Europe, Part 1: Comparison of the Life Cycle Costs of Green and Non Green Products.
[67] See, Öko-Institut & ICLEI, Study on costs/benefits of Green public procurement in Europe, Part 2: Additional Costs for Individual Purchasing Authorities of Buying Green Products (Administrative and Product Costs), p. 29.
[68] Brammer and Walker, note[61], p. 457.

In cases of strict budgetary limitations, the contracting authorities might prefer to avoid green products.[69] Furthermore, once cost-savings or cash-related savings are considered as personal performance measurement criteria, the organisational factors hamper the progress towards sustainable procurement as the long-term benefits are avoided for the sake of daily savings.[70] In the same context, in cases where the procurements require high capital costs, the long-term sustainability might be avoided due to financial pressure which might lead to the preference of lowest cost options instead of best value options that generate long-term sustainable outcomes.[71]

As different factors enter into consideration, it is not possible to lay down a definite template for the transition to sustainability in public procurement since costs and benefits vary depending on the methods used. In certain circumstances, product-specific and sector specific costs and barriers or one-time costs and barriers can even challenge the contracting authorities.[72] In that regard, the pursuit of GPP and other sustainable procurement policies require consideration of a wide range of parameters and are influenced by different institutional approaches for adapting and implementing such policies.

Arrowsmith considers the discretion costs as the most important costs of the GPP, i.e. the cost of granting a broad margin of discretion to the procurement officers for implementing horizontal policies related to sustainable procurement.[73] The political context plays the primary role in whether to grant a broad margin of discretion to the procurement officers.[74]

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[69] Marron, note[47], p. 81; Brammer and Walker, note[61], p. 456.
[70] Preuss and Walker, note[61], p. 504.
[71] Amr Sourani and Muhammad Sohail, 'Barriers to addressing sustainable construction in public procurement strategies' (2011) 164 *Proceedings of the Instituion of Civil Engineers - Engineering Sustainability* 229, p. 232.
[72] For barriers to addressing sustainable development themes related to construction in public procurement process see, ibid, p. 232; See also, Öko-Institut & ICLEI, Study on costs/benefits of Green public procurement in Europe, Part 2: Additional Costs for Individual Purchasing Authorities of Buying Green Products (Administrative and Product Costs), p. 20.
[73] Arrowsmith, note[53], p. 138.
[74] See, Sue Arrowsmith, John Linarelli and Don Wallace, *Regulating public procurement: National and International Perspectives* (The Hague: Kluwer Law International, 2000), p. 20 et seq.

Public procurement is argued to be the public activity which is most vulnerable to corruption.[75] It is argued that the discretionary powers in public procurement always lead to corruption, and limiting the discretion of procurement officers and laying down strict procurement regulations are the most important measures for combatting corruption.[76] As previously explained, the evaluation of environmental issues and deciding upon the most sustainable option without encountering the pitfall of green-wash requires people to exercise broad discretion. The benefits of the GPP and other sustainable procurement policies could only be gained by exercising broad discretion. Therefore, having broad discretionary powers could promote sustainable procurement and best value for money as much as it can lead to corruption. In fact, different measures to prevent corruption can be used, such as increasing transparency, eliminating conflicts of interest, imposing procurement sanctions on bidders and criminal and disciplinary sanctions, rather than adopting a restricted approach on discretion.[77] Once the procurement system is designed wisely, corruption can be minimised whilst sustainability is promoted. In that regard, it is the individual state's burden to make the impact assessment of benefits and costs of restricting the power of discretion and to adopt a flexible approach or restrictive approach on the regulation of public procurement.

According to Kunzlik the main challenge that the broadness of discretion power creates in the EU context is discrimination under the cloak of environmentalism.[78] Indeed, the implementation of sustainable public procurement without discriminating on grounds of nationality and distorting free movement of goods, freedom to provide services and freedom of establishment is quite a complex issue. As strongly emphasised by Arrowsmith, the main

[75] For relevant statistics see, OECD, *Integrity in public procurement: good practice from A to Z* (Paris: OECD Publishing, 2007), p. 9.
[76] For a comprehensive review of this argument see, Steven Kelman, *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance* (Washington DC: The AEI Press, 1990).
[77] See, Arrowsmith, Linarelli and Wallace, note[74], p. 38 et seq.; The OECD also recommends ten principles for enhancing integrity in public procurement under four main themes (transparency, good management, prevention of misconduct, compliance and monitoring, and accountability and control). See, OECD, *OECD principles for integrity in public procurement* (Paris: OECD, 2009).
[78] Kunzlik, note[35], p. 388.

purpose of the Procurement Directives is to promote the internal market and they seek to do this by three means: prohibiting discrimination, implementing transparency and removing barriers to access.[79] Furthermore, Arrowsmith rightly maintains that the decisions of incorporating horizontal objectives in procurement and balancing different horizontal objectives and adjusting the balance between horizontal and commercial goals is in principle for Member States.[80] In that regard, the determination of respective weightings for horizontal criteria in principle is under the competence of Member States.

Graells, however, is sceptical about the use of public procurement as a policy tool due to the possible implications for competition and adopts a pro-competitive approach.[81] Accordingly, Graells argues that public procurement needs to seek to create conditions emulating as far as possible those in private markets so as to achieve welfare and efficiency goals, and that the instrumental use of public procurement to pursue horizontal policies should be discontinued. This approach has significant implications for sustainable public procurement since it significantly restricts the discretionary powers of Member States. Indeed, Graells' scepticism cannot be justified, especially when we consider the policy instruments of sustainable public procurement, in particular, the Europe 2020 Strategy. As explained in Section 3.3 above, the new public procurement directives allow for greater strategic use of public procurement and they are like "*an instrument of Union economic/industrial policy, being intended to help deliver the Europe 2020 Strategy*".[82]

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[79] See, Sue Arrowsmith, 'The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies' in Barnard Catherine, Markus Gehring and Iyiola Solanke (eds), *Cambridge Yearbook of European Legal Studies 2011-2012* (Oxford: Hart Publishing, 2011-2012).

[80] Ibid, p. 45.

[81] For a comprehensive review of the issue see, Albert Sanchez Graells, *Public Procurement and the EU Competition Rules* (Oxford: Hart Publishing, 2011), p. 111 et seq.; p. 225 et seq.; See also, Albert Sanchez Graells, 'More Competition-Oriented Public Procurement to Foster Social Welfare' in Thai KV (ed), *Towards New Horizons In Public Procurement* (Boca Raton, FL: PrAcademics Press, 2010); Albert Sanchez Graells, *The Principle of Competition Embedded in the EC Public Procurement Directives* (September 2009) available at <http://ssrn.com/abstract=1928724>.

[82] Kunzlik, note[24], p. 108.

Furthermore, when it comes to environmental considerations and green procurement, the legal and policy frameworks explicitly recognise the legitimacy of horizontal policies, which is summarised by Kunzlik as evolution "*from suspect practice to market-based instrument*".[83] Therefore, it is not a pragmatic argument to propose discontinuation of the use of public procurement to pursue horizontal policies considering the increasing awareness of the use of public procurement, which is set as a political target under the Europe 2020 Strategy and is reflected in the new public procurement directives.

On the other hand, Hettne argues that there is a correlation between harmonisation of rules at the EU level and the discretion of Member States to pursue horizontal policies, and it is contended that the Member States are expected to respect harmonised union rules if they are relevant for the subject matter of a contract.[84] Indeed, this wide approach does not lead to practical outcomes. The promotion of sustainability could be better promoted in the existence of mandatory sustainability requirements. It is noteworthy that the EU has laid down such requirements for certain products and services. The reason why 'in principle' is underlined is that unless the EU sets a mandatory requirement, the pursuit of horizontal policies is at the discretion of Member States. But for the products or services that have evolved into mandatory requirements, the Member States need to respect these requirements.[85] These kinds of mandatory requirement have evolved over the course of time from voluntary arrangements to mandatory requirements in accordance with the development of the sustainability context within the EU.

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[83] See, ibid.

[84] See, Hettne, note[20], p. 32-34.

[85] For instance see, Directive 2010/31/EU on the energy performance of buildings, Directive 2005/32/EC on Energy End-use and Energy Services, Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles, the European Energy Star Programme. For the substance of these regulations see Section(3.4).

On the other hand, as explained in Chapter 2, each country is unique in its economy, society and environmental priorities so they have different challenges and needs. In that regard, addressing sustainable development objectives throughout public procurement needs to be evaluated in a local context since the level of sustainability that needs to be achieved is different for each Member State due to the diversity of social and environmental challenges. The legitimacy of exercise of this discretion is mainly subject to avoiding discrimination, implementing transparency and removing any barriers to access to public contracts. Furthermore, the horizontal policies can be incorporated into different stages of procurement and different legal constraints come forward for each respective stage.

3.4.3 The identification of the need

The determination of what is needed and the decision of what to buy is defined by each contracting authority's autonomy within the context of its institutional framework. As discussed above, the Procurement Directives, in their simplest definition, regulate how to buy, not what to buy. The contracting authorities, in that regard, have a wide margin of discretion before they initiate the tendering proceedings, once they have identified their actual need.[86]

Once planned wisely, the preparation stage of procurement, where the need of the individual authority is identified, can serve the protection of environment. As pointed out by Arrowsmith, the decision to purchase or not to purchase, what to purchase, as well as timing, amount and quantity of purchase, in the long term have consequences for energy consumption and waste production.[87] Therefore, if the actual need is assessed properly, the

[86] Arrowsmith and Kunzlik argues that the decision of whether to initiate the procurement, deciding on what to buy or simply 'excluded buying decisions' should not be treated as hindrance to trade, even when they are discriminatory in effect. This approach distinguishes the functions of public authorities when being a purchaser and a regulator. See, Sue Arrowsmith and Peter Kunzlik, *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009), p. 21-29.

[87] Arrowsmith, note[53], p. 130.

public authority can contribute to the protection of the environment without making any further structural changes in the procurement procedures through buying less or buying on time. Günther elaborates a five step decision-making process for implementing the GPP: identifying targets, researching alternatives, deciding on alternatives, implementing the decision, and controlling the outcome against the targets.[88] The European Commission also encourages the contracting authorities to make a comprehensive market analysis before commencing the tender proceedings.[89]

According to Walker and Brammer the level of communication between buyers and suppliers has a substantial impact on the facilitation of sustainable procurement.[90] They argue that greater communication enhances information exchange and collaboration, hence augments the ability of the buyers to implement sustainable procurement policies in their supply relationships.

The Procurement Directives leave room for the contracting authorities to seek or accept advice, i.e. to use a technical dialogue before launching a procedure for the award of the contract, provided that such advice does not preclude competition.[91] The extent of these negotiations, however, has legal consequences. In the Stadt Halle case the CJEU held that "*acts which constitute a mere preliminary study of the market or which are purely preparatory and form part of the internal reflections of the contracting authority with a view to a public award procedure*" are not amenable to review.[92] By contrast, during the technical

[88] Edeltraud Günther, 'Hurdles in Green Purchasing - Method, findings and discussion of the hurdle analysis' in Erdmenger Christoph (ed), *Buying into the environment : experiences, opportunities and potential for eco-procurement* (Sheffield: Greenleaf, 2003), p. 31-32.
[89] European Commission, note[32], p. 18.
[90] Helen Walker and Stephen Brammer, 'The relationship between sustainable procurement and e-procurement in the public sector' (2012) 140 *International Journal of Production Economics* 256, p. 265.
[91] Public-Sector Directive, Recital(8); Utilities Directive, Recital(15).
[92] Case C-26/03, Stadt Halle, RPL Recyclingpark Lochau GmbH v. Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna, [2005], E.C.R. I-1, para 35.

dialogue, if the expression of will passes that stage of preliminary study of the market, that expression has legal consequences and is open to review.

3.4.4 The description of the subject matter

Once the actual need is determined it has to be expressed in a tangible way and reflected in the call for tenders. This stage of description of the subject matter has significant legal consequences. First of all, the subject matter of a contract primarily determines its legal classification. For instance, a contract is classified as a public works contract only if its subject matter specifically covers the execution of activities listed in Annex I of Public-Sector Directive and is deemed as a works contract only if its subject matter specifically covers the execution of activities listed in Annex XII of Utilities Directive.[93]

The description of subject matter also has legal implications in terms of administrative law. As pointed out by Comba, the definition of the subject-matter of a contract has an impact on the pursuit of any horizontal policies since a contracting authority can pursue only the objectives that fall within the scope of its legal competencies.[94] The competence issues such as competence absence of an explicit mandate or implied mandate needs to be evaluated in its own national and institutional context of the contracting authority.

The description of the subject matter needs be as explanatory and comprehensive as possible. The European Commission considers that the description of needs in a broad and performance-based way makes it possible for economic operators to propose a better and wider variety of solutions, which is eventually deemed to foster the market for innovative products and services and increases the quality of public services.[95]

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[93] Public-Sector Directive, Recital(10); Utilities Directive, Recital(16); For the status of mixed contracts see, Caranta, note[6], p. 29.

[94] Mario E. Comba, 'Green and Social Considerations in Public Procurement Contracts: A Comparative Approach' in Caranta Roberto and Martin Trybus (eds), *The Law of Green and Social Procurement* (Copenhagen: DJØF Publishing, 2010), p. 310.

[95] European Commission, Putting knowledge into practice: A broad-based innovation strategy for the EU COM(2006)502, p. 11.

3.4.5 Technical specifications

Technical specifications define the characteristics of the products, services or works to be procured. The technical specifications have a significant impact on the competition insofar as they set out the minimum compliance criteria for a public contract. Therefore, the technical specifications have to provide equal access for the tenderers and have to avoid any unjustified obstacles to competition.[96] According to the statistics, the technical specifications are the most frequently used procurement stage to address environmental concerns.[97]

There are different methods of addressing environmental concerns within the technical specifications such as performance-based or functional definition, relying on environmental technical standards, using eco-labels and referring to specific production and process methods.

3.4.5.1 Performance-based or functional specifications

The Procurement Directives permit the contracting authorities to define performance-based or functional technical specifications.[98] In cases of performance-based or functional definition, the contracting authorities identify their needs as desired outputs within the technical specifications rather than stipulating the inputs or a specific method. As exemplified by Arrowsmith, an authority might refer to the degree of heat resistance required from a product, rather than require that it should be made from a specified heat-resistant material.[99] As The European Commission points out, functional definition leaves sufficient room for the tenderers to offer the most cost-effective and innovative methods.[100]

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[96] Public-Sector Directive, Article(23); Utilities Directive, Article(34).
[97] Centre for European Policy Studies and College of Europe, *The Uptake of Green Public Procurement in the EU27: Submitted to the European Commission, DG Environment* (Brussels: CEPS; College of Europe, 2012), p. 46.
[98] Public-Sector Directive, Article(23); Utilities Directive, Article(34).
[99] Sue Arrowsmith, *The Law of Public and Utilities Procurement* (London: Sweet & Maxwell, 2005), p. 109.
[100] European Commission, note[32], p. 27; See also, Arrowsmith, note[53], p. 133.

Once sustainability parameters such as energy efficiency, diminishing water and energy consumption and waste creation are defined as the desired output, this method contributes to the achievement of concrete environmental objectives which are more measurable. However, such definitions must be precise enough to allow tenderers to make justifiable evaluations.[101]

3.4.5.2 Environmental technical standards

Another method is to refer to environmental technical standards within the technical specifications. A standard is defined as a "*technical specification approved by a recognised standardising body for repeated or continuous application, compliance with which is not compulsory and which falls into one of the following categories: international standard, European standard, national standard*".[102] The contracting authorities may refer to national, international or European standards.[103] There is no hierarchy between European and other standards and the contracting authorities cannot insist on compliance only with the European standards. In fact, the Procurement Directives require that any reference to an environmental standard has to be accompanied by the words of 'or equivalent'.[104]

The European Commission issued a communication in 2004 in order to enhance integration of environmental policies into European standardisation.[105] The reference to environmental standards facilitates the promotion of GPP as certain standards already cover environmental characteristics of products and services. Especially in cases where the human capacity of the individual contracting authority is weak, the environmental technical standards can promote

[101] Public-Sector Directive, Article(23(3)(b)); Utilities Directive, Article(34(3)(b)).
[102] Annex VI of Public-Sector Directive; Annex XXI of Utilities Directive.
[103] European Committee for Standardisation ('CEN'), European Committee for Electro-technical Standardisation ('CENELEC') and European Telecommunications Standards Institute ('ETSI').
[104] Public-Sector Directive, Article(23(3)(a)); Utilities Directive, Article(34(3)(a)); The requirement for accepting equivalent means of proof emanates from the case-law of the CJEU, which is fully examined in Chapter(6):Section(6.2).
[105] European Commission, Integration of Environmental aspects into European Standardisation, COM(2004)130.

the elimination of barriers deriving from information asymmetry as the reference to environmental technical standards does not require any structural change within the contracting authority.

3.4.5.3 Eco-labels

The third method of addressing environmental concerns in the technical specifications is relying on eco-labels. In the simplest definition, eco-labels are voluntary schemes that aim to increase recognisability of environmentally friendly products and services.[106] The contracting authorities are permitted to use eco-labels within the technical specifications in order to address specific environmental considerations provided that those specifications are: (1) appropriate to define the characteristics of the supplies or services that are the object of the contract; (2) drawn up on the basis of scientific information; (3) adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate; and (4) accessible to all interested parties.

It is important to note that North-Holland case ruled in 2012 has substantially changed the rules governing eco-labels.[107] Therefore, the legal status of eco-labels is fully scrutinised in the following sections.

(1) The origins and underpinnings of the eco-labels

The origins of eco-labels date back to 1980s.[108] In order to satisfy the consumers' demand for green products (in the widest context, including concerns such as energy saving, protection of the environment and less demand on resources), different labels have been

[106] See, The European Commission, 'What is the Ecolabel?' available at <http://ec.europa.eu/environment/ecolabel/about_ecolabel/what_is_ecolabel_en.htm>
[107] C-368/10, Commission v Netherlands, judgment of 10 May 2012.
[108] Global Ecolabelling Network (hereafter 'the GEN'), Introducing to Ecolabelling, July 2004, available at <www.globalecolabelling.net/docs/documents/intro_to_ecolabelling.pdf>, p. 3.

established and been used in various countries.[109] In the course of time, the approach of economic operators to environmental issues within their business pursuits gradually increased, and environmental protection started to be an important aspect of marketing and competition in different industries.[110]

At the international level, the International Organisation for Standardisation (hereafter 'the ISO') has taken the initiative to standardise environmental labelling that is used in different countries. Eco-labels are classified by the ISO under 'Type I environmental labelling programme' and defined as "*a voluntary, multiple-criteria based, third party program that awards a license which authorizes the use of environmental labels on products indicating overall environmental preferability of a product within a particular product category based on life cycle considerations*".[111] According to the ISO, the impetus of environmental labels and declarations is the encouragement of the demand for and supply of those products and services that cause less stress on the environment, which is considered to stimulate the potential for market-driven continuous environmental improvement.[112]

In parallel with the development of industry driven labels, the first European ecolabel was established under Council Regulation (EEC) no. 880/2 of 23 February 1992. The eco-label scheme established under Regulation no. 880/2 set as its target to promote the design, production, marketing and use of products which have a reduced environmental impact during their entire life cycle, and to provide consumers with better information on the environmental impact of products.

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[109] For instance see, Blue Angel (Germany, 1978), Green Seal (USA, 1989), Nordic Swan (Nordic Countries [Denmark, Finland, Iceland, Norway and Sweden], 1989).
[110] European Commission and Eurostat, *Sustainable development in the European Union: 2009 monitoring report of the EU sustainable development strategy* (Luxembourg: Office for Official Publications of the European Communities, 2009), p. 140-141.
[111] International Organization for Standardization (ISO), *ISO 14024: Environmental labels and declarations - Type I environmental labelling - Principles and procedures* (Switzerland: ISO, 1999), p. 1.
[112] International Organization for Standardization (ISO), *ISO 14020: Environmental labels and declarations - General Principles* (Switzerland: ISO, 2000), p. 1.

The European Union revised its legal framework on the EU Ecolabel scheme in 2010.[113] According to the new framework, the EU Ecolabel criteria is based on the environmental performance of products, taking into account the latest strategic objectives of the Community in the field of the environment.[114] The new framework provides that EU Ecolabel criteria should take into account existing criteria developed in officially recognised Ecolabelling schemes in the Member States in order to ensure harmonisation.[115] The European Commission also provides the Ecolabel Catalogue for helping European consumers to distinguish greener, more environmentally friendly products (except food and medicine).[116]

Eco-labels are voluntary schemes that aim to increase recognisability of environmental friendly products and services.[117] As of 2012, there are a broad range of eco-labels valid in different countries and industries.[118] As highlighted by Wilsher being driven by the market and their diversity provides greater flexibility for eco-labels.[119] In that regard, eco-labels can react better to the new developments in environmental policies and can be updated according to changes within the local market context.

(2) Eco-labels prior to North-Holland case

The approach of the European Commission on eco-labels within the procurement proceedings is put forward under the Second Edition of the Buying Green Handbook, which was published in 2011.[120] According to the Commission the eco-labels could be used in two

[113] Regulation (EC) No 66/2010 of 25 November 2009 on the EU Ecolabel, OJ 2010 L 27/1; Regulation No 66/2010 does not apply to the organic foods and products. The labelling of organic food is subject to Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91, OJ 2007 L 189/1.
[114] Regulation (EC) No 66/2010, Article(6).
[115] Id. Article(11).
[116] The Ecolabel Catalogue is available at <http://ec.europa.eu/ecat/>.
[117] See, The European Commission, 'What is the Ecolabel?' available at <http://ec.europa.eu/environment/ecolabel/about_ecolabel/what_is_ecolabel_en.htm>.
[118] A private web site provides a global directory of eco-labels valid in different countries and industry services, which is available at <www.ecolabelindex.com/ecolabels/>.
[119] Dan Wilsher, 'Reconciling national autonomy and trade integration in the context of eco-labelling' in Arrowsmith Sue and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009), p. 412.
[120] European Commission, note[32].

different ways within the context of technical specifications: (1) to help the contracting authorities while drawing up technical specifications and defining characteristics of the goods or services to be procured; (2) to check compliance with these requirements by accepting eco-labels as one of the means of proof of compliance with the technical specifications.[121]

The Commission also provides guidance on the conditions for using eco-labels whereby the Commission reiterates the Procurement Directive's rules regarding where contracting authorities lay down environmental characteristics in terms of performance or functional requirements.[122] To recap, these principles are that:

(i) The specifications need to be appropriate to define the characteristics of the supplies or services that are the object of the contract.

Public-Sector Directive does not provide a further explanation about the determination of appropriateness. It could be argued that appropriateness implies the requirement of being linked to the subject matter of the contract as set forth by the Concordia Bus case. Wilsher underlines that the vagueness in that respect could create heavy costs with uncertain outcomes.[123] However, Wilsher does not consider that Public-Sector Directive provides a room for such an interpretation and suggests that the requirement of appropriateness is merely a reiteration that the requirement must comply with all other conditions laid down under Public-Sector Directive.[124] It is noteworthy that the ISO requires environmental labels to be accurate, verifiable, relevant and not misleading.[125] Being relevant is explained by the ISO as follows: "*to address only nontrivial environmental aspects related to the actual circumstances of natural resource extraction, manufacture, distribution, use or disposal*

[121] Ibid, p. 30
[122] Public-Sector Directive, Article(23(6)), Utilities Directive, Article(34(6)).
[123] Wilsher, note[119], p. 427
[124] Ibid, p. 427
[125] International Organization for Standardisation, Environmental labels and declarations, note[111], p. 2.

associated with the product or service".[126] It could be argued that appropriateness is to be interpreted as being linked to the subject matter of a contract.

(ii) The requirements for the label need to be drawn up on the basis of scientific information.

Wilsher criticises this requirement laid down under Public-Sector Directive on the grounds that the requirement does not lay down the extent to which the contracting authorities need to investigate the science behind the eco-labels.[127]

(iii) The eco-labels need to be adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate.

This requirement is defined by the Commission as a 'participatory approach'.[128] This requirement is considered to reflect the principle of participation recognised by administrative law that puts emphasis on the significance of consultation on proposed regulatory rules.[129] The ISO also sets as a principle that the process of developing environmental labels and declarations needs to include an open, participatory consultation with interested parties, which requires an effort to achieve a consensus throughout the process.[130]

(iv) The eco-labels need to be accessible to all interested parties.

The accessibility is also set by the ISO as a principle that the environmental labels and declarations need to meet. The ISO provides that all organisations, regardless of size, should have equal opportunity to use environmental labels and declarations.[131] The ISO underlines that the involvement should not be hindered by extraneous factors or requirements such as procedural complexity or unreasonable information or administrative demands. Wilsher

[126] Ibid, p. 2.
[127] Wilsher, note[119], p. 427
[128] European Commission, note[32], p. 31.
[129] Wilsher, note[119], p. 428.
[130] International Organization for Standardization, Environmental labels and declarations, note[112], p. 4.
[131] Ibid, p. 4

interprets accessibility as the rules encapsulating the eco-labels are defined clearly and are easy to interpret and apply, employing common used terminology.[132]

It is noteworthy that the Commission distinguishes between eco-labels related to the subject-matter of a contract and eco-labels related to the general management practices of the companies. The Commission provides that the former is permitted as technical specifications while the latter is ineligible as technical specifications.[133] The Commission also underlines that the contracting authorities cannot stipulate that the tenderers should be registered under a certain eco-label scheme and highlights that the contracting authorities must always accept equivalent means of verifying compliance.[134]

(3) North-Holland Case

North-Holland case was brought by the Commission before the CJEU against the Netherlands with regard to a tender procedure conducted by the province of North-Holland according to Public-Sector Directive for the supply and management of automatic tea and coffee machines. The tender documents specified that the tea and coffee to be supplied should have an EKO label, which is a private label for products made up of at least 95% ingredients from organic productions methods. The tender documents did not elaborate comprehensively on the environmental objectives that the contracting authority aimed to achieve; rather, the documents only made a cross reference to the EKO label.

The European Commission argued that the stipulation of the EKO label certifying that they are products of organic agriculture constitutes a description of the required characteristics of the products concerned and therefore is a technical specification subject to Article 23 of Public-Sector Directive.[135] The Commission added that Article 23(6) of Public-Sector

[132] Wilsher, note[119], p. 429.
[133] European Commission, note[32], p. 31.
[134] Ibid, p. 31.
[135] North-Holland, note[107], para. 59.

Directive, subject to certain conditions, permits eco-labels while describing environmental characteristics, and the Commission maintained that the usage of eco-labels in the case at does not fall within the permitted way of using eco-labels. On the other hand, the Netherlands responded that the EKO label is well-known to economic operators active in the sector of activity concerned and refers to products of organic agriculture.[136] The Netherlands claimed that an economic operator concerned displaying ordinary care would have access to the substance of criteria constituting the EKO label, either through the Internet or through asking clarification from the contracting authority. In that regard, the Netherlands asked for dismissal of the claim that reference to the EKO label ran the risk of undermining the principle of equal treatment.

With regard to the legal status of the reference to the EKO label, the Court firstly referred to Article 23(3)(b) of Public-Sector Directive whereby technical specifications are permitted to be formulated in terms of performance or functional requirements which may include environmental characteristics. The Court also referred to Recital 29, which identifies a given production method to constitute such an environmental characteristic. In that regard, the Court held that the EKO label constitutes an 'eco-label' within the meaning of that provision on the grounds that it is based on environmental characteristics and fulfils the conditions listed in Article 23(6) of Public-Sector Directive.[137]

Before interpreting Article 23(6) of Public-Sector Directive, and so before examining the legitimacy of the EKO label in question according to Article 23(6), the Court highlighted the main principles governing the award of contracts according to Public-Sector Directive to set the context for interpretation. The Court underlined Article 2 of Public-Sector Directive, which requires the contracting authorities to treat economic operators equally and

[136] Ibid, para. 60.
[137] Ibid, para. 61.

non-discriminatorily and to act in a transparent way. Then the Court cited Article 23(2) and 3(b) and the last sentence of Recital 29 which provide that the technical specifications must afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition, and be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contracts. The Court considered that these rules are laid down (despite the explicit wording of Article 2) due to the crucial importance of the technical specifications on discrimination and equal treatment.[138]

After setting the context on the general principles that the technical specifications need to comply with, the Court questioned whether Article 23(6) of Public-Sector Directive referring to eco-labels could be subject to extensive interpretation. In other words, the Court questioned the extent of the discretion that Article 23(6) confers to the contracting authorities while using eco-labels. It is worth noting that the Court stated that this article, while setting the requirements concerning environmental characteristics only "*confers on contracting authorities the option to use the detailed specifications of an eco-label, but not the eco-label as such*".[139] Considering the fact that Article 23(6) itself refers to Article 23(3), which stipulates that the requirement has to be precise, the Court concluded that Article 23(6) of Public-Sector Directive referring to eco-labels cannot be subject to an extensive interpretation. In that regard, the Court referred to the second subparagraph of Article 23(6) and the Court held that the eco-label itself could only be used indirectly as proof of compliance with the technical specifications laid down in the contract documents, and the contracting authorities must accept any other appropriate means of proof.[140]

[138] Ibid, para. 62.
[139] Ibid, para. 63.
[140] Ibid, para. 64-65.

As stated above, the Netherlands claimed that an economic operator displaying ordinary care would have discovered the criteria encapsulating the EKO label through the Internet or by asking the contracting authority. The Court dismissed this argument and held that the contracting authorities could establish a presumption that the economic operators are properly informed and reasonably aware, provided that they formulate their requirements clearly.[141] The Court also emphasised that the contracting authorities could not refrain from their obligations stemming from Public-Sector Directive through relying on such an expectation.

The CJEU adopted a strict approach to the reliance on eco-labels and provided that the contracting authorities are required to specify any detailed environmental characteristics that they intend to impose even where this refers to the characteristics defined by an eco-label. With regard to this requirement, the CJEU concluded that considering the challenges, such as uncertainties of searching for information and the possible temporal variations in the criteria applicable to a particular eco-label, the contracting authorities are required to provide to the potential tenderers a single official document coming from the contracting authority.[142]

The EKO label, as stated, refers to organic private labels for products made up of at least 95% of ingredients from organic productions methods. Organic foods are currently subject to the Council Regulation no. 834/2007.[143] The CJEU clarified that Public-Sector Directive does not preclude the contracting authorities from referring to legislative or regulatory provisions under the technical specifications in cases where this is unavoidable.[144] However,

[141] Ibid, para. 66.
[142] Ibid, para. 67.
[143] It is to note that the council regulation that the EKO case cites has been repealed in 2007. The requirements for a food product to be marketed as organic in the EU are laid down under Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91, OJ 2007 L 189/1.
[144] North-Holland, note[107], para. 68.

the CJEU underlined that such a requirement needs to be accompanied by all the additional information required by Public-Sector Directive.

In the light of the reasons explained above, the CJEU ruled that by requiring that the products to be procured should bear a specific eco-label (the EKO label) rather than using the detailed specifications defined by that eco-label, the province of North-Holland established a technical specification which was incompatible with Article 23(6) of Public-Sector Directive.[145]

(4) The possible implications of North-Holland case

The decision of the CJEU in North-Holland case requires the contracting authorities to prepare detailed specifications and to use eco-labels only as means of proof. The only permitted cross reference is to requirements set out in legislations provided that such a cross reference is unavoidable. The most prominent outcome of the judgment of the CJEU is that it made it less convenient for the contracting authorities to rely on eco-labels. It is important to note that the judgment of the Court equally applies to the procurement of utilities on the grounds that the rules on eco-labels under Public-Sector Directive are identical to the ones under Utilities Directive.

The stipulation of registration under a specific eco-label clearly violates Public-Sector Directive and the case-law of the CJEU requiring that the technical specifications need to be drafted according to the purchaser's performance requirements, and the contracting authorities must accept any equivalent goods that meet the targeted performance. In that respect, the Court's approach is consistent with the established case-law.[146]

On the other hand, the judgment indicates that the Court holds eco-labels as equivalent to technical dossiers or test reports. In that respect, the pragmatic benefits of using eco-labels

[145] Ibid, para. 70.
[146] See, Dundalk case, Chapter 6, Section(6.2.2.1) and UNIX case, Section(6.2.2.2).

need to be questioned. In other words, if the contracting authorities are under the obligation of preparing a detailed technical specifications and incorporating all environmental concerns to those specifications, why would the economic operators need eco-labels henceforth?

The Court established its reasoning on the precision requirements set forth in Public-Sector Directive. As highlighted by Kostonis, the need for clarity and precision highlighted by the CJEU not only affects the eco-labels, but also lays down instructive principles in relation the formulation of technical specifications.[147] As explained in Chapter 3, notwithstanding the stage whereby the sustainability is pursued, the principles of transparency, equal treatment and non-discrimination must be respected. However, the CJEU adopted a rigid approach against eco-labels on the grounds that the eco-labels could be subject to variations. It could be questioned whether variations in eco-labels constitute a significant risk for the economic operators, and would it therefore be possible to provide a solution without restricting cross-reference to eco-labels? Is an interpretation to favour eco-labels, which are significant market instruments that eliminate burdens of addressing environmental concerns within the procurement procedures, possible?

As explained previously, environmental labels, covering eco-labels, have been subject to international (ISO) and regional (EU) harmonisation. At both levels, there is consensus over the principles, such as the environmental labels needing to be established by independent organisations based on valid scientific data and with the participation of the stakeholders. Most importantly, both the ISO and the European Union (under the Procurement Directives) considers 'accessibility' as a prerequisite to qualify an environmental labelling as an eco-label. To recap, the accessibility criterion is twofold. The first aspect is that the eco-labels need to be available to any stakeholder. Neither the international context nor the regional

[147] Totis Kotsonis, 'Commission v Netherlands (C-368/10): Environmental and fair trade considerations in the context of a contract award procedure' (2012) 5 *Public Procurement Law Review* 234, p. 240.

context stipulates a specific means of communication to provide accessibility. In that regard, it is the author's view that the dissemination of eco-labels over the Internet could satisfy the accessibility requirement. The second aspect of accessibility is concerned with clarity, and the eco-labels need to be clear and easy to interpret and apply, employing commonly used terminology.

It is the author's view that the CJEU in North-Holland case created an impression that eco-labels are kinds of instruments that are changed on a daily basis. For eco-labels, being a market-driven instrument does not imply that the organisations/bodies in charge of preparing eco-labels have unlimited discretion on reshaping, revising or updating them. Both the Procurement Directives and the ISO mandate a scientific reasoning and participation of the relevant stakeholders on the determination of criteria underlying the eco-labels. Even though the eco-labels might vary over time, there are other mechanisms that could provide precision, such as versioning the eco-labels and dating the eco-labels. For instance, a contracting authority could provide precision regarding the environmental criteria specified under an eco-label through specifying a version or date.

It is worth examining the EKO label that gave rise to the legal dispute. The criteria underlying the EKO is explained as follows: "*[T]he use of the EKO-marking is permitted only in the labelling of, and in relation to products by Skal certified to one of the following categories: - unprocessed product from organic production; - processed product for at least 95% of the organic production; - Feed, compound feed or feed material from the organic farming*".[148] The very same document provides that "*This regulation replaces, with effect from March 26, 2009 all previous versions of the Skal Rules for using the EKO hallmark*"[149] which could justify the argument put forward by the Netherlands that an economic operator

[148] Skal-Reglement EKO-keurmerk, Article(3) (free translation).
[149] Skal-Reglement EKO-keurmerk available at <www.eko-keurmerk.nl/product/ondernemer/SkalR33.pdf>.

concerned with displaying ordinary care would have discovered without difficulty on the Internet the description of the criteria referring to that label. In other words, the Netherlands indirectly referred to the accessibility criterion, which is a prerequisite for an environmental labelling to be qualified as an eco-label.

The eco-labels have evolved in the course of time as a necessity; the necessity is that the current regulatory practices permit environmentally unsound and unsustainable products and the eco-labels have been developed by the market in order to better reflect the degree of environmental sustainability of products or services. As pointed out by Wilsher, diversity is a valuable aspect of eco-labels since complete harmonisation has the risk of hampering innovation in such a dynamic area.[150] As stated, notwithstanding the stage whereby sustainability is pursued, the principles of transparency, equal treatment and non-discrimination must be respected. However, the restriction of cross-reference to only exceptional circumstances and interpretation of precision as having a single official document, coming from the contracting authority, providing all technical and environmental aspects, is not a pragmatic approach. It will be burdensome for contracting authorities to prepare technical specifications that address any environmental concern. The CJEU could be less sceptical about eco-labels that rely on scientific data, are prepared through a stakeholder participation process, are accessible, and which have been in the market for more than thirty years.

(5) Eco-labels under the proposals for the Draft Public-Sector Directive

Considering the importance of eco-labels, it is worth examining the draft Public-Sector Directive for new public procurement directives to find out whether they are providing any practical solution for the cross-referencing to eco-labels.[151] Article 40 of the Draft Public-

[150] Wilsher, note[119], p. 412.
[151] See, European Commission, Proposal for a Directive on public procurement, COM(2011)896; European Commission, Proposal for a Directive on procurement by entities operating in the water, energy, transport and postal services sectors, COM(2011)895.

Sector Directive permits the contracting authorities to formulate technical specifications in terms of performance or functional requirements, including environmental characteristics, as per Public-Sector Directive. The Draft also reiterates the requirement of precision to allow the tenderers to determine the subject matter of the contract. Article 41 of the Draft set the requirements to be met in case the contracting authorities prefer to use labels in cases where they lay down environmental, social or other characteristics of the works, service or supply in terms of performance or functional requirements. The Draft specifies the conditions that the labels need to fulfil which are:

(i) To be linked to the subject matter of contract and being appropriate to define the subject matter of contract

Being appropriate is already a requirement of Public-Sector Directive, while being linked to the subject matter of the contract is a new provision. The pragmatic benefit of this provision is better understood when Article 41(b) of the Draft is examined. It might be the case that the label might cover a wide range of issues which are partly relevant to the subject matter of the contract. Article 41(b) of the Draft makes it clear that the contracting authorities are entitled to rely on labels for the parts having links with the subject matter of the contract, provided that other requirements are also met.

(ii) To be drawn up and adopted on the basis of scientific information or based on other objectively verifiable and non-discriminatory criteria

The requirement of a scientific base is similar to Public-Sector Directive. However, the Draft provides a broad margin for labels and considers any objectively verifiable and non-discriminatory criteria sufficient.

(iii) To be adopted through participation of stakeholders

This requirement is identical to Public-Sector Directive.

(iv) To be accessible to all interested parties

This requirement is identical to Public-Sector Directive.

(v) To be set by a third party which is independent from the economic operator applying for the label

This requirement is a contribution of the Draft. This requirement seems to ensure the reliability of labels and eliminate any possible conflict of interest.

The Draft explicitly states that any contracting authorities requiring a specific label must accept all equivalent labels that fulfil the requirements of the label.[152] Moreover, the Draft provides that for products that do not bear the label, contracting authorities must also accept a technical dossier of the manufacturer or other appropriate means of proof.

It could be argued that the Draft is more responsive to eco-labels. Firstly, the Draft does not require detailed specifications in the existence of labels having certain conditions, as outlined above. The current wording of Article 41 governing labels indicates that cross-reference to labels will be the default method of addressing environmental considerations. Secondly, the Draft explicitly provides that the contracting authorities need to accept all equivalent labels.

3.4.5.4 Specific materials and production process methods

The last method for addressing environmental concerns within the technical specifications is requiring the application of specific materials and production process methods.[153] As explained in Chapter 2, changing consumption and production methods is the primary objective for promoting sustainable development internationally and at a European level.[154] The contracting authorities can use their powers of purchase in reshaping the behaviour of the industry and promoting more sustainable consumption and production patterns, and they can contribute to eco-innovation. For instance, the contracting authorities may insist on

[152] DRAFT Public-Sector Directive, Article(41(1)).
[153] Public-Sector Directive, Annex VI; Utilities Directive, Annex XXI.
[154] Chapter(2):Section(2.2) and Section(2.3.2.2).

inclusion or exclusion of certain materials or chemical substances or can request usage of a minimum percentage of recycled or reused substances. Similarly, the contracting authorities can insist on the application of certain processes or production methods.

The European Commission under its revised Buying Green Handbook points out that only "*those requirements which are related to the production of the good, service or work being purchased and contribute to its characteristics, without necessarily being visible*" can be incorporated into the technical specifications for implying certain processes and production methods.[155] The Commission also elaborates further details on key sectors for promoting sustainable consumption and production which are buildings, food and catering services, electricity and timber.[156]

The approach of European Commission needs further examination. Indeed, the approach of the European Commission has been contradictive in the course of time, and this contradiction is so-called by Kunzlik as the '*invisibility fallacy*'.[157] The fallacy stems from the failure of the European Commission to distinguish and identify requirements relating to the production processes and methods. The European Commission adopted a strict interpretation of what is permissible in the technical specifications and only considered requirements that affect the product's characteristics at the consumption stage as legitimate concerns.[158]

The CJEU, however, in its EVN/Wienstrom favoured the use of criteria favouring green electricity, in other words, favoured a consideration related to a specific production processes and methods, i.e. electricity generated from renewable energy sources.[159] The

[155] European Commission, note[32], p. 29.
[156] Ibid, p. 49-52.
[157] Kunzlik, note[35], p. 394.
[158] See, European Commission, Interpretative Communicaiton on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement COM(2001)274.
[159] This ruling of the CJEU is fully examined in Section(3.4.7.2) below.

CJEU had highlighted that the source of energy from which electricity is produced cannot be determined due to the physical nature of electricity.[160] However, the CJEU held that the contracting authority could request that the electricity it would procure be generated from renewable energy sources.[161] The CJEU ruled that the contracting authorities were permitted to incorporate environmental concerns into the award criteria, even if the criteria did not affect the intrinsic characteristic of the product itself, which was the case in EVN/Wienstrom in terms of requiring the electricity to be procured be generated from renewable energy sources.

After EVN/Wienstrom case, however, the European Commission failed to properly lay down the outcomes of the ruling of the CJEU. The European Commission, although specified that the contracting authorities can require supply of green electricity, the justification was contradictive. In that regard, while maintaining that the production process and methods unrelated to consumption characteristics could not be incorporated into the technical specifications under the Public-Sector Directive, the Commission argued that the case of green electricity is different on the ground that green electricity was 'invisibly' different at the consumption stage from electricity from fossil fuels.[162] This approach was controversial since that green electricity has no difference at the consumption stage, this is why called as invisibility fallacy by Kunzlik.

EVN/Wienstrom case was ruled in 2003, i.e. before the Public-Sector entered into force. Indeed, the Public-Sector Directive, as explained in Section(3.4.5) above, explicitly recognised the legitimacy of referring environmental considerations under the technical specifications without requiring any explicit requirement of having an effect at the consumption stage.

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[160] C-379/98 Preussen Elektra [2001] ECR I-2099, para. 79.
[161] C-448/01 EVN and Wienstrom v. Austria [2003] ECR I–14527, para. 40.
[162] European Commission, note[32], p. 23. For a detailed examination see, Kunzlik, note[24], p. 99-100.

As highlighted by Kunzlik:

> "The same appears to be true of specifications under Article 23(3)(b) formulated 'in terms of performance or functional requirements [which] … may include environmental characteristics'. The concept of 'environmental characteristics' is not qualified or restricted. Arguably the drafting suggests that 'performance' means something different to 'functional' and thus that environmental characteristics may relate to environmental performance unconnected to functionality."[163]

It is noteworthy that Article 40 of the DRAFT Public-Sector Directive explicitly recognises that technical specifications may include references to the production process or any other stage of the life-cycle for all types of contract.

3.4.6 Qualification criteria

Public-Sector Directive sets out the main legal requirements for the qualification of economic operators stage, and the process of deciding which firms are eligible to participate in order to ensure competition and prevent any possible discrimination. Depending on the procurement procedure in place, the Directive provides how and when qualification of economic operators has to take place and the rules on the number of economic operators to be invited. In that regard, two-tier pre-qualification and selection stages (shortlisting) apply in restricted and negotiated procedures, while admission to the open procedure is conducted in one stage. Article 44(3) of the Directive requires that the criteria or rules that the contracting authority intends to apply have to be announced within the tender notice objectively and in a non-discriminatory manner.

It is important to distinguish the selection stage from the award stage. As clarified by the CJEU's case-law, although it is possible to conduct the processes of selection and award simultaneously, the two procedures are governed by different rules.[164] The selection stage is

[163] Kunzlik, note[35], p. 398, supra-note, 114.

[164] See, Case 31/87 Gebroeders Beentjes BV v State of the Netherlands [1988] ECR 4635, para. 16; Case C-532/06 Emm. G. Lianakis AE and Others v Dimos Alexandroupolis and Others [2008] ECR I-251, para. 27-28; For a detailed examination of this distinction see, Steen Treumer, 'The distinction between selection and

the stage whereby the economic operators' ability to satisfy the requirements of the contracts in terms of experience, manpower or equipment is assessed. On the other hand, the award stage deals with evaluation of bids on the lowest price or the most economically advantageous tender, which are submitted by the economic operators who are found to be eligible. In other words, selection criteria relate to the characteristics of the tenderers while the award criteria relate to the relative merits of the tenders.

Public-Sector Directive lays down detailed rules with regard to the criteria of economic and financial standing and of technical capability (i.e. qualitative selection criteria). The contracting authorities in certain cases are obliged to exclude certain economic operators from the procurement procedure and in certain cases have discretion to decide upon the exclusion. Accordingly, in order to protect the integrity of the procurement system, having a conviction for participation in a criminal organisation, corruption, fraud and money laundering is considered by both procurement directives as a reason to be excluded from the procurement procedures.[165] On the other hand, in certain cases the exclusion is optional such as when a tenderer has been convicted by final judgment of an offence concerning professional conduct[166] and grave professional misconduct is proven[167]. The European Commission points out that exclusion from the tendering procedures in the case of being convicted by final judgment of an offence concerning professional conduct and being proven grave professional misconduct can be used for the promotion of green procurement.[168] Accordingly, a contracting authority may exclude an economic operator from the tendering procedures who has violated environmental legislation and has been convicted by a

award criteria in EC public procurement law - a rule without exception?' (2009) 3 *Public Procurement Law Review* 103.

[165] Public-Sector Directive, Article(45); Utilities Directive, Article(54).

[166] Public-Sector Directive, Article(45(2)(c)); Utilities Directive, Article(54(3)).

[167] Public-Sector Directive, Article(45(2)(d)); Utilities Directive, Article(54(3)).

[168] European Commission, note[32], p. 33.

judgment, i.e. noncompliance with environmental legislation.[169] In the same context, a contracting authority can exclude an economic operator who has repeatedly breached environmental requirements and been found guilty of grave professional misconduct.

The contracting authorities can query the capacity of the tenderers to cope with environmental problems related to the subject matter of the contract and accordingly knowledge, experience, technical equipment and facilities and human capacity of the tenderer can be taken into evaluation. The Procurement Directives exhaustively outline the technical capacity criteria that can be prescribed by the contracting authorities in order to evaluate the technical capacity of the tenderers.[170] In that regard, the contracting authorities can use environmental technical capacity criteria and environmental management schemes while addressing environmental concerns during the qualification stage.

With regard to environmental technical capacity criteria, The European Commission exemplifies such requirements and provides that such competence can be related to waste management contracts, construction, building maintenance and renovation contracts and transport services for the purpose of minimising waste creation, avoiding spillage of polluting products, reducing fuel costs and minimising disruption of natural habitats.[171]

The contracting authorities can also benefit from the environmental management schemes while determining environmental capacity of a tenderer. Two environmental management schemes are deemed valid throughout the EU, which are the Eco-Management and Audit Scheme (hereafter 'EMAS')[172] and the international standard on environmental management systems, EN/ISO 14001[173]. The environmental management schemes, like the eco-labels, are voluntary programmes that help the companies to assess and target environmental

[169] Public-Sector Directive, Recital(43); Utilities Directive, Recital(54).
[170] Public-Sector Directive, Article(48); Utilities Directive, Article(53) and (54).
[171] European Commission, note[32], p. 34.
[172] Regulation (EC) No. 761/2001 allowing voluntary participation by organisations in a Community eco-management and audit scheme, OJ 2001 L 761/2001.
[173] European/International Standard EN/ISO 14001:1996 on environmental management systems.

impacts and increase their environmental performance. Article 48(2)(f) of Public-Sector Directive permits the contracting authorities in 'appropriate cases' to ask the tenderers to meet certain environmental management measures for public works and services contracts, and the directive recognises EMAS certificates as means of proof that can be used for that purpose.

Caranta criticises the lack of sufficient guidance within Public-Sector Directive for identifying the 'appropriate' cases.[174] It could be argued that 'appropriate cases' need to be evaluated in the narrowest sense and only compliance with the criteria that are related to the contract to be performed must be requested. Furthermore, the contracting authorities have to recognise any other equivalent certificates from bodies established in other Member States. It is therefore the case that The European Commission underlines that the contracting authorities cannot require tenderers to possess an EMAS registration or fully comply with the requirements of an EMAS registration.[175]

North-Holland case also has significant outcomes with regard to establishing qualification criteria based on sustainability. In the tender documents the Province of North-Holland asked suppliers to demonstrate their suitability by providing information about the way in which they fulfilled criteria concerning sustainable purchasing and socially responsible business. The contracting authority also asked suppliers to state in what way the suppliers contributed to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production. The suppliers who failed to satisfy these requirements were deemed unqualified.

The CJEU evaluated the legal status of the 'criteria of sustainable purchases and socially responsible business' and the obligation to 'contribute to improving the sustainability of the

[174] Caranta, note[6], p. 42.
[175] European Commission, note[32], p. 36.

coffee market and to environmentally, socially and economically responsible coffee production', and concluded that these criteria were laying down minimum levels of capacity to be met by suppliers in order to be qualified for the tenders, rather than legal obligations to be met in the contract.[176] In other words, the CJEU distinguished qualification criteria from the contract conditions.

The CJEU discussed the legitimacy of the aforementioned sustainability concerns according to Article 48 of Public-Sector Directive, which governs the qualification criteria in terms of technical and professional ability. The CJEU concluded that the criteria stipulated by the contracting authority were unlawful since Article 48 exhaustively outlines all the factors on the basis of which technical and professional abilities may be assessed, and the Court held that the sustainability criteria in question did not relate to these factors.[177] The CJEU, in that respect, clarified that a contracting authority cannot consider an economic operator's environmental or social record in areas unrelated to the contract as qualification for a public contract.

The CJEU also evaluated the sustainability criteria from the prism of transparency deriving from Article 2 of Public-Sector Directive. The Court stated that the transparency obligation requires all conditions and detailed rules of award procedures to be laid down in the tender notice or tender documents in a manner that is "*clear, precise and unequivocal*".[178] The Court pointed out that this obligation is twofold. The first aspect is that all reasonably informed tenderers exercising ordinary care must understand the exact significance of all criteria and interpret them in the same way. The second aspect is that the contracting authority must be able to ascertain whether the tenders submitted satisfy these criteria. The CJEU found that the sustainability criteria specified in the tender documents were

[176] North-Holland, note[107], para. 102-104.
[177] Ibid, para. 107.
[178] Ibid, para. 109.

insufficiently precise and breached the general transparency obligation. This reasoning of the CJEU implies that general references to business conduct cannot be used as criteria for qualification.

Article 55.3(a) of Draft Public-Sector Directive enables the contracting authorities to exclude an economic operator from the tendering procedures on the basis of violations of EU or international environmental or social obligations.

3.4.7 Award criteria

The Procurement Directives permit the contracting authorities to rely on the lowest prices or most economically advantageous offer that considers other sub-criteria besides the price, e.g. quality, technical merit, aesthetic and functional characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period and period of completion, which are outlined non-exclusively.[179]

The contracting authorities may pursue environmental objectives in the latest stage of the tender, i.e. awarding the contract stage. Compared with other stages, the incorporation of environmental objectives into the award criteria is quite complex. As Caranta points out "*award criteria have been the battleground over which sustainability considerations have fought for recognition*".[180] The rules governing this issue mostly emanate from the case-law of the CJEU. Amongst these case-laws Concordia Bus and EVN/Wienstrom were ruled before 2004, i.e. before the Procurement Directives entered into force. On the other hand, North-Holland was ruled in 2012, which had significant outcomes in terms of pursuit of sustainable development concerns.

[179] Public-Sector Directive, Article(53), Recital(46); Utilities Directive, Article(55), Recital(55).
[180] Caranta, note[6], p. 43.

3.4.7.1 Concordia Bus

The dispute in the Concordia Bus case emanated from whether in the context of procurement of bus transport services, the contracting authorities were entitled to incorporate environmental concerns such as noise and pollution reduction into the award criteria. With regard to the nature of the award criteria, the CJEU dismissed the argument that "*the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature*".[181] In that regard, the CJEU held that the contracting authorities were permitted to incorporate environmental concerns into the award criteria, even if the criteria in question did not provide an immediate economic benefit for the contracting authority in terms of external environmental costs such as levels of noise and nitrous oxide emissions from the tenderers' bus fleets. However, critically, the CJEU approached the possible implications of conferring such a broad discretion to the contracting authorities. In that regard, the CJEU elaborated the main principles governing the legitimacy of the pursuit of environmental policies (so that, the sustainable development objectives) in the award stage. The Court held that the award criteria used by the contracting authority: (1) must have a link to the subject matter of the contract; (2) must be adequately specific and objectively quantifiable; (3) must be expressly mentioned in the contract documents or the tender notice; (4) the criterion must comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.[182] Weller and Pritchard interpret the ruling of Concordia Bus as: "*the Court has built on general principle of discretion to decide 'what to buy' by concluding that it is not discriminatory to be discriminating*".[183]

[181] C-513/99 Concordia Bus Finland v. Helsingin Kaupunki [2002] ECR I-7213, para. 55.
[182] Ibid, para. 65.
[183] Weller and Pritchard, note[54], p. 58.

3.4.7.2 EVN/Wienstrom

EVN/Wienstrom case was settled in 2003, a year after Concordia Bus. The dispute in ENV/Wienstrom emanated from whether a contracting authority was entitled to lay down an award criterion relating to the supply of electricity where the highest number of points was awarded to the tenderer able to supply the highest amount of renewable energy to consumers. The electricity supplier was required to undertake to supply the electricity from renewable energy sources, however was not required to submit proof of its electricity sources.

The CJEU reiterated its ruling in Concordia Bus and held that the contracting authorities were permitted to address environmental concerns in the award criteria provided that they are linked to the subject matter of the contract.[184] It is noteworthy that the Court also evaluated the extent of the discretion of contracting authorities while defining any sub-criteria and held that "*the contracting authorities are not only free to choose the criteria for awarding the contract but also to determine the weighting of such criteria*".[185] The CJEU further questioned the substance of this link set within the procurement in question. In that regard, the Court referred to its ruling in Preussen Elektra.[186] In Preussen Elektra, the CJEU had held that the use of 'renewable energy sources'[187] for producing electricity is a convenient method for protection of the environment, provided that this process contributes to the reduction in emission of greenhouse gases and to combatting climate change.[188] However, the CJEU had highlighted that the source of energy from which electricity is produced cannot be determined due to the physical nature of electricity.[189] In other words,

[184] EVN/Wienstrom, note[161], para. 34.
[185] Ibid, para. 39.
[186] See, Preussen Elektra, note[160].
[187] Directive 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, in the internal market, defines renewable energy sources under article 2 as "*renewable non-fossil energy sources (wind, solar, geothermal, wave, tidal, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases)*".
[188] Preussen Elektra, note[160], para. 73.
[189] Ibid, para. 79.

the electricity produced from renewable sources is no different from the electricity produced from traditional sources and does not affect the consumption characteristics.

In EVN/Wienstrom case the CJEU held that the contracting authority could request that the electricity it would procure be generated from renewable energy sources.[190] The CJEU ruled that the contracting authorities were permitted to incorporate environmental concerns into the award criteria, even if the criteria did not affect the intrinsic characteristic of the product itself, which was the case in EVN/Wienstrom in terms of requiring the electricity to be procured be generated from renewable energy sources. As emphasised by Weller and Pritchard with regard to the distinction between Concordia Bus and EVN/Wienstrom, in the former the ecological impact occurred in the usage phase and in the latter it occurred in the production phase; both were considered legitimate concerns.[191]

Another issue that was addressed in EVN/Wienstrom case was the legitimacy of award criterion which was not accompanied by requirements that permit the accuracy of the information contained in the tenders to be effectively verified. The Court pointed out that "*tenderers must be in position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority*"[192] and ruled that "*[i]t is thus apparent that where a contracting authority lays down an award criterion indicating that it neither intends, nor is able, to verify the accuracy of the information supplied by the tenderers, it infringes the principle of equal treatment, because such a criterion does not ensure the transparency and objectivity of the tender procedure*"[193] (emphasis added). In that regard, the CJEU laid down a burden on the contracting authorities to ensure verification of award criteria. It is noteworthy that Directive 2009/28/EC established a mechanism called

[190] EVN/Wienstrom, note[161], para. 40.
[191] Weller and Pritchard, note[54], p. 57.
[192] EVN/Wienstrom, note[161], para. 47.
[193] Ibid, para. 51.

'Guarantee of Origin' certificates to deal with the problems arising from sale of green electricity, i.e. electricity generated from renewable energy sources.[194] This mechanism is considered to enhance authoritative identification of green electricity.[195] Furthermore, this mechanism avoids any duplicate marketing of green electricity.

Besides the verification requirement, the CJEU also elaborated a significant rule for formulating the award criteria. In accordance with the principle of equal treatment and the requirement of transparency, the CJEU held that "*award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed tenderers of normal diligence to interpret them in the same way*".[196]

In that case, the contracting authority had also required an amount of electricity exceeding its particular annual consumption and asked tenderers to state their overall capacity to supply from renewable energy sources to a non-defined group of consumers. The CJEU was asked to clarify whether such a requirement established a legitimate link with the subject-matter of the contract. The Court ruled that the contracting authority cannot stipulate that all electricity of the tenderer's company generated from renewable energy sources which exceed the volume of consumption; in other words, the requirement has to be proportional with the subject-matter of the contract.[197]

3.4.7.3 The evaluation of rules prior to North-Holland

The CJEU's jurisprudence on the horizontal policies was translated into the Procurement Directives when they were reformed in 2004. For instance, Recital 46 states that the award criteria could be formulated not only economic but also qualitative grounds, such as environmental characteristics. However, the criteria must allow the level of performance

[194] Directive 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ 2009 L 140/16.
[195] Kunzlik, note[35], p. 380.
[196] EVN/Wienstrom, note[161], para. 57.
[197] Ibid, para. 71.

offered by each tender to be assessed in the light of the object of the contract. Furthermore, the award criteria must be defined objectively, assuring the tenderers that their bids are compared and evaluated objectively within effective competition. Aside from the recitals, the main texts of the Procurement Directives also reiterate similar rules with regard to the formulation of award criteria. For instance, the most economically advantageous tender could be formulated through relying on various sub-criteria, examples of which are listed non-exhaustively under Article 53(1)(a) of Public-Sector Directive provided that they are linked to the subject matter of the contract in question.

The European Commission also issued a communication in 2008 entitled 'Public procurement for a better environment' in order to guide the contracting authorities while incorporating environmental concerns into the procurement process in accordance with the Action Plan on Sustainable Consumption and Production and Sustainable Industrial Policy.[198] In particular, The European Commission attempted to establish a common set of criteria for that purpose. In this context, The European Commission proposed core and comprehensive criteria that could be used for addressing different levels of environmental protection.[199] In this context, the core GPP criteria stand for the minimum level of protection, which provides compliance with the minimum level of environmental protection standards set out by the EU. On the other hand, the comprehensive GPP criteria cover more aspects or higher levels of environmental performance for the contracting authorities that seek to go further for achieving their environmental goals.

When the contracting authorities opt to rely on the most economically advantageous offer, they rely on different sub-criteria which can be compared and weighed up with matrix

[198] European Commission, Public procurement for a better environment COM(2008)400.
[199] Ibid, p. 6.

comparisons and relative weightings. In this context, a different methodology can be applied while integrating the environment as a parameter into the award criteria.[200] For instance:

i. Awarding extra points for compliance with a certain standard (e.g. the bids offering a voluntary European standard before it becomes a mandatory standard will receive X extra points).

ii. Awarding extra points for performance beyond the minimum requirements in the technical specifications (e.g. the bids offering lower energy demand than the requirements in the technical specifications will receive up to X points, whereas the bids meeting the technical specifications will receive 0 points).

iii. Awarding points proportionally on the basis of performance in the absence of any minimum requirements stipulated under the technical specifications (e.g. the bids will be evaluated in terms of their energy demand and the bid that offers the lowest energy demand will receive the highest points, when the worst offer will receive 0 points).

The European Commission recommends a gradual transition to sustainability and advises Member States to adopt a step-by-step approach, e.g. initiating green procurement policies for a small range of products and services where environmental impacts are more visible.[201] The European Commission also recommends the use of variants as complementary instruments to assess cost impact of alternative solutions for meeting the need.[202] The Procurement Directives permit the use of variants on the condition that the acceptance of variants is publicised in the tender documents explicitly.[203] As highlighted by Arrowsmith, the award stage is the most convenient stage to assess the real cost of horizontal policies and

[200] See, Arrowsmith, note[53], p. 143-144.
[201] European Commission, note[32], p. 10.
[202] Ibid, p. 29.
[203] Public-Sector Directive, Article(24); Utilities Directive, Article(36).

the use of variants is an efficient method to make a specific evaluation of the costs.[204] In that regard, once variants are accepted, the contracting authority can compare the bids (ordinary bids and green alternatives) on the basis of the same set of award criteria and can appraise the prospective cost of environmental protection.

The protection of the environment through public procurement requires consideration of a complex set of parameters by the contracting authorities. The European Commission recommends the contracting authorities to take account of life-cycle costs of the goods, e.g. initial purchase price, running and maintenance costs over the lifetime, and costs at the end of life such as disposal, termination or replacement costs.[205] The European Commission has developed a database that contains basic environmental information for about 100 different product and service groups.[206] The Commission has also published a report for calculation of life-cycle costs in the field of construction in order to support the contracting authorities while they formulate their award criteria, and initiated the Clean Vehicle project for life-cycle costing for vehicle procurement.[207] The main problem with regard to addressing life-cycle costing is that it could require addressing invisible externalities. In that regard, how far contracting authorities could address such concerns or to what extent such externalities could be considered to establish a legitimate link with the subject matter of the contract is questionable. North-Holland case, in that regard, is a breakthrough on the grounds that it laid down a new approach for the requirement of horizontal policies to be linked with the subject matter of the contract. The outcomes of this case and the approach of the draft procurement directives will be examined in the following section.

[204] Arrowsmith, note[53], p. 134.
[205] European Commission, note[32], p. 42.
[206] The database is available at <http://europea.eu.int/comm/environment/green_purchasing>
[207] The European Commission, 'Clean Vehicle' available at <www.cleanvehicle.eu>

3.4.7.4 North-Holland

The province of North-Holland, the contracting authority in the Netherlands, established an award criterion that included the ingredients to be supplied should bear the EKO and/or MAX HAVELAAR labels. The EKO label, as explained previously, relates to products that have been produced through organic agriculture. The CJEU referred to the Regulation 2092/91, regulating organic agriculture, whereby it is stated that the method of organic production promotes environmental production since it imposes strict rules with regard to use of fertilisers and pesticides. On the other hand, MAX HAVELAAR label seeks to promote the interests of small-scale producers in developing countries while maintaining trade relations with them that take into account the need of those products. The Court identified the EKO label as an environmental criterion and MAX HAVELAAR label as a social award criterion.

The European Commission argued that the formulation of award criteria by the contracting authority of the Netherlands infringed Article 53 of Public-Sector Directive in two respects: the requirement was not linked with the subject matter of the contract and the criteria did not comply with the requirements regarding equal access, non-discrimination and transparency.[208] The Commission established the arguments on the grounds that both labels relate to the general policy of the tenderers rather than the products and the stipulation of these labels had the effect, inter alia, of disadvantaging tenderers who operated outside the Netherlands and who did not hold the labels. However, the Netherlands maintained that the award criteria were transparent, objective and non-discriminatory and accessible to any potential tenderer.[209] Furthermore, the Netherlands discussed that Public-Sector Directive was not strict with regard to the award criteria as it related to technical specifications, so the

[208] North-Holland, note[107], para. 82.
[209] Ibid, para. 83.

Netherlands argued that it is was not necessary that all the tenderers were required to be able to fulfil an award criterion. In this context, the Netherlands claimed that the award criterion was linked to the subject matter of the contract.

The CJEU, before examining the legitimacy of the award criteria, set the context of rules governing award criteria laid down under Public-Sector Directive. Firstly, the CJEU clarified that the MEAT could be formulated through relying on various sub-criteria which are listed non-exhaustively under Article 53(1)(a) of Public-Sector Directive.[210] The CJEU referred to Recital 46 which permits the formulation of the award criteria based not only on economic but also qualitative factors, such as environmental characteristics. The CJEU further referred to the fourth paragraph of Recital 46, which states that 'contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs – defined in the specifications of the contract – of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong'. In that regard, the Court held that "*contracting authorities are also authorised to choose the award criteria based on considerations of a social nature, which may concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons*".[211]

Secondly, the CJEU referred to Article 53(1)(a) of Public-Sector Directive, requiring the award criteria be linked to the subject matter of the contract, and Recital 46, requiring that the criteria must allow the level of performance offered by each tender to be assessed in the light of the object of the contract.[212]

Thirdly, the CJEU referred to the first and fourth paragraphs of Recital 46, which require the award criteria to be defined objectively, assuring tenderers that their bids are compared and

[210] Ibid, para. 84.
[211] Ibid, para. 85.
[212] Ibid, para. 86.

evaluated objectively within effective competition.[213] In that regard, the Court referred to its jurisprudence of the Concordia Bus case where the Court had ruled that the award criteria must not have the effect of conferring on the authority an unrestricted freedom of choice.

Fourth and finally, the Court highlighted that the principle of equal treatment and the principle of transparency apply to every stage of the procurement proceedings and referred to its jurisprudence of the EVN/Wienstrom case, where the Court had ruled that the award criteria must be formulated in a way that allows all reasonably well-informed tenderers exercising ordinary care to know the exact scope and thus to interpret them in the same way.[214]

After setting the legal context, the Court then proceeded to examine the legitimacy of the award criteria in question. In that regard, the Court examined the criteria underlying eco-labels and held that the criterion at issue with regard to the EKO label, based on organic agriculture, embodies environmental characteristics while the MAX HAVELAAR label, based on fair trade, embodies social characteristics.[215] The Court then held that the criteria are related to the ingredients to be supplied, without having a bearing on the general purchasing policy of the tenderers which establishes the link to the subject matter of the contract.[216] With regard to the issue of whether the criteria must relate to an intrinsic characteristic of a product, the Court held that there is not such a requirement and referred to its jurisprudence of the EVN/Wienstrom.[217] It is noteworthy that the CJEU made a correlation between the electricity supplied to be produced from renewable energy sources and the products having fair trade origin, and considered them to have equal status. In this context, the CJEU ruled that "*[t]here is therefore nothing, in principle, to preclude such a*

[213] Ibid, para. 87.
[214] Ibid, para. 88.
[215] Ibid, para. 89.
[216] Ibid, para. 90.
[217] Ibid, para. 91.

criterion from referring to the fact that the product concerned was of fair trade origin".[218] In other words, the fair trade origin of the product was found to relate to the subject matter of the contract. Considering the explanations hereto, the CJEU ruled that the award criterion at issue is linked to the subject matter of the contract.[219]

The CJEU also evaluated the formulation of the award criteria in question. With regard to the formulation manner of the award criteria, the CJEU pointed out the requirements of precision and objectivity that apply to the contracting authorities in that regard.[220] The CJEU referred to the rules governing specifications related to the eco-labels and held that it was permitted to make recourse to the criteria underlying an eco-label in order to establish certain characteristics of a product, but it was not allowed to make an eco-label a technical specification.[221] The Court clarified that the permission granted in this context only aims to create a presumption that the products bearing the label comply with the characteristics defined, expressly subject to any other appropriate means of proof being allowed. As stated, the Netherlands had maintained that the limitations laid for eco-labels are only applicable to technical specifications, not to the award of contracts. However, the CJEU dismissed this argument and held that there is no room for such an interpretation, considering that the consequences of the principles of equality, non-discrimination and transparency are different where award criteria are considered.[222] The Court ruled that the Province of North-Holland established an award criterion that was incompatible with Public-Sector Directive by granting a certain number of points in the choice of the MEAT to certain products bearing specific labels instead of listing the criteria underlying those labels and allowing proof that a product satisfies those criteria by all appropriate means.[223]

[218] Ibid, para. 91.
[219] Ibid, para. 92.
[220] Ibid, para. 93.
[221] Ibid, para. 94.
[222] Ibid, para. 95.
[223] Ibid, para. 97.

Weller and Pritchard consider that this ruling sanctioned the idea that a sustainability criterion can have a significant influence on the award criteria.[224] In the same direction, Martens and De Margerie consider this ruling to enhance the possibilities provided by the Procurement Directives and contend that it allows for consideration of upstream social considerations such as the trading conditions of farmers at the start of the production chain.[225] In the scope of this interpretation, Martens and De Margerie argue that the externalities generated during the execution of the contract such as implications of products after use can also be legitimately addressed within the award criteria.[226] In the same context, Dragos and Neamtu contend that this ruling highlighted that "*the award criteria may contain environmental and social aspects which do not find their tangible correspondent in the final product*".[227] Furthermore, Totis maintains that the jurisprudence makes it clear that the criteria related to the tenderers' general policies do not establish a link between the award criteria and the subject matter of the contract.[228] In the same context, Totis contends that the CJEU established a general obligation of precision and clarity which applies to any award criteria, not necessarily for those referring to eco-labels.[229] Arrowsmith also evaluates the requirement of precision in the context of transparency and as a constraint on the discretion of contracting authorities.[230] Kunzlik also interprets this ruling as adding a fourth criterion to the Concordia Bus decision: the duty of precision.[231]

It is the author's view that North-Holland case increased the levels that could be addressed within the supply chain link of a product. The ruling of North-Holland, in other words, significantly relaxed the link to the subject-matter of contract test. Furthermore, the CJEU

[224] Weller and Pritchard, note[54], p. 59.
[225] Marc Martens and Stanislas De Margerie, 'The Link to the Subject-Matter of the Contract in Green and Social Procurement' (2013) 1 *European Procurement & Public Private Partnership Law Review* 8, p. 14.
[226] Ibid.
[227] Dragos and Neamtu, note[26], p. 27.
[228] Kotsonis, note[147], p. 243.
[229] Ibid, p. 244
[230] Arrowsmith, note[79], p. 19.
[231] Kunzlik, note[24], p. 104.

compiled all general principles regarding the formulation of any award criteria. In that regard, the CJEU underlined that the principles of equality, non-discrimination and transparency equally apply to the formulation of award criteria insofar as they apply to the technical specifications. To recap, these principles are that (1) the contracting authorities themselves need to specify precisely in the tender documents the criterion that must be met for the extra points to apply rather than simply referring to labels; (2) the contracting authorities need to accept other means of proof besides the labels in order to prove that a product meets the relevant standards. Considering the similarities of the rules governing award criteria under Public-Sector Directive and Utilities Directive, the jurisprudence under North-Holland case is equally relevant for utilities.

It is noteworthy that the European Parliament's resolution with regard to the modernisation of public procurement "*underlines the fact that whether or not a product or service has been sustainably produced is rightly considered to be a characteristic of the product*".[232] This resolution also considers sustainable production as a legitimate criterion to compare products or services that have not been sustainably produced, "*so as to enable contracting authorities to control the environmental and social impact of contracts awarded by them in a transparent way but at the same time not to weaken the necessary link to the subject matter of the contract*" (emphasis added).[233] As explained, Draft Procurement Directives are expected to facilitate better integration of sustainable development concerns into public procurement.[234]

[232] European Parliament resolution of 25 October 2011 on the modernisation of public procurement (2011/2048(INI)), para. 18.
[233] Id., para. 18.
[234] Section(3.3).

3.4.8 Contract performance clauses

Contract performance clauses lay down the technical details of how the contract has to be performed. The Procurement Directives permit the contracting authorities to lay down special conditions relating to the performance of a contract provided that such conditions are compatible with EU Community law and pre-announced in the tender notice or in the specifications.[235] The Procurement Directives point out that the conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

The European Commission points out that once designed wisely, the contracting authorities can contribute to the protection of the environment without making any significant structural changes.[236] For instance, packaging and timing of orders also have environmental impacts. Asking items to be delivered in the appropriate quantity, usage of reusable containers to transport the products and specifying the most convenient method of transportation can have an impact on the environment and can decrease the amount of emissions generated through the procurement. In the same context, in cases of works or services procurement, the contracting authorities have the option to require implementation of a certain environmental management system and stipulate this requirement in the contract performance clauses. In all circumstances, the contracting authorities have to accept any equivalent environmental management systems submitted by the tenderers. As also underlined by The European Commission, the success of addressing environmental concerns throughout the contract performance clauses is dependent on the effectiveness of monitoring contract compliance.[237] In this regard, it can be requested that the supplier provide evidence of compliance or spot checks can be carried out. The European Commission also recommends that authorities

[235] Public-Sector Directive, Article(26); Utilities Directive, Article(38).
[236] European Commission, note[32], p. 47.
[237] Ibid, p. 48.

should impose appropriate penalties in cases of non-compliance and should promote bonuses for good performance.

3.4.9 Preliminary conclusions

The research conducted by CEPS and the College of Europe submitted to The European Commission, DG Environment with regard to the uptake of green public procurement in the EU 27 confirms that the use of green procurement is increasing.[238]

The main findings of this study is as follows:

1. The uptake of EU core Green Public Procurement (GPP) criteria in the EU27 is significant.
2. The uptake of EU core GPP criteria is on the increase.
3. In terms of value of procurement, GPP uptake appears very significant.
4. The majority of public authorities are undertaking some form of GPP.
5. The uptake of EU GPP criteria varies significantly across the EU 27.
6. The uptake of EU core GPP criteria does not vary only across countries, but also across product groups.
7. A few individual EU core GPP criteria are very frequently used.
8. Life-Cycle Costing (LCC) and Total Cost of Ownership (TCO) methods are not frequently used by public authorities.
9. Many authorities face difficulties in including GPP criteria in public procurement.

This report particularly highlights that purchasing price remains the predominant criterion to evaluate contracts.[239] In that regard, although the outcomes are mainly positive, the relatively low use of LCC is a significant shortcoming in terms of achieving long-term

[238] Centre for European Policy Studies and Europe, note[97].
[239] Ibid, p. 37.

sustainability. A similar piece of research also suggests that LCC is not yet considered to be a critical component of sustainable public procurement worldwide.[240]

In fact, the importance given to life-cycle costing in the award criteria is increasing. The Draft Public Sector Directive as well as the Draft Utilities Directive provides that "*Costs may be assessed, on the choice of the contracting authority, on the basis of the price only or using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 67*" (emphasis added)[241], and a separate article is laid down on life-cycle costing which provides a unified methodology on the calculation of real costs of products, services and works. Accordingly, life-cycle costing covers the following costs: *"(a) internal costs, including costs relating to acquisition, such as production costs, use, such as energy consumption, maintenance costs, and end of life, such as collection and recycling costs and (b) external environmental costs directly linked to the life cycle, provided their monetary value can be determined and verified, which may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs*".[242] The draft provisions provide that the use of a life-cycle costing methodology into award criteria is discretionary unless a common methodology is mandated at the EU level. As explained, the Clean Vehicle Directive already lays down such a common methodology.[243]

The draft provisions also underline that the methodology has to be drawn up on the basis of scientific information or be based on other objectively verifiable and non-discriminatory criteria, has to be established for repeated or continuous application and has to be accessible to all interested parties. The draft provisions do not preclude the contracting authorities from

[240] Oshani Perera, Barbara Morton and Tina Perfrement, *Life cycle costing a question of value : a white paper from IISD* (Winnipeg, Man.: International Institute for Sustainable Development, 2009), p. 1.
[241] DRAFT Public-Sector Directive, Article(66(1)); DRAFT Utilities Directive, Article(76(1)).
[242] DRAFT Public-Sector Directive, Article(67); DRAFT Utilities Directive, Article(77).
[243] Section(3.4).

relying on environmental criteria which do not provide economic benefit for the contracting authority; they only require the translation of such external environmental concerns (e.g. the impact of pollution on the population) to monetary values, which is indeed in line with the Concordia Bus decision where it was underlined that the award criteria had to be adequately specific and objectively quantifiable.

Martens and De Margerie consider the approach put forward under the DRAFT Procurement Directives as a broad view, and it is contended that "*anything that is comprised in the life cycle would thus be considered linked to the subject-matter*".[244] Dragos and Meamtu, though, are sceptical with regard to the approach of Draft Procurement Directives and they consider that there is ambiguity with regard to the legitimacy of addressing non-financial benefits or social costs.[245] Nevertheless, they acknowledge that the feasibility of societal LCC is a contested issue[246] and they consider that the main challenge of life-cycle costing is caused by the lack of a uniform and advanced scientific knowledge in that area.[247] Indeed, the success of the implementation of life-cycle costing is related to the human capacity of contracting authorities. As the research conducted by CEPS and the College of Europe indicated, many authorities face difficulties in including GPP criteria in public procurement. Indeed, as explained in Chapter 2, sustainability is a contested and complex concept.[248] In that regard, further harmonisation of terminologies, taxonomies, targets and overall scope of national GPP policies is the most important action to overcome these challenges and to achieve sustainability in public procurement.

[244] Martens and De Margerie, note[225], p. 17.
[245] Dragos and Neamtu, note[26], p. 24 and 28.
[246] Ibid, p. 25.
[247] Ibid, p. 28.
[248] Chapter(2):Section(2.2).

3.5 Social procurement

The promotion of social policies through public procurement constitutes of the second essential dimension of sustainable procurement. As explained in Chapter 2, sustainable development embodies a strong social dimension in the EU.[249] To recap, the Sustainable Development Strategy and the Europe 2020 Strategy lay down detailed action plans in order to ensure realisation of these policies. Most importantly, the Renewed Social Agenda of the EU stipulates that all EU policies have to promote opportunities, providing access for the disadvantaged and demonstrating solidarity through fostering social inclusion.[250]

The European Commission sought to clarify the possibilities under the Community legal framework on the incorporation of social considerations into the public procurement process and queried whether and to what extent such considerations can be justified during the previous procurement directives.[251] The Procurement Directives, adopted in 2004, clarified the possibilities of incorporation of social considerations into the public procurement process in the same way as it had addressed environmental considerations. The European Commission also issued a handbook entitled Buying Social in order to guide the Member States.[252]

Social procurement could simply be defined as procurements that address the social pillar of sustainable development such as employment opportunities, decent work, compliance with social and labour rights, social inclusion, equal opportunities, accessibility, designing for all, ethical trade issues and corporate social responsibility.[253]

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[249] Chapter(2):Section(2.3.1).
[250] European Commission, Renewed social agenda: Opportunities, access and solidarity in 21st century Europe COM(2008)412, p. 6.
[251] See, European Commission, Public Procurement: Regional and Social Aspects COM(89)400; European Commission, Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement COM(2001)566.
[252] See, European Commission, *Buying social: a guide to taking account of social considerations in public procurement* (Luxembourg: Official Publications of the European Communities, 2010).
[253] Ibid, p. 7.

Social procurement is expected to generate different outcomes such as (1) assisting compliance with social and labour law, including related national and international policy commitments/agendas; (2) stimulating socially conscious markets; (3) demonstrating socially responsive governance; (4) stimulating integration; (5) ensuring more effective public expenditure.[254] Social problems or priorities challenging the EU Member States are different and are influenced from different constraints. In that regard, the European Commission recommends the contracting authorities to take a step-by-step approach like in green procurement and advises them to focus on specific social aspects, e.g. fair wages, health or safety, where social impacts are visible or in the areas where sufficient data is available for the contracting authority.[255]

McCrudden adopts a broad approach when it comes to the use of public procurement to promote social justice, in particular ensuring equality and non-discrimination.[256] McCrudden prefers the term "linkages" in order to describe promotion of social justice through equality and non-discrimination clauses in public procurement. As an attempt to reconcile social and economic considerations, McCrudden adopts a broad interpretation of equality and non-discrimination by using a methodology based purchaser/regulator distinction of states.[257] In that regard, McCrudden extends the general principle of equal treatment to a positive obligation. McCrudden further considers that the CJEU might develop the fundamental principle of equality in EU law to provide for an obligation to take into account equality in public procurement.[258]

Boyle also rejects this interpretation of equality, which inter alia could be applied for disability issues, on the grounds that there is neither an explicit or implicit mandate under

[254] Ibid, p. 9-10.
[255] Ibid, p. 16.
[256] See, McCrudden, note[12].
[257] Ibid, p. 538 et seq.
[258] Ibid, p. 583-586.

the Public-Sector Directive.[259] The author adopts the approach put forward by Boyle. Furthermore, the author considers that the approach put forward by McCrudden, which adds another layer of complication to the procurement proceedings, i.e. a positive obligation of equality consideration, has adverse implications for the promotion of sustainable public procurement.

Indeed, Weller and Pritchard argue that the pursuit of social considerations throughout public procurement has been more controversial than the pursuit of environmental considerations on the grounds that the impacts of social considerations in the use phase of a product is less visible, which complicates the establishment of a link to the subject matter of a contract.[260] As explained previously, implementation of horizontal policies in the majority of cases involves certain costs that must be weighed by the contracting authorities against their possible benefits. The same methodology applies for the pursuit of social policy considerations. In that regard, the contracting authorities need to assess the benefits, costs and subsidiarity of using public procurement to achieve social outcomes.

The rules, procedures and case-law explained in Section 3.4 dealing with green procurement mostly apply to social procurement. This section, in that regard, will provide an overview of possible ways of addressing social considerations through public procurement and will only highlight the distinguishing features of such a pursuit.

3.5.1 The identification of the need

As explained previously, the contracting authorities have a wider margin of discretion before they initiate the tendering proceedings whereby they identify their actual need and tailor the need to the contract notices. The European Commission, as in green procurement,

[259] See, Rosemary Boyle, 'Disability issues in public procurement' in Arrowsmith Sue and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009), p. 331.

[260] Weller and Pritchard, note[54], p. 57.

recommends the contracting authorities to define the subject matter of a contract in a way that is 'performance-based' in order to provide a broad margin for the economic operators while proposing solutions for social concerns.[261] In that way the contracting authorities can define their intended social objectives and leave the implementation possibilities to the tenderers, which can provide broad room for manoeuver in the area of fostering innovation. The contracting authorities have to ensure that their definition does not distort competition between the economic operators and show full respect to the transparency and equal treatment principles in their definition.

3.5.2 Technical specifications

Technical specifications define the characteristics of the products, services or works to be procured. The Procurement Directives explicitly mention the possibility of addressing environmental considerations throughout the technical specifications while silent for social considerations. In fact, technical specifications are not an appropriate stage for addressing all social considerations, in particular labour and employment concerns, since they are not technical specifications within the meaning of the Procurement Directives.[262]

The Procurement Directives refer specifically to certain social considerations that can be addressed throughout the specifications, which are 'disability' and 'design for all users' (i.e. the ability of the services to ensure equal opportunities for all users).[263] The Procurement Directives require the technical specifications to take into account "whenever possible" accessibility criteria for people with disabilities and the criteria of design for all users. It could be argued that the wording of "whenever possible" might be interpreted as a mandatory requirement to incorporate accessibility criteria. However, Arrowsmith doubts this and does not consider the wording of "whenever possible" to be read as an imperative rule and

[261] European Commission, note[252], p. 24.
[262] Ibid, p. 32.
[263] Public-Sector Directive, Article(23(1)); Utilities Directive, Article(34(1)).

identifies the rule as exhortatory.[264] Boyle suggests that this wording "*merely creates a binding obligation to give consideration to accessibility issues, leaving broad discretion to the authority in balancing cost and accessibility*".[265] Nevertheless, considering the importance of having a common set of criteria for disability issues, the European Commission has also issued two standardisation mandates in the area of information and technologies and the built environment to facilitate the incorporation of accessibility criteria to the public procurement process.[266]

Boyle argues that public procurement as a policy tool can also contribute to an increase the profile of accessibility standards in the industry.[267] However, in order to achieve the maximum benefit from the usage of public procurement as a policy tool, Boyle suggests that realistic and reasonable objectives must be set. As explained in Chapter 2, 'sustainability' is a vague concept and therefore referring to 'sustainability' as a criterion would not be sufficient to highlight the possible objectives to be achieved. Instead of this, the contracting authorities must be specific; in accordance with the local context and local challenges, they need to assess their actual need and the desired level of accessibility and incorporate this into the specifications adequately within their organisational capacity and allocated budget for the procurement in question.

On the other hand, the European Commission, under its Buying Social handbook, gives a special emphasise to social labels and implications for ethical trade.[268] Firstly, the Commission underlines that the contracting authorities could use ethical trade labels as a means of demonstrating compliance and stresses that the contracting authorities are not

[264] Arrowsmith, note[99], p. 1155-1156.
[265] Boyle, note[259], p. 331.
[266] The European Commission, Standardisation Mandate to CEN, CENELEC and ETSI in support of European accessibility requirements for public procurement in the ICT domain, M/376 EN, 7 December 2005 and M/420 EN, 21 December 2007.
[267] Boyle, note[259], p. 323.
[268] European Commission, note[252], p. 31-32.

permitted to oblige certification for a specific label. After setting the context of ethical trade, the Commission states that sustainability requirements (including social criteria) may be incorporated into the technical specifications of a public tender provided these criteria are linked to the subject matter of the contract in question, and provided that they ensure compliance with the other relevant EU public procurement rules and the principles of equal treatment and transparency.[269] However, the European Commission fails to properly exemplify the possibilities to address social concerns that may be incorporated into the technical specifications. The examples given such as clauses on 'recycled material' and 'organically grown' products do indeed fall within the scope of green procurement. As examined in North-Holland case, the ethical trade labels mostly fall within social procurements and the contract performance clauses are the most appropriate stage to address them, as it was the case for MAX HAVELAAR label.

The European Commission makes an important recommendation with regard to formulation of technical specifications in the context of ethical trade and links to the subject matter of the contract. Notably, the Commission advises the contracting authorities to avoid 'cutting and pasting' all contents of trade labels into technical specifications and recommends being selective and incorporating only criteria that are related to the subject matter of a contract.[270]

3.5.3 Qualification criteria

Article 45(2)(e) of Public-Sector Directive lays down a specific ground of exclusion that have social implications: failure to pay social contributions. This reason of exclusion signals that public bodies only do business with economic operators, regardless of their place of establishment, who act fairly to their employees by duly making the payments of social security contributions. As Trepte points out this ground of exclusion is not directly related

[269] Ibid, p. 31.
[270] Ibid, p. 32.

with the performance of a contract, and is related to the integrity of the economic operators and to what extent they show respect to the law.[271]

Aside from this specific ground of exclusion, the general grounds of exclusions that could be used for promoting green procurement could also be used as means to promote social procurement. The European Commission, in that regard, points out that exclusion from the tendering procedures in case of being convicted by final judgment of an offence concerning professional conduct and being proven to have grave professional misconduct can be used for the promotion of social procurement.[272] For instance, the contracting authorities can exclude an economic operator that has been convicted by a judgment for disregarding health and safety at work or discrimination on various grounds (e.g. race, gender, disability, age, sex, religious belief, etc.). In cases of grave professional misconduct, the national law plays a role since this concept is not defined at the EU level. Therefore, an economic operator who does not implement equal opportunities policies can be excluded from the procurement procedure once the national law considers such an act as grave professional misconduct.

The Procurement Directives introduced a special qualification criteria promoting social cohesion: workshops for workers with disabilities. The Procurement Directives permit the contracting authorities to have set-asides only for sheltered workshops and sheltered employment programmes where most of the employees concerned are handicapped people.[273] Such workshops or programmes are initiated in order to integrate certain disadvantaged groups into society. For this purpose, the Procurement Directives permits the contracting authorities to give preferences for such workshops or programmes since they

[271] Trepte, note[56], p. 346.
[272] European Commission, note[252], p. 35.
[273] Public-Sector Directive, Article(19); Utilities Directive, Article(28).

would not be able to obtain a contract under a competitive market provided that such reservations are incorporated into the prior information notices and contract notices.[274]

As explained, the contracting authorities can query the capacity of the tenderers to cope with environmental problems related to the subject matter of a contract and accordingly, knowledge, experience, technical equipment and facilities, human capacity and previous experience of a tenderer can be taken into evaluation. The European Commission contends that social considerations can be incorporated into the technical capacity criteria only if the achievement of the contract requires specific 'know-how' in the social field.[275]

3.5.4 Award criteria

The Procurement Directives also permit the contracting authorities to address social concerns in award criteria in the same way as they do for environmental concerns. Public-Sector Directive exemplifies certain social criteria that could be pursued and lays down that a contracting authority may use criteria aiming to meet social requirements in response in particular to the needs - defined in the specifications of the contract - of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong.[276]

The methodology used for green procurement can also be applied for social procurement. In this context, the contracting authorities can prefer to give extra points to the tenderers who offer better performance than that specified in the technical specifications for achieving a given social objective. As exemplified by Boyle, if a product/service has different levels of accessibility, the contracting authorities can grant extra points in proportional with the level of accessibility that the product/service offers.[277] The European Commission also

[274] Public-Sector Directive, Annex VII; Utilities Directive, Annex XIII.
[275] European Commission, note[252], p. 36.
[276] Public-Sector Directive, Recital(46).
[277] Boyle, note[259], p. 329.

recommends the use of variants as complementary instruments to assess the cost impact of alternative solutions for meeting the need.[278] Once variants are accepted, the contracting authority can compare the bids (ordinary bids and social alternatives) on the basis of the same set of award criteria and can appraise the prospective cost of social protection.

On the other hand, the pursuit of labour and employment concerns under the award criteria requires special attention. With regard to a procurement whereby the French authorities incorporated the ability of the tenderers to combat local unemployment as a parameter of award criteria, the CJEU held that such a policy of combating unemployment could be used as an award criterion provided that it was formulated in a non-discriminatory way, but only where the contracting authorities had to consider two or more equivalent tenders.[279] Arrowsmith argues that the decision rendered by the CJEU (also known as Nord-Pas-De-Calais) is vague and maintains that the ruling failed to distinguish between the award criteria and contract performance clauses.[280] Indeed, the CJEU referred to its previous ruling in the Beentjes case while ruling that the inclusion of employment considerations in award criteria was legitimate. However, as also pointed out by Arrowsmith, the ruling of Beentjes did not suggest this outcome; rather it highlighted the possibilities of addressing employment considerations in contract performance clauses.[281] Caranta is more sceptical about the approach of the CJEU and maintains that neither Beentjes nor Nord-Pas-De-Calais can be interpreted as an unconditional show of support for sustainable public procurement.[282]

Nevertheless, in the Beentjes case the CJEU held that a criterion requiring employment of the long-term unemployed could be discriminatory if it could only be satisfied by contractors of that Member State.[283] Martens and De Margerie also disagree with this interpretation of

[278] European Commission, note[252], p. 30.
[279] C-225/98 Commission of the European Communities v France [2000] E.C.R. 1-7445.
[280] Arrowsmith, note[99], p. 1289.
[281] Ibid, p. 1289.
[282] Caranta, note[6], p. 20-21.
[283] Beentjes, note[164].

the CJEU of laying down the concept of 'additional award criteria' and, considering North-Holland case, they maintain that all award criteria must be linked to the subject matter of contract.[284] As discussed earlier, the rules governing the pursuit of horizontal policies during the award stage mostly emanate from the case-law of the CJEU.[285] In particular, in North-Holland case, fair trade concerns, which fall under the concept of social procurement, were considered to relate to the subject matter of the contract. As explained, this case substantially enhanced the discretion of contracting authorities to pursue not only environmental but also social concerns. Therefore, the applicability of the additional award criteria condition deriving from Nord-Pas-de-Calais is questionable.

3.5.5 Contract performance clauses

The public contracts, like the private contracts, must comply with all applicable rules, including social, labour and health regulations applicable in the territory where the contract is performed. As highlighted by the European Commission, the contract performance clauses could be used as means to achieve additional social objectives, which stand for objectives that go beyond those set out by the applicable mandatory legislation and do not relate to the technical specifications, qualification or award criteria.[286]

The Procurement Directives explicitly recognise the possibility of incorporation of social and environmental concerns throughout the performance stage of procurement. Furthermore, the Recitals exemplify the social policies that could be incorporated into the contract performance clauses such as (1) favouring on-site vocational training; (2) the employment of people experiencing particular difficulty in achieving integration; (3) the fight against unemployment or the protection of the environment; (4) the recruiting of long-term job-seekers or the implementation of training measures for unemployed or young persons; (5)

[284] Martens and De Margerie, note[225], p. 14.
[285] Section(3.4.7).
[286] European Commission, note[252], p. 43.

complying in substance with the provisions of the basic International Labour Organisation (ILO) Conventions in the cases where such provisions have not been implemented in national law[287]; (6) recruiting more handicapped persons than are required under national legislation.[288]

3.5.5.1 Compliance with employment regulations

The compliance with national employment regulations requires special attention. The Recitals provide that the laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of employment conditions and safety at work apply during performance of a public contract, providing that such rules, and their application, comply with the Community law.[289] This issue has created controversy in practice, which was discussed further in the decision of the CJEU in the Rüffert case.[290] This case was brought before the CJEU due to a piece of German legislation that stipulated that public contractors should pay their employees at least the remuneration stipulated by the applicable collective agreement and should impose the same obligation on subcontractors. The CJEU evaluated this dispute in accordance with the Posted Workers Directive[291] and in the light of the freedom to provide services as regulated under Article 49 of the TFEU (now Article 56). In that regard, the CJEU ruled that imposing working conditions on public contracts that do not apply to workers in general is incompatible with the Posted Workers Directive, which is interpreted in the light of Article 49 of the TFEU. Arrowsmith and Kunzlik criticise this ruling from different perspectives. Firstly, the ruling is criticised since the CJEU did not evaluate the legitimacy of the case in accordance with the Procurement

[287] In particular see, ILO Convention concerning Labour Clauses in Public Contracts (No. 94), which entered into force at 20 Sep 1952, which requires the signatory states to include clauses on wages, working hours and labour conditions in all public contracts awarded to third parties.
[288] Public-Sector Directive, Recital(33); Utilities Directive, Recital(44).
[289] Public-Sector Directive, Recital(34); Utilities Directive, Recital(45).
[290] C-346/06, Dirk Rüffert v. Land Niedersachsen [2008] ECR I-1989.
[291] Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ 1996 L 018.

Directives and the previous jurisprudence of the CJEU.[292] Secondly, the ruling is criticised since the CJEU did not address the position of non-discriminatory rules as not all procurement measures that influence attractiveness of providing services in another Member State can be considered restrictions on trade.[293] In that regard, it is argued that the possibility to treat workers differently in public and private contracts is still vague.[294] The European Commission, under the Buying Social handbook, maintains that the Rüffert case has no implications for the possibilities offered by the Procurement Directives to pursue social considerations in public procurement.[295] The Commission considers that the Rüffert case only clarified that social considerations regarding posted workers must also comply with EU law, in particular the Posted Workers Directive.[296]

3.5.5.2 Empowerment of the SMEs

Another issue that requires special attention is the empowerment of the Small and Medium Sized Enterprises (hereafter 'the SMEs') through public procurement.[297] As explained in Chapter 2, the Europe 2020 Strategy identifies the SMEs as the economic operators who are worst affected by the economic crisis and mandates The European Commission to lay down the possibilities of empowerment of the SMEs within the procurement market.[298] In fact, the empowerment of the SMEs is not only a matter emerged as a consequence of the global financial crisis. The enhancement of the share of the SMEs have been a matter of discussion at the EU for a considerable time due to the low rate of award of contracts to the SMEs despite their overall share in the economy.

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[292] Arrowsmith and Kunzlik, note[3], p. 2.
[293] Ibid, p. 3.
[294] Ibid, p. 5.
[295] European Commission, note[252], p. 46.
[296] Ibid, p. 47.
[297] For a comprehensive examination of this issue and the evolution of the case-law of the CJEU see, Nicholas Hatsiz, 'The legality of SME development policies under EC procurement law' in Arrowsmith Sue and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009).
[298] Chapter(2):Section(2.3.2.3).

The empowerment of the SMEs is a multidimensional issue, which requires consideration of not only legal but economic factors. As highlighted by Hatsiz, the rationale behind empowering the SMEs derives from the presumptions that the SMEs are considered to have a better capacity for developing innovative solutions as a result of their non-traditional business practices and structures and they provide better benefit to society in general through contributing to local economy and job creation.[299] The European Commission's communication issued in 1990 on that matter is noteworthy, which underlined that "*all business, large and small should have access to public contracts on an equal footing*".[300]

The European Commission has maintained the approach of disfavouring discriminatory action in favour of the SMEs and has sought for other possible means for enhancing participation of the SMEs. For instance, the European Commission issued guidelines in 2008 to guide Member States for the application of the EU legal framework on public procurement in a way which enables SMEs to participate in contract award procedures.[301] In that regard, the contracting authorities are advised to evaluate their procurement procedures and simplify the requirements, disseminate the contract opportunities through the most convenient communication mediums which are more available to the SMEs or provide training.

The European Commission, however, distinguishes mandatory requirements and voluntary initiatives.[302] In that regard, The European Commission provides that the contracting authorities may encourage large enterprises to enhance their supplier diversity on a voluntary basis through subcontracting with the SMEs or the enterprises can opt to act in this direction pursuant to their corporate social responsibility policies.[303] With regard to mandatory

[299] Hatsiz, note[297], p. 346-347.
[300] European Commission, Promoting SME participation in public procurement in the Community. Communication from the Commission to the Council. COM(90)166, p. 2.
[301] European Commission, Commission Staff Working Document - European Code of Best Practices Facilitating Access by SME's to Public Procurement Contracts, SEC(2008)2193.
[302] European Commission, note[252], p. 25-26.
[303] Ibid, p. 25.

requirements, the European Commission underlines that the contracting authorities are not permitted to give positive discrimination to such economic operators, and cannot set aside contracts for the SMEs or stipulate that certain percentage of the contract be performed or provided by the SMEs.[304] Furthermore, although subdividing contracts into lots to could provide opportunities for meeting the production capacities of the SMEs, the European Commission is cautious and reminds that such a division into lots should not be conducted with the intention of avoiding the threshold values that determine the application of the Procurement Directives.[305]

The approach put forward by the European Commission, disfavouring mandatory requirements with regard to the empowerment of the SMEs could be justified. For instance, reserving certain contract opportunities to the SMEs could be one of the methods for empowering the SMEs. As all the tendering opportunities are solely dedicated for a particular group, these kinds of mechanism to use public procurement as a policy tool are identified as set-asides.[306] Set-asides are generally used in cases where there is the need to protect a certain group of economic operators who could not compete in the ordinary marketplace, which is the case for workshops for workers with disabilities.[307]

Article 2 of Public-Sector Directive and Article 10 of Utilities Directive explicitly require the contracting authorities to treat economic operators equally and non-discriminatorily and act in a transparent way. According to Hatsiz, "*the very purpose of set-asides is to forestall competition*".[308] Although setting aside certain contracts for the SMEs could be considered as a suitable action, considering alternative methods of empowering the SMEs an unavoidable necessity to impede competition in the public procurement market substantially

[304] Ibid.
[305] This issue is further examined in Chapter(8):Section(8.8.2).
[306] Arrowsmith, note[99], p. 1244.
[307] Chapter(3):Section(3.5.3).
[308] Hatsiz, note[297], p. 352.

could not be argued to exist. Similar reasons could also be discussed for compulsory subcontracting.[309] In fact, the wording of the Procurement Directives for subcontracting is prudent, not strong and the Directives state that it is advisable to include provisions on subcontracting in order to encourage the involvement of the SMEs in the public contracts procurement market.[310]

3.5.5.3 Fair trade concerns

The European Commission issued a communication in 2009 (hereafter 'the Fair Trade Communication') to highlight the role of fair trade schemes with regard to sustainable development.[311] The Commission does not provide its own definition of fair trade; instead, it relies on the definition given under the Charter of Fair Trade principles provided by the International Social and Environment Accreditations and Labelling Alliance and the World Fair Trade Organization. According to the Fair Trade Communication, fair trade is defined as "*a trading partnership, based on dialogue, transparency and respect, that seeks greater equity in international trade. It contributes to sustainable development by offering better trading conditions to, and securing the rights of, marginalized producers and workers especially in the South*".[312] The definition implies that fair trade concerns are mostly social concerns and seems to encompass a wide margin of social issues.

The Fair Trade Communication also refers to public procurement as an instrument to address fair trade concerns. The Commission set the conditions for the contracting authorities while referring to the fair trade conditions within the technical specification. In that regard, the Commission underlines that the criteria of fair trade need (1) to be linked with the subject-matter of contract; (2) to comply with the other relevant EU public procurement rules such

[309] This issue is further examined in Chapter(9):Section(9.4).
[310] Public-Sector Directive, Recital(32); Utilities Directive, Recital(43).
[311] European Commission, Communication on Contributing to Sustainable Development: The role of Fair Trade and nongovernmental trade-related sustainability assurance schemes, COM(2009)215.
[312] Ibid, Annex I.

as the principles of equal treatment and transparency; (3) to relate to the characteristics of or performance of the products or the production process of the products.[313]

The Commission recommends that Member States should look through the criteria underlying a fair trade label and points out that the contracting authorities need to ask for compliance only with the criterion related to the subject matter of contract.[314] The Commission also provides that the compliance needs to be verified by using Fair Trade labels and any other means of proof. The approach put forward by the Commission under the Fair Trade Communication is reiterated under the Buying Social Handbook published in 2010.[315]

North-Holland case also has implications for the incorporation of fair trade concerns into contract performance clauses. The Province of North-Holland, in the procurement disputed before the CJEU, requested the tenderers to hold MAX HAVELAAR label for coffee and tea products. MAX HAVELAAR label is a private label, administrated by a foundation established according to the Netherlands' private law with regard to the standards laid down by the Fairtrade Labelling Organisation (hereafter 'the FLO'). The main impetus of this label is promoting fair trade products through certifying that the labelled products are purchased at a fair price and under fair conditions from organisations made up of small-scale producers in developing countries.[316] In order to provide consistency of the label, the FLO sets minimum prices that a buyer of fair trade products must pay the producer.

The European Commission determined that the criteria underlying MAX HAVELAAR label fell under the definition of technical specifications and argued that the stipulation of certification under this label violated Article 23(8) of Public-Sector Directive, which

[313] Ibid, p. 9.
[314] Ibid, p. 9.
[315] European Commission, note[252].
[316] FairTrade Max HaveLaar (Netherlands), 'De criteria' available at <www.maxhavelaar.nl/keurmerkvoorfairtrade/criteria>

prohibits, in principle, technical specifications from referring to a specific source, or a particular process, or to trademarks or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products.[317] The Netherlands, though, argued that MAX HAVELAAR is related to a process or method of production and maintained that the label is a social condition which is covered by the concept of 'conditions for performance of the contract' within the meaning of Article 26 of Public-Sector Directive.[318] The Netherlands rejected the Commission's argument that relies on the prohibitions of Article 23(8) of Public-Sector Directive.

The CJEU clarified that there are four sub-criteria that MAX HAVELAAR is based on: (1) the price must cover all the costs; (2) the price must contain a supplementary premium compared to the market price; (3) production must be subject to pre-financing and (4) the importer must have long-term trading relationships with the producers.[319] In that regard, the CJEU held that those criteria do not correspond to the definition of the concept of technical specifications on the grounds that the definition of the technical specifications under Public-Sector Directive applies exclusively to the characteristics of the products themselves, their manufacture, packing or use, whereas those criteria related to the conditions under which the supplier acquired the products from the manufacturer.[320] In this context, the CJEU ruled that those criteria need to be evaluated under the contract performance clauses, which favoured the argument of the Netherlands. However, the CJEU did not evaluate the legitimacy of MAX HAVELAAR as a contract performance condition since the European Commission did not raise such a claim during the pre-litigation procedure. The Court ruled that "*if a complaint was not included in the reasoned opinion, it is inadmissible at the stage*

[317] North-Holland, note[107], para. 71.
[318] Ibid, para. 72.
[319] Ibid, para. 73.
[320] Ibid, para. 74.

of proceedings before the Court".[321] Indeed, the European Commission could have questioned the legitimacy of MAX HAVELAAR label as a contract performance clause which is in line with its previous approach put forward under the Fair Trade Communication and reiterated under the Buying Social Handbook.

The European Commission highlights under the Buying Social Handbook that the contracting authorities are not permitted to address the labour conditions of the workers involved in the production process of the supplies to be procured in the technical specifications on the grounds that such considerations are not technical specifications within the meaning of the Procurement Directives.[322] The Commission provides that such clauses could be included in the contract performance clauses under certain circumstances. It is noteworthy that the Commission gives an example of ethical (fair) trade. According to the Commission:

> "If a contracting authority wants to buy ethical trade coffee or fruits, it can, for example, insert in the contract performance conditions of the procurement contract a clause requesting the supplier to pay the producers a price permitting them to cover their costs of sustainable production, such as decent salaries and labour conditions for the workers concerned, environmentally friendly production methods and improvements of the production process and working conditions." [323]

As stated, the CJEU did not enter into discussions of the legitimacy of fair trade conditions as contract performance clauses. It could be argued that the CJEU implied that such concerns are legitimate within the context of Article 26 of Public-Sector Directive. Advocate General Kokott has addressed the compatibility of the reference to MAX HAVELAAR label with Public-Sector Directive and examined the reference in the light of Article 26.[324] The Advocate General favours the approach put forward by the European Commission

[321] Ibid, para. 78.
[322] European Commission, note[252], p. 44.
[323] Ibid, p. 32.
[324] Opinion of AG Kokott, Case C-368/10 – North Holland (2011), para. 84 et seq.

considering that Article 26 of Public-Sector Directive does not permit the contracting authority to exercise unlimited influence over the purchasing policy of its future contractor.[325] The Advocate General underlines that the requirement in respect of a procurement policy needs to specifically target the subject matter of the contract, not the contractor's policy in general.[326] The Advocate General distinguishes the fair trade certification of products in all product ranges and the fair trade certification only for the products to be supplied under a public contract. In that regard, the General Advocate maintains that by formulating a contract performance clause falling under the first category, the Netherlands failed to comply with Public-Sector Directive in the case in question.[327] As Kotsonis rightly highlights, the conditions related to the general purchasing policies, on the other hand, would be deemed disproportionate, having the risk of discrimination and unjustifiable restriction of competition.[328]

The European Commission, under the Buying Social Handbook, maintains that "*[c]onditions included in the contract performance clauses do not necessarily need to be linked to the subject-matter of the contract, but only to performance of the contract*".[329] On the other hand, Arrowsmith adopts a different approach with regard to horizontal policies and the procurement stage whereby they could be addressed. According to Arrowsmith, the requirements that could be addressed as award criteria can also be addressed as technical specification or contract performance conditions, provided that the link to the subject matter condition is met.[330] Furthermore, it is argued that the distinction between technical specifications and contract performance clauses is not crystal clear.[331] As discussed in

[325] Ibid, para. 88.
[326] Ibid, para. 88.
[327] Ibid, para. 88.
[328] Kotsonis, note[147], p. 242; For a comprehensive review of this case and in particular the status of the relationship between the producers and the intermediary part of the performance, see, Martens and De Margerie, note[225], p. 15-16.
[329] European Commission, note[252], p. 32.
[330] See, Arrowsmith, note[16], p. 215 et seq.
[331] Ibid, p. 218 and 213.

Section 3.4.7 whereby the implications of North-Holland case is examined in context of the award criteria, the CJEU enhanced the coverage of what constitutes a link to the subject matter of a contract. Following the same methodology, it could be argued that the fair trade requirements can legitimately be addressed within the contract performance clauses provided that they specifically target the subject matter of the contract, not the contractor's policy in general.

On the other hand, it is worth examining whether the contracting authorities need to follow the strict rules adopted by the CJEU in North-Holland case with regard to the usage of eco-labels under the technical specifications while drafting the contract performance clauses. Neither Public-Sector Directive nor Utilities Directive lays down a special rule regarding the incorporation of ethical trade issues within the technical specifications as they do for the eco-labels. As explained previously, the CJEU requires an explicit reference to the detailed criteria that underlie an eco-label rather than a mere cross-reference to an eco-label.[332] Kotsonis argues that the rule elaborated with regard to the applicability of eco-labels under the technical specifications applies to the contract performance clauses.[333] On the other hand, the Advocate General underlines that the disparities between the contracting authorities with regard to what constitutes fair trade has the risk of fragmenting the market.[334] In that regard, the General Advocate rightly maintains that "*it is in the interests of both potential tenderers and contracting authorities for reference to fair trade labels to be permitted when awarding public supply contracts*".[335] As explained earlier, the author disfavours the approach put forward by the CJEU. The CJEU could be less sceptical to eco-labels which rely on scientific data, are prepared through a stakeholder participation process, are accessible, and which have been in the market for more than thirty years. In that regard, the author reiterates the

[332] Section(3.4.5.3).
[333] Kotsonis, note[147], p. 242.
[334] Opinion of AG Kokott, note[324], para. 91.
[335] Ibid, para. 91.

approach put forward with regard to eco-labels and does not favour the approach limiting practicality offered by fair trade labels for the contract performance clauses.

In conclusion, the incorporation of requirements to meet additional social objectives requires certain costs, as with all other horizontal policies. The cost that will be undertaken by the economic operator will eventually be reflected in the tender that is submitted. As pointed out by Arrowsmith, "*a better balance between costs and benefits can generally be achieved by using award criteria rather than contract conditions as a mechanism for implementing secondary policies*".[336] In that regard, a better cost-benefit analysis can be made by the contracting authority and a better decision can be rendered with regard to subsidiarity of using public procurement to achieve certain societal goals.

3.6 Sustainable public procurement in the WTO

As discussed in Chapter 2, the concept of sustainable development has been enshrined in the Preamble of the Marrakesh Agreement.[337] Furthermore, the Doha Development Agenda, a new round of trade and economic liberalisation, and the Ministerial Declaration of this meeting reaffirmed the commitment of the WTO to the concept of sustainable development.

The WTO Agreement on Government Procurement (hereafter 'the GPA') dealing with public procurement entered into force in 1996. The GPA is a plurilateral agreement and the WTO members are not required to join the GPA. The GPA, therefore, only applies to the signatory states. Furthermore, the GPA does not apply to all procurements of the signatory parties and its coverage is determined in accordance with each signatory party's reservations specified under the annexes of the agreement. It is noteworthy that the EU and the Member States are party to the GPA; in this context, the approach of the GPA to sustainable procurement has legal consequences for the EU and the Member States.[338]

[336] Arrowsmith, note[99], p. 1289.
[337] Chapter(2):Section(2.2).
[338] Public-Sector Directive, Recital(7) and Article(5); Utilities Directive, Recital(14) and Article(12).

In its preamble the objective of the GPA is stated as contributing to the liberalisation and expansion of world trade. The GPA attempts to achieve this objective by opening the public procurement markets of the signatory states to international trade. In this context, the GPA requires the signatory parties to apply the principles of transparency and non-discrimination (most notably the principles of national treatment and most-favoured nation) to their national public procurement laws, regulations and procedures. The public procurement market covered by the GPA, considering the potential accession candidates, provides a remarkable market access opportunities world-wide.[339] Accordingly, the most prominent benefit of the GPA accession is being safeguarded against any protectionist or 'buy national' measures introduced by other GPA members.[340] It is noteworthy that on 15 December 2011, the Ministers of the Parties to the GPA reached a political agreement on renegotiation of the GPA and, most importantly the Ministers agreed that the previously negotiated revised GPA text could come into effect. The revised GPA text is considered by Anderson as clarifying and improving the transitional measures, i.e. the special and differential treatment, available to developing countries that accede to the GPA.[341]

The GPA does not mention sustainable development or sustainable procurement in the preamble or the main text. Indeed, the pursuit of horizontal policies within the context of the GPA is a controversial issue since such policies are perceived as having the potential to be used as discriminatory measures by the signatory states.[342] In the original text of the GPA,

[339] For the estimations see, Robert D. Anderson, Anna Caroline Muller, Kodjo Osei-Lah and Philippe Pelletier, 'Assessing the value of future accessions to the WTO Agreement on Government Procurement: some new data sources, provisional estimates, and an evaluative framework for WTO members considering accession' (2012) 4 *Public Procurement Law Review* 113.
[340] For a comprehensive review of potential benefits and relevant factors of the GPA accession see, ibid, p. 119.
[341] Robert D. Anderson, 'The conclusion of the renegotiation of the World Trade Organization Agreement on Government Procurement: what it means for the Agreement and for the world economy' (2012) 3 *Public Procurement Law Review* 83, p. 85.
[342] For a comprehensive examination see, Arwel Davies, 'The national treatment and exceptions provisions of the Agreement on Government Procurement and the pursuit of horizontal policies' in Arrowsmith Sue and Robert D. Anderson (eds), *The WTO regime on government procurement: challenge and reform* (Cambridge: Cambridge University Press, 2011); Weber, note[6], p. 193.

neither social nor environmental policies were mentioned. However, during the Doha Round in December 2006 on the revisions of the GPA, the increasing focus on the protection of environment has been reflected in the GPA.[343] Accordingly, the revised Article X provides that the promotion of conservation of natural resources or the protection of environment can be addressed within the technical specifications and environmental characteristics has been accepted as a legitimate concern that can be addressed under the award criteria. Social considerations, though, are not referred to this article. Tosoni maintains that treating social considerations differently, in that respect, has no fundamental basis.[344]

However, neither sustainable development nor sustainable procurement or sustainability concerns are explicitly mentioned in the revised text of the GPA. The year of 2011 was a breakthrough for the recognition of sustainable procurement within the GPA. As a part of the GPA renegotiation process, the Committee on Government Procurement in the Ministerial-Level Meeting of the Committee on Government Procurement in December 2011 brought the concept of sustainable procurement to the forefront of the GPA's agenda for the first time.[345] Notably, the promotion of the use of sustainable procurement practices, consistent with the Agreement, is one of the agreed future work programmes of the WTO. Accordingly, (a) the objectives of sustainable procurement; (b) the ways in which the concept of sustainable procurement is integrated into national and sub-national procurement policies; (c) the ways in which sustainable procurement can be practised in a manner consistent with the principle of 'best value for money'; and (d) the ways in which sustainable procurement can be practised in a manner consistent with Parties' international trade

[343] See, Anderson, note[339], p. 264.
[344] Luca Tosoni, 'The Impact of the Revised WTO Government Procurement Agreement on the EU Procurement Rules from a Sustainability Perspective' (2013) 1 *European Procurement & Public Private Partnership Law Review* 41, p. 47.
[345] Ministerial-Level Meeting of the Committee on Government Procurement (15 December 2011), GPA/112 available at <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/PLURI/GPA/112.doc>

obligations, will be examined within the scope of the Work Programme on Sustainable Procurement.[346]

Tosoni considers that the GPA does not pose a substantial legal barrier with regard to the pursuit of sustainability criteria in public procurement.[347] As pointed out by Wang, "*the GPA does not legitimize any form of discrimination which is necessary to pursue national policy goals*".[348] The incorporation of sustainability criteria, as discussed in this chapter, requires consideration of different environmental and social parameters, which can also be related to non-financial or external aspects. Furthermore, as discussed in Chapter 2, there exist different interpretations of what constitutes sustainability and the concept of sustainability embodies a certain conceptual ambiguity at both international and the European Union level. In that regard, it would not be an easy task to make conclusion on whether the GPA poses a substantial legal barrier with regard to pursuit of sustainability criteria in public procurement. Considerably more work will need to be done to reach a common sustainable procurement policy, since sustainable development, which sustainable procurement emanates from still embodies ambiguity at both international and European level. The Committee on Government Procurement is expected to identify sustainable procurement practices that are consistent with the principle of 'the best value for money'. The sustainable procurement policy of the WTO must be consistent with the main objective of the GPA, which is to open up public procurement markets of the signatory states; therefore, it must be transparent, so that it does not create any further market restrictions. In this regard, the Committee can establish the WTO's own definition of sustainable procurement in its own context; it can bring a practical and achievable approach to sustainable procurement rather than a holistic

[346] Id. at, Annex 7.
[347] Tosoni, note[344], p. 48.
[348] Ping Wang, 'China's Accession to the WTO Government Procurement Agreement—Challenges and The Way Forward' (2009) 12 *Journal of International Economic Law* 663, p. 690-692.

approach where almost all sustainable development themes can fall under the coverage. In this regard, a consensus of sustainable procurement can be achieved where any discriminatory measures are eliminated and can be applied coherently throughout different jurisdictions.

3.7 Conclusion

Sustainable public procurement is the procurement whereby contracting authorities take account of all three pillars of sustainable development (economic, social and environmental) when procuring goods, services or works. Although the environmental aspect of sustainable public procurement (i.e. green procurement) is the most prominent, sustainable public procurement is not merely the protection of the environment through public procurement and it encapsulates social and economic aspects.

On the other hand, although a certain degree of standardisation is currently present, there is no single template for promoting sustainable public procurement and the balancing process of economic, social and environmental pillars needs to be conducted according to the peripheral conditions and local context. Furthermore, sustainable procurement policies are influenced by different institutional approaches for adapting and implementing such policies. The commercial and analytical abilities, competencies and tools to judge the long-term benefits of policies are significant factors determining the success of achieving sustainability in public procurement.

Amongst everything, the examination revealed that the promotion of sustainable public procurement is voluntary unless sector-specific or general regulation mandates the pursuit of certain sustainability concerns. The examination in this chapter has demonstrated that sustainability concerns can be pursued in different procurement stages, starting from identification of the need to the contract conditions. The possibilities for addressing sustainability objectives at each stage of the public procurement life-cycle are different. In

that regard, different commercial barriers, technological barriers and legal barriers can enter into consideration depending on the context. The examination enshrined that the legitimacy of sustainability concerns and the discretion granted to the contracting authorities needs to be evaluated at the stage whereby the sustainability concern is pursued. Furthermore, the examination laid down that the cost of addressing each sustainability concern varies according to the stage of procurement whereby the concern is addressed. As rightly pointed out by Weller and Pritchard "*transparency and non-discrimination are the backbone of public procurement, and remain the backbone of sustainable public procurement*".[349] Notwithstanding the stage whereby the sustainability concern is pursued, the principles of transparency, equal treatment and non-discrimination must be respected, which is reinforced by the recent case-law of the CJEU.

As explained, in the international arena, sustainable public procurement is widely accepted. However, when it comes to the European Union, the status of sustainable public procurement is surrounded by a certain degree of ambiguity, which are gradually being dispersed in conjunction with the increasing normative and political value of sustainable development. It is noteworthy that Caranta argues that "*sustainable procurement is not just a passing fashion*".[350] Indeed, the initiatives that seek to enhance strategic use of public procurement in order to promote sustainable development are increasing. As explained in Chapter 2, the Marrakesh Process has been carried out by the United Nations for that purpose. Furthermore, the WTO established the Work Programme on Sustainable Procurement in 2011. Both initiatives seek the ways in which sustainable procurement can be achieved in a manner consistent with the principle of non-discrimination and transparency. The increasing importance given to sustainable development under the TEU and the TFEU and secondary

[349] Weller and Pritchard, note[54], p. 59.
[350] Caranta, note[6], p. 49.

regulations (as explained in Chapter 2) and the increasing references to public procurement under the legal and policy framework on sustainable development support this argument. The European Parliament, as discussed earlier, underlined "*the need to strengthen the sustainability dimension of public procurement by allowing it to be integrated at each stage of the procurement process*".[351] The DRAFT Public Procurement Directives are prepared in that regard for increasing the strategic use of public procurement and they explicitly put the objective of promoting sustainable development through public procurement at their epicentre.

This chapter has attempted to lay down a broad framework of sustainable public procurement. As stated, the main objective of this chapter is to provide the contextual and legal background for later chapters where Turkish law is examined. In the following chapters, Turkish law will be examined in accordance with this framework.

[351] European Parliament resolution of 25 October 2011 on the modernisation of public procurement (2011/2048(INI)), para. 14.

CHAPTER 4

The Historical Development of Turkish Public Procurement Law

4.1 Introduction

Public procurement has always played a significant role in the Turkish economy, which is 17th largest economy in the world and 6th largest economy in Europe.[1] The total expenditure on goods, services and works has varied between 10% and 20% of Turkey's GDP in the last decade.[2] Furthermore, the Turkish public procurement market is growing gradually and in 2011 it was estimated that 91 billion Turkish Liras (equivalent to about 41 billion EUR) were utilised by the Turkish public authorities overall.[3]

Public procurement is a dynamic area of regulation in Turkey. The system has been subject to two substantial reforms and a new public procurement reform is on the agenda of the government. Four main pieces of legislations have governed public procurement since the foundation of modern Turkey in 1923:

- The Auctions, Reverse Auctions and Tendering Act numbered 661: 1923-1934
- The Auctions, Reverse Auctions and Tenders Act numbered 2490: 1934-1984
- The State Tender Act numbered 2886: 1984-2003
- The Public Procurement Act numbered 4734: 2003-(still in force)

The main objective of this chapter is to illustrate the historical development of the Turkish public procurement framework, to analyse the driving factors that triggered the public procurement reforms and to identify any weak points and inherent problems in the system. The examination of reform dynamics in particular aims to provide a useful insight for understanding the main features of the Turkish public procurement system.

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[1] The rankings provided by the World Bank available at <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>

[2] See, Sakire Kural and Umit Alsac, 'Public Procurement Procedures in Turkey' (2006) 6 *Journal of Public Procurement* 100, p. 100.

[3] The statistics available at <www.ihale.gov.tr/Istatistikler_Raporlar/ihale_istatistikleri.htm>

4.2 The pioneer regulation on public procurement: the Act numbered 661

Turkey introduced public procurement regulations soon after the foundation of modern Turkey in 1923.[4] The first legislation on public procurement, which was the Auctions, Reverse Auctions and Tendering Act numbered 661, was enacted and entered into force in 1925.[5] The Act regulated both auctions and tendering procedures under the same text and required public authorities to award contracts for any purchasing, selling, hiring, maintenance, construction and transportation activities through a tendering procedure. The Act numbered 661 was not a comprehensive piece of public procurement legislation since it focused more on basic principles of the tendering process rather than procurement.

The Act numbered 661 was amended in 1926, 1929 and 1933 in order to provide harmony with the reforms initiated by the proclamation of the Republic, and in accordance with the developments and changes in the Turkish economy. The Act numbered 661 was then replaced with the Auctions, Reverse Auctions and Tenders Act numbered 2490 of 10 December 1934. The main driving factors that led to this reform were explained under the Preamble of the Act numbered 2490 as promoting participation of small entities in the auctions and procurements held by public bodies and ensuring that Turkish nationals/companies could gain contracts so that public money would remain and be utilised within the territories of the Turkish state. In other words, the protection of national industry and the setting aside of contracts for the Turkish economic operators was the main impetus for the reform.

The Act numbered 2490 covered auctions and tenders of all departments included in the general budget, annexed budget and special budget. The main purpose of the Act was laid

[4] For historical development of Ottoman Empire's procurement framework see, Kemal Erol, *Kamu ihaleleri ve küçük ve orta boy işletmeler* (Ankara: Türkiye Esnaf-Sanatkar ve Küçük Sanayi Araştırma Enstitüsü, 1996), p. 1.

[5] OJ 28.04.1925/97; For the historical development of the procurement framework see, Abdullah Uz, *Kamu Ihale Hukuku* (Ankara: Turhan Kitabevi, 2005), p. 128 et seq.; Burak Oder, 'Kamu Ihale Hukuku' in Ozay Ilhan (ed), *Günisiginda Yonetim* (Istanbul: Filiz Kitabevi, 2004), p. 557 et seq.; Erol, note[4], p. 1.

down as protecting the financial interests of the public authorities. However, the Act did not put forward the main principles for achieving this objective. Article 54 of the Act only required public authorities to initiate the tender proceedings during a time when it would be possible to receive the most suitable price.

The most controversial part of the Act numbered 2490 was the provision on award criteria.[6] Article 36 of the Act accepted the lowest price as the only award criterion for the procurement of goods, services and works. Even though awards were based on lowest price, there was not any provision in the Act regarding rejection of abnormally low tenders. An abnormally low tender, in in its simplest definition, means that the submitted tender is substantially lower than other submitted tenders, which raises suspicion that the tenderer will not be able to fulfil its obligations.[7] In such circumstances, public authorities are entitled to ask for further information regarding the offer and if not satisfied, they are entitled to reject such unrealistic or unfeasible bids. However, the Act numbered 2490 did not provide such discretion to public authorities which left the tendering system open to abuse.

The tenderers were able to abuse the system by using different methods. For instance, the tenderers who won contracts through offering abnormally low tenders were making profit by asking for excessive remuneration for later variations, or they were receiving initial payments and prolonging the delivery of the works and, in most of cases, were diminishing the quality of work. The lack of efficient mechanisms on monitoring and enforcing the regulatory framework also facilitated such abuses. According to Yaman, procuring the needs through a tendering procedure was not the best way to achieve value for money since the tendering system, vulnerable to abuse, increased transaction costs dramatically; almost

[6] See, Metin Günday, *Idare Hukuku* (Ankara: Imaj Yayinevi, 2004), p. 195.
[7] For substance of the concept see, Sue Arrowsmith, *The Law of Public and Utilities Procurement* (London: Sweet & Maxwell, 2005), p. 531 et seq.

doubled for public authorities.[8] The first Five-Year Development Plan, which was published in 1963 after three decades of implementation of the Act numbered 2490, outlined the problems that award criteria based on lowest price had caused.[9]

Even though the problems that the Act numbered 2490 created were prominent, a comprehensive reform could not be initiated due to the political instability in Turkey at that time. Instead of initiating a comprehensive reform, Turkish governments preferred to exclude certain public authorities from the scope of the Act and for each exempted public authority a separate public procurement regulation was issued which made the Turkish public procurement legal framework more complex.[10] Furthermore, the diversity of regulations on public procurement resulted in considerable variation in institutional practices, which created more ambiguity and impeded competition in the public procurement market significantly.

4.3 The first comprehensive public procurement reform

The relative political stability by the beginning of the 1980s and the adoption of neoliberalism as the national policy in Turkey provided the appropriate conditions for initiating a comprehensive public procurement reform after five decades with the Act numbered 2490 in force.

This period is also recalled as a deregulation period that aimed at diminishing the level of the Turkish State's intervention in the economy.[11] The ultimate objective was integrating the Turkish economy with the world through eliminating barriers to international trade. The adoption of neoliberalism as the State policy was a remarkable shift from the *etatism* policy

[8] Huseyin Yaman, *Turkiye'nin Idari Reform Tarihi* (Ankara: Turhan Kitabevi, 2008), p. 182.
[9] See, DPT, *Birinci Beş Yıllık Kalkınma Planı (1963-1967)* (Ankara: Devlet Planlama Teşkilatı, 1963), p. 368.
[10] For instance, the Act numbered 4876, enacted on 24 April 1946, which updated the monetary values of the Act numbered 2490, could only provide a temporary solution. The Decree Law numbered 2490 revised certain provisions of the Act numbered 2490 and abolished the outdated Act numbered 4876 in 1979. See, Erol, note[4], p. 2.
[11] See, Galip L. Yalman, *Transition to Neoliberalism (The Case of Turkey in The 1980's)* (Istanbul: Istanbul Bilgi University Press, 2009).

which was endorsed in 1931.[12] In accordance with the *etatism* policy, a number of state economic enterprises (hereafter 'SEEs') were established in the capital incentive sectors like transportation, communication, energy, banking, textile and refining, where the private sector was reluctant to make investment.[13] Consequently, the Turkish State became an active market player in the Turkish economy whilst simultaneously regulating the markets. In accordance with the neo-liberalism policy, various SEEs started to be privatised by the mid-1980s.[14] This privatisation was supplemented by the adoption of export-oriented policies, deregulation of the markets and policies enabling the convertibility of the Turkish Lira. It was believed that the diminishing of the industrial and commercial activities of the State within the economy would consequently increase private sector participation in the economy, most importantly from free market economy primarily based on competition.

The privatisation of SEEs was the first step in the transition to neo-liberalisation in Turkey. The second step was adopting fiscal discipline in order achieve efficiency in public spending. A comprehensive public procurement reform was therefore initiated by the middle of 1983. In this direction, the Act numbered 2490 was completely abolished and a new public procurement regulation, the State Tender Act, was promulgated in 1983, which entered into force on 1 January 1984.[15]

The State Tender Act, which was enacted in order to eliminate the shortcomings of the Act numbered 2490, however inherited the same problems and could not provide efficiency as desired. The following sections will provide an overview of the main features of the State Tender Act and will highlight some of its prominent shortcomings.

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[12] Ibid, p. 155.
[13] SEEs are further examined under Chapter(5):Section(5.3.2.2).
[14] The privatisation implementations between 1986 and 2013 are available at <www.oib.gov.tr/program/implementations.htm>
[15] OJ 10.09.1983/18161.

4.3.1 The scope of the State Tender Act

Public procurement has always been conducted in a decentralised way in Turkey.[16] Although a central agency named the State Supply Agency, established in 1926, procures various goods such as stationery items, computers and office equipment, it is not compulsory to purchase from this agency, and each public authority is entitled to procure the goods, services and works itself. The centralisation of procurements was deemed to have a risk of creating cartels and impeding competition in the public procurement market.[17]

The State Tender Act covered procurement activities of all departments included in the general budget, annexed budget or special budget and municipalities regardless of any threshold value. However, two kinds of entities were excluded from the scope of the State Tender Act. The first group consisted of entities which provided production, transport and distribution services of electricity, transport by train, services for airports or other terminal facilities by air and telecommunication services. The second group consisted of the state economic enterprises. These two groups of entities were excluded since their activities were considered by the legislature to bear special characteristics that needed different treatment. In this regard, for each of the excluded entities specific regulations were issued to regulate their procurement activities.

Although the State Tender Act was enacted in order to simplify and harmonise the public procurement rules, eventually further exemptions to the State Tender Act were introduced.[18] These exemptions were mainly introduced on the grounds that certain institutions required more flexibility while procuring due to the particular nature of their activities. However, Erol

[16] Kural and Alsac, note[2], p. 101.
[17] Erol, note[4], p. 48.
[18] For the complete list of exemptions see, ibid, Annex I and Annex II.

maintains that the exemptions were introduced to the State Tender Act inconsistently and the majority of exemptions could not be justified according to their prescribed objectives.[19]

Furthermore, Barçın argues that the State Tender Act did not provide a uniform institutional framework, which led to conflict between certain institutions about the regulation of public procurement.[20] Even though the Ministry of Finance had the primary responsibility for regulating the implementation policies and granting permission on certain matters during the tender proceedings, the Ministries, that the excluded public authorities were attached or related to, issued further regulations on the implementation of procurements. Amongst these, the Ministry of Public Works and Settlement played a key role in implementation activities concerning construction works. Furthermore, the World Bank noted that although the Ministry of Finance had control over the procurement decisions, the examination consisted of examining the decisions from a budgetary viewpoint.[21] In that regard, the World Bank suggested establishment of a single entity with oversight responsibility for public procurement at the national level.[22]

The diversity of legal rules as well as the institutional framework made the Turkish public procurement system more complex and vague for economic operators as the practice and requirements of each contracting authority differed considerably. Moreover, the necessity of following different procurement procedures due to different sources of funding created more complexity and increased red-tape during the procurement procedures. Gozel argues that the diversity of regulations diminished transparency, which in turn distorted competition

[19] See, ibid, p. 5.
[20] See, H. Bahadır Barçın, 'Kamu Alımlarında Bağımsız İdari Otorite İhtiyacı ve Kamu İhale Kurumunun Katkısı' (2010) 2 *Sayder Dış Denetim Dergisi* 125, p. 126.
[21] The World Bank, *Turkey - Country procurement assessment report* (Washington D.C.: The Worldbank, 2001) available at <http://documents.worldbank.org/curated/en/2001/06/3348322/turkey-country-procurement-assessment-report>, p. 10.
[22] Ibid, p. 10.

between economic operators significantly.[23] Serdar describes the fragmented framework crated by the exceptions introduced to the State Tender Act as 'turmoil'.[24] In particular, Erol highlights that the fragmented legal framework on public procurement particularly impeded the access of small and medium sized enterprises to the public contracts.[25] Indeed, this complication was burdensome on the contracting authorities as much as the economic operators since the complication diminished transparency over the procedures and rules to be applied, and the contracting authorities that lacked adequate human capital generated poor or unethical decisions.

4.3.2 The main principles of the State Tender Act

The State Tender Act outlined five main objectives to be considered and implemented in all stages of the tendering procedures regardless of any threshold value. Accordingly, Article 2 of the State Tender Act required the contracting authorities to meet their needs through the tendering procedure with full respect to (1) meeting the requirements in the most advantageous manner and (2) under most suitable conditions and in time by ensuring (3) openness and (4) competition throughout the whole process.[26] This provision was a milestone since it directly conferred normative value to the principles of openness and competition.

The State Tender Act also outlined further implementation principles like (1) the items which are customarily met by different suppliers cannot be combined in one tender; (2) the procurement cannot be split up with the intention of avoiding monetary values and circumventing the procurement procedures; (3) unless there is an absolute necessity to do

[23] See, Kadir Akın Gözel, 'Reforming public procurement sector in Turkey' in Thai K. V. (ed), *Challenges in Public Procurement: An International Perspective* (Boca Raton: PrAcademics Press, 2005), p. 51.
[24] Ali Serdar, 'Kamu İhale Mevzuatı Hakkında Genel Değerlendirme' (2010) 2 *Sayder Dış Denetim Dergisi* 34, p. 35.
[25] See, Erol, note[4], p. 49.
[26] For a more comprehensive review of the principles see, ibid, p. 6.

otherwise, the tenders have to be initiated during the seasons when it is possible to achieve the most suitable price.

The State Tender Act, like the Act numbered 2490, regulated both purchasing and selling, i.e. the administrative contracts that generate revenue (e.g. the selling of goods and services produced by public authorities; the selling and hiring of public owned properties and lands) and the administrative contracts that require public expenditure (e.g. the procurement of goods, services and works). Compared with the Act numbered 2490, the State Tender Act gave more weight to the procurement matters. However, the focus was given mostly to construction works and the State Tender Act contained limited provisions on the procurement of goods and services. Indeed, the public interest while procuring and selling are quite different, and distinctive principles and objectives enter into consideration. As will be discussed later in detail, in the most basic sense, procurement activities target the best value for money whilst selling activities encapsulate a wide range of motivations and objectives, e.g. selling at the highest price. This particular regulation method of the State Tender Act, i.e. regulation of procurement and selling procedures under the same text and laying down the same principles for activities which have remarkably different underpinnings, was therefore not an efficient method of regulation.

4.3.3 The procurement procedures

The State Tender Act laid down five procurement procedures which were closed and sealed envelope procedure, public bidding, selective limited tendering procedure, negotiated procedure and direct competition procedure, and these mostly stemmed from the Act numbered 2490.[27]

[27] For the details of the procurement procedures see, Robert L. Burdsal, 'An overview of Turkish public procurement law' (2002) 1 *Public Procurement Law Review* 56, p. 67 et seq.; See also, The World Bank, note[21], p . 5.

Article 81 of the State Tender Act also conferred a wide margin of discretion to the contracting authorities to rely on in-house provision that limited the possibilities of outsourcing works and services through a tendering procedure since the works or services were conducted by the contracting authority's own personnel and equipment. Gozel, however, justifies this approach since contracting out certain activities of public administrations was not popular in Turkey until the beginning of 2000.[28]

The State Tender Act contained another controversial provision. Article 89 permitted the contracting authorities to apply for exemption from the Council of Ministers in order to award the contract without competition when the State Tender Act was considered inapplicable to the works bearing a peculiar nature. The State Tender Act did not define these works that may bear a peculiar nature. Even though there is no empirical data published on the implementation of this provision, the provision was drafted so vaguely that it is believed to have been an "*escape clause*"[29] for circumventing the competition requirements.

According to the report prepared by the State Planning Organisation (hereafter 'the SPO'), the scope of procurements that could be conducted through the selective limited tendering and negotiated procedure were extended over time despite the explicit provision of Article 36 of the State Tender Act which stated that the closed and sealed envelope procedure was the main and default procurement procedure.[30] In that regard, the exceptional procurement procedures were generalised, which significantly limited the competition in the public procurement market since the selective limited tendering and negotiation procedure did not require any advertisement requirements.

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[28] Gözel, note[23], p. 51.

[29] See, World Trade Organisation Trade Policy Review Body, 12 - 13 October 1998, Trade Policy Review, Turkey (WT/TPR/M/44), available at <www.wto.org/French/tratop_f/gproc_f/turkey.pdf>, p. 88, para. 154; see also, Sami Kaplan, 'İdeal Bir Kamu İhale Kanunu ve İdeal Bir Kamu İhale Kurumu ve Kurulu Nasıl Olmalıdır? Fonksiyonel Bir Model Çalışması' (2012) 162 *Maliye Dergisi* 18, p. 22.

[30] See, DPT, *Türkiye - AT Mevzuat Uyumu Sürekli Özel İhtisas Komisyonu Raporları - Cilt 1: Kamu İhaleleri Alt Komisyonu* (Ankara: Devlet Planlama Teşkilatı, 1995), p. 23.

4.3.4 The qualification of tenderers

According to Article 5 of the State Tender Act, in order to participate in any bidding the tenderers were required to have to a legal domicile in Turkey. This was a pre-qualification criteria applied regardless of the procurement procedure. Article 16 also permitted the contracting authorities to require the tenderers to possess certain financial and technical efficiencies in order to ensure the most convenient conditions for concluding the public contract. However, the State Tender Act did not objectively identify any standard set of documents that could be requested while assessing the financial and technical eligibility of the tenderers. Instead it conferred discretion to the contracting authorities, each of whom was entitled to determine the financial and technical qualifications to be required from the tenderers, taking into account the subject matter of the procurement in question. This approach resulted in differentiation of the practice of different contracting authorities, which in turn diminished the predictability of the qualification criteria that jeopardised the principles of transparency, equal treatment and competition. Furthermore, certain secondary regulations laid down strict qualification rules that not only distorted competition, but particularly disadvantaged the small and medium sized enterprises.[31]

On the other hand, the State Tender Act entitled the Ministry of Public Works and Settlements to determine qualification criteria for contractors of civil, mechanical and electrical works. In this regard, the Ministry of Public Works and Settlements created the contractor certification system, also known as the carnet system. The carnet system was based on the record of past performance kept by the Ministry of Public Works and Settlements. This system had significant advantages. The creation of the carnet system facilitated the qualification process since the Ministry conducted the qualification assessment procedure one time only on behalf of the contracting authorities and updated its

[31] See, Erol, note[4], p. 47.

database of approved suppliers regularly. However, due to the lack of any mechanism to prevent abuse of the system, the carnet system became a substantial shortcoming to the Turkish public procurement system.[32] For instance, as the State Tender Act did not prohibit the transfer of the carnets, they were frequently sold or exchanged between contractors in order to meet the performance requirement of certain construction work. In this context, a considerable number of public contracts were awarded to unqualified tenderers, even to tenderers who had no previous experience on the construction works. The Ministry of Public Works and Settlement was not capable of monitoring such abuses, which jeopardised the reliability of the carnets and distorted competition between economic operators. Most importantly, the foreign contractors who submitted their authentic qualifications were not able to compete with the Turkish contractors, who were using other contractors' carnets.

The carnet system was also considered by the World Bank as one of the shortcomings of the Turkish public procurement system.[33] It was cited as one of the reasons for the poorly constructed public buildings in Turkey. Accordingly, the World Bank suggested reform of the carnet system to ensure that contractors' records corresponded to their actual resources and capabilities. Furthermore, the World Bank suggested that the abuse of a carnet should be treated as procurement fraud, addressed under criminal law and sanctioned by disqualification.[34] It is to note that the carnet system was abolished completely during the second public procurement reform in 2002.

4.3.5 The award of contracts

As explained previously, the award criteria underpinning the Act numbered 2490 had weaknesses. The Preamble of the State Tender Act underlined that the new system conferred a wider discretion to the contracting authorities and it aimed to meet the needs not in the

[32] See, Gözel, note[23], p. 52; Oder, note[5], p. 557; Uz, note[5], p. 293; Erol, note[4], p. 47.
[33] See, The World Bank, note[21], p. 3.
[34] Ibid, p. 9.

cheapest way, but the in the most appropriate way. Although the State Tender Act improved the provision on the award criteria, it did not eliminate the shortcoming completely. The definition of the award criterion as the most suitable price rather than the lowest price was an improvement; however insistence on relying on price as a basis for awards was a shortcoming in itself.

Article 4 of the State Tender Act defined the concept of suitable price as the price found worthy of preference provided it did not exceed the estimated value, and in any bidding where the value could not be estimated, it should be the price found to be most suitable among those offered. In accordance with Article 9, the contracting authorities were not required to conduct in-depth research and the estimated value that the award criteria was based on could be determined by relying on any figures of the municipalities, chambers of commerce, stock markets or experts. Uz argues that the estimated value under the State Tender Act did not reflect the actual market price and was inconsistent with standard practices for the determination of price.[35]

In fact, according to Article 28, the criteria to be used in the determination of the suitable price and the maximum amount or rate of discount in tenders were determined by the Ministries of Defence, Finance, Agriculture and Rural Affairs, Energy and National Resources under the coordination of the Ministry of Public Works and Settlement. They were published in the Official Gazette each year by considering the specifications, description and quantity of the work, unit prices, the amount of advance payment demanded by the tenderer, technical and financial adequacy of the tenderers and similar qualifications. Gozel argues that these criteria were not determined and announced adequately and

[35] Uz, note[5], p. 162.

consistently by the aforementioned Ministries, which jeopardised the principle of openness as well as the principle of competition.[36]

The State Tender Act preferred a discount method for the calculation of award criteria for construction works which ran into deficit over time. The State Tender Act enabled the bidders to submit discounted offers on pre-disclosed unit rates during the evaluation stage for the procurements of works. In that regard, the bid was not expressed as a monetary value; rather it was submitted as a percentage discount offered on pre-disclosed unit rates which were published annually by the aforementioned Ministries. However, the State Tender Act, like the Act numbered 2490, did not have any mechanisms to prevent abuse of the system like rejection of abnormally low tenders, so the discount system made the public tenders vulnerable to corruption.[37]

As is clear, the methods used to abuse the system were similar to the methods used when the Act numbered 2490 was in force. Indeed, the State Tender Act laid down a low profile of transparency.[38] The inefficiency of the Ministry of Works and Settlements on auditing the contracts for compliance with the State Tender Act provided the appropriate conditions for such abuses. In other words, the State Tender Act could not overcome the deficits and the public tenders became ineffective in terms of supplier selection.

4.3.6 The procurement preferences

In accordance with the national policy on the transition to neo-liberalisation and opening the market to international competition, no specific restrictions were imposed in terms of the nationality of suppliers under the State Tender Act. Similarly, it did not discriminate between domestic and foreign goods or services and did not give any preference to the domestic goods

[36] Gözel, note[23], p. 52.
[37] Serdar, note[24], p. 39; Rauf Gonenc, Willi Leibfritz and Erdal Yilmaz, *Reforming Turkey's public expenditure management* (Paris: OECD Publishing, 2005), p. 50; Gözel, note[23], p. 52; Kaplan, note[29], p. 21.
[38] See, Hasan Gül, 'Türk Kamu Alımları Sisteminde Kamu İhale Kurumu'nun Yeri ve Artan Önemi' (2010) 2 *Sayder Dış Denetim Dergisi* 5, p. 6.

or services. However, the requirement of having an address in Turkey and having membership of the Turkish chamber of commerce as qualification criteria indirectly limited the access of foreign economic operators to the Turkish public procurement market. Furthermore, Article 28 of the State Tender Act permitted the Council of Ministers to decide upon a preference margin in favour of the national economic operators. In this direction the Council of Ministers decided on 27 March 1985 that the contracting authorities would be allowed to apply a preference margin of up to 15% to national economic operators while awarding contracts.[39] Even though such discrimination between national and foreign economic operators contradicts the national policy on liberalisation of the markets, Turkish governments have used this provision in order to promote national industrial policies. The World Bank notes that public procurement discriminated heavily against foreign bidders and the contracting authorities adopted a strict approach for limiting the contracting opportunities to the national economic operators.[40] It was even discussed in the course of time whether or not to enhance the preferential procurement and to provide an extra margin of preference in favour of small and medium sized enterprises.[41]

4.3.7 Sustainability issues under the State Tender Act

The State Tender Act did not have any reference to sustainability issues. Indeed, sustainable development had not yet emerged as a concept at the international level when the State Tender Act first entered into force. Moreover, until the mid-1990s, sustainable development and in particular environmental protection was not considered as a key issue in Turkey's socio-economic development. Furthermore, the State Tender Act was fundamentally enacted as legislation to promote efficiency in public spending and eliminate corruption. The use of public procurement as a policy tool in particular to pursue social and environmental policies

[39] The Council of Ministers Decree No. 85/9342, 27 March 1985.
[40] The World Bank, note[21], p. 7.
[41] This recommendation was proposed during the Turkish Artisans and Small Traders Summit held between 3 and 5 December 1990. See, Erol, note[4], p.60 and 67.

was a new phenomenon in Turkey. For these reasons, sustainable development was not one of the driving factors that triggered the first public procurement reform in Turkey.

4.3.8 Preliminary conclusions

The codification of the State Tender Act was a significant step in the process of the conceptualisation of public procurement in Turkey as it put more weight on procurement than auctions. In the same direction, conferring normative value to the principles of transparency and competition was a remarkable contribution of the State Tender Act. However, several factors prevented the Act from achieving its objectives and it could not eliminate some of the major disadvantages of the Act numbered 2490.

Firstly, the State Tender Act could not unify and simplify the legal framework on public procurement since each Ministry issued different procurement rules for the contracting authorities that were attached or related to them; this created a complicated legal and institutional framework. Furthermore, various exceptions were introduced to the issued regulations which added a new layer of complication that was not only burdensome for the economic operators, but was also burdensome for the contracting authorities. The fragmentation also constrained the possibility to make reliable estimates of value of expenditure on public procurement in Turkey.[42]

Secondly, the State Tender Act could not provide transparency at a high level. For example, it did not oblige the advertisement of contracts conducted through selective limited tendering and negotiated procedures. Similarly, it did not require pre-disclosure of the award criteria or announcement of the award decisions. In the same direction, the contracting authorities were not required to give feedback to unsuccessful bidders on the grounds of dismissal of their bids.

[42] See, The World Bank, note[21], p. 13-14.

Thirdly, even though the State Tender Act improved the provision on qualification and award criteria, due to the lack of mechanisms to prevent abuse of the system and insufficient pro-active review of the tender proceedings, certain systematic failures emerged. In particular, the lack of an effective bid protesting system and administrative review system tailored for public procurement made it challenging for the economic operators to seek remedies. Therefore, the tendering system became vulnerable to mismanagement or, in the widest meaning, corruption over time. It is noteworthy that the SPO had contended that the review mechanisms established by the State Tender Act were adequate.[43] In fact, this conclusion was deficient since the State Tender Act was not evaluated from all perspectives.

4.4 The second comprehensive public procurement reform

The need to reform the Turkish public procurement system is regarded as being related to the development of neo-liberalism in Turkey.[44] The first stage started at the beginning of the 1980s and resulted in the first comprehensive public procurement reform after five decades of the Act numbered 2490. The second stage of transition started at the end of the 1990s and consisted of legal and structural reforms with respect to market-oriented internationalisation. The main objectives of this period were eliminating obstacles that prevented integration of the Turkish economy to the world economy and encouragement of foreign investment in Turkey through opening up markets to foreign competition.

Similar to the first period, public procurement was considered as a significant area to be adjusted due to its significance in the Turkish economy. As previously explained, in the first stage of the transition the State Tender Act was enacted in order to achieve efficiency in public spending. However, the State Tender Act was not able to achieve this objective and in addition to inheriting the problems of the Act numbered 2490, it created new problems.

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[43] DPT, note[9], p. 25.

[44] Fuat Ercan and Sebnem Oguz, 'Rescaling as a class relationship and process: The case of public procurement law in Turkey' (2006) 25 *Political Geography* 641, p. 648.

Public procurement is argued to be a public activity which is most vulnerable to corruption.[45] Corruption in Turkey, like other developing countries, has always been considered as a major threat to the public administration and an obstacle to economic development.[46] Saygılıoğlu argues that corruption in Turkey not only continued to be a problem, but also became systematic due to the lack of mechanisms providing transparency.[47] In fact, public procurement in Turkey has always been publicly perceived as the area that had and has the highest risk of corruption and mismanagement.[48] The World Bank noted that bidders had very little confidence in the fairness of the public procurement system in Turkey and relations between the contracting authorities and the economic operators were characterised by mistrust.[49]

It is important to note that during the period when the State Tender Act was implemented, Turkey suffered from exceptionally high construction costs. For instance, it was estimated that the cost of construction for 1 kilometre of highway was $10 Million USD Dollars when the international reference price was $4 Million USD Dollars, which demonstrates the severity of the mismanagement.[50] The World Bank also notes substantial delays in the implementation of major investment projects.[51]

As explained previously, the State Tender Act was drafted with the impetus of preventing or at least minimising corruption while spending public money. However, the State Tender Act failed to achieve its objectives due to the complexity of the legal and institutional framework

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[45] For relevant statistics see, OECD, *Integrity in public procurement: good practice from A to Z* (Paris: OECD Publishing, 2007), p. 9; For a comprehensive examination of the concept of corruption and its implications in public procurement see, Michelle Greenwood and James M Klotz, 'The fight against corruption in public procurement: an introduction to best practices' in García Roberto Hernández (ed), *International Public Procurement - A Guide to Best Practice* (London: Globe Law and Business, 2009).
[46] Nevzat Saygılıoğlu, 'Değişen Devlet Yapısı Karşısında Yolsuzluk Gerçeği Ve Saydamlık Gereği' (2010) 1 *Sayder Dış Denetim Dergisi* 21, p. 24; Gül, note[38], p. 9.
[47] Saygılıoğlu, note[46], p. 26.
[48] Servet Alyanak, 'An overview of the legal rules governing public procurement in Turkey' (2007) 2 *Public Procurement Law Review* 125, p. 127; Erol, note[4], p. 13.
[49] The World Bank, note[21], p. 17-18.
[50] See, Gonenc, Leibfritz and Yilmaz, note[37], p. 37.
[51] The World Bank, note[21], p. 14.

and the low profile of transparency over the procurement procedures. On the other hand, although the shortcomings of the State Tender Act were obvious, two factors obstructed the initiation of a comprehensive public procurement reform. The first factor was the resistance of the national economic operators and the second was political instability.

4.4.1 The factors obstructing the reforms

4.4.1.1 Resistance of the national economic operators

The public procurement system created by the Act numbered 2490 and the State Tender Act are classified by Ercan and Oguz as closed systems, favouring the domestic capital groups.[52] The domestic capital groups stand for the Turkish suppliers doing business in the public procurement market.[53] It is argued that the complexity of the rules on public procurement, the lack of transparency over the procedures to be applied in awarding contracts and the corrupt practices diminished expectations of being fairly treated and discouraged foreign suppliers from operating in the Turkish public procurement market. In that regard, foreign suppliers' reluctance to participate in procurements apparently created a de facto monopoly of the domestic economic operators. According to Ercan and Oguz, the Turkish public procurement expenditure was estimated at around 15% of the GDP, and 90% of the public procurement contracts were estimated to be met by the national suppliers.[54] In other words, national suppliers were benefiting from a privileged position which was further supported by the Council of Ministers' decree that enabled a preference margin of up to 15% for national suppliers. The national economic operators at that time objected to any public procurement reform that would grant foreign suppliers full and equal access to the Turkish public procurement market, asserting that they would not be able to compete against the foreign suppliers in a competitive market.

[52] Ercan and Oguz, note[44], p. 648.
[53] For an analysis of anatomy of the Turkish capital groups see Yalman, note[11], p. 265.
[54] Ercan and Oguz, note[44], p. 651.

The resistance of the domestic economic operators is regarded as a common problem of developing countries.[55] Public procurement is an important instrument of national industrial policy in many countries.[56] Developing countries in particular are argued to show resistance to opening their public procurement markets to international competition in order to maintain their freedom to use public procurement as an instrument in support of national industrial policies. Therefore, the national economic operators in Turkey objected to any comprehensive public procurement reforms with the intention of maintaining the status quo.

4.4.1.2 Political instability

The second factor that prevented the reforms was the composition of the Turkish governments. Turkey was suffering from political instability due to weak coalition governments during this period; therefore no ruling party was able to initiate a comprehensive public procurement reform. The most comprehensive reform proposal to amend the State Tender Act in 1992 also failed due to the change of government in a very short time.[57] The 7th Five-Year Development Plan had also outlined a detailed roadmap for the prospective public procurement reforms.[58] Although different stakeholders established workgroups and outlined shortcomings of the State Tender Act, due to the political instability, a comprehensive reform could not be initiated.

4.4.2 The dynamics of the reforms

Despite the internal obstacles, the momentum required to initiate a comprehensive public procurement reform was gained under the political pressure of certain external dynamics.

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[55] For a comprehensive examination of this argument see, Robert Hunja, 'Obstacles to Public Procurement Reform in Developing Countries' in Arrowsmith S. and M. Trybus (eds), *Public Procurement: the Continuing Revolution* (London: Kluwer Law International, 2003).
[56] Arrowsmith, note[7], p. 1227; Christopher Bovis, *EU public procurement law* (Cheltenham: Edward Elgar Pub., 2007), p. 467 et seq.
[57] Uz, note[5], p. 129.
[58] The main reform proposals were consolidated under a single project entitled the Liberalisation and Integration to World Project. See, DPT, *Seventh Five Year Development Plan (1996-2000)* (Ankara: Devlet Planlama Teşkilatı, 1995), p. 240.

These dynamics were the International Monetary Fund (hereafter 'the IMF'), the World Bank and the European Union (hereafter 'the EU').

4.4.2.1 The IMF and the World Bank

Turkey suffered from a widespread financial crisis at the beginning of 2001 and applied for long-term loans from the IMF in order to overcome the economic crisis. The IMF stipulated substantial financial reforms in order to provide more efficient public spending and the promulgation of fifteen new pieces of legislation for this purpose as the preconditions for releasing the loans. One of these fifteen pieces of legislation was the enactment of a new public procurement law. In this regard, Turkey undertook to enact that *"[a] public procurement law in line with UN standards (UNCITRAL) will be submitted to Parliament by October 15, 2001*".[59] The commitment of the Turkish government was clear: the promulgation of a new public procurement legislation based on the UNCITRAL Model Law on Procurement of Goods, Construction and Services. The IMF also advised Turkey to eliminate any restrictive measures against foreign economic operators.

Besides the IMF, the World Bank also influenced the public procurement reforms in Turkey. The World Bank has developed the Programmatic Financial and Public Sector Adjustment Loans and the Public Financial Management Projects where the Bank enforces its own conditions for lending money in order to ensure efficiency. Turkey used such adjustment loans during the period of economic crisis and in this respect, the World Bank reviewed Turkey's public procurement system. The World Bank criticised the complexity of the regulations on public procurement. The World Bank identified the Turkish procurement system in 2001 as non-transparent, open to abuse, contributing to the low completion rate of investment projects, contributing to waste and most importantly offering opportunities for

[59] See, Turkey's Letter of Intent and Memorandum on Economic Policies, May 3, 2001, available at <www.imf.org/external/np/loi/2001/tur/02/index.htm>

corruption in the award of public sector contracts.[60] In that regard, the World Bank outlined the necessary reforms under the Strategic Framework for Public Management Reform and advised Turkey to revise the State Tender Act to ensure conformity with the UNCITRAL standards as the initial step until full compliance with the EU directives could be provided.

4.4.2.2 The European Union

Turkey's relations with the EU date back to 1960s.[61] The relations were officially initiated by the application of Turkey for association to the European Economic Community on 31 July 1959. The application was followed by the signature of the Ankara Agreement between Turkey and the European Economic Community on 12 September 1963 which came into effect on 1 December 1964.[62] The Ankara Agreement envisaged a gradual transition of integration, based on the establishment of a customs union and specified three key stages in order to initiate the integration process consisting of preparatory, transitional and final stages. Upon the completion of the preparatory stage, Turkey and the European Economic Community signed the Additional Protocol on 13 November 1970 determining the provisions and obligations related to the transitional stage which came into effect in 1973.[63] The completion of the transition stage established foundations for the further step of integration: establishment of the common customs regime. In that regard, Turkey and the European Union agreed to create the Customs Union on 31 December 1995 which came into effect on 1 January 1996.[64] The Customs Union provided a significant momentum to initiate

[60] See, The World Bank, Turkey Public Expenditure and Institutional Review Reforming Budgetary Institutions for Effective Government (Report No. 22530-TU), August 20, 2001 available at <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2001/10/19/000094946_01101004022561/Rendered/PDF/multi0page.pdf>

[61] For the chronology of Turkey's relations with the European Union see, Joseph S. Joseph, 'EU Enlargement: The Challenge and Promise of Turkey' in Bindi Federiga M. (ed), *The foreign policy of the European Union assessing Europe's role in the world* (Washington, D.C.: Brookings Institution Press, 2010). See also, The European Commission, EU-Turkey relations available at <http://ec.europa.eu/enlargement/candidate-countries/turkey/eu_turkey_relations_en.htm>

[62] Ankara Agreement of 12.09.1963, OJ 1964 L 217.

[63] Additional Protocol of 23.11.1970, OJ 1972 L 293.

[64] Decision 1/95 of the Association Council of 22.12.1995, OJ 1996 L 35.

reforms to adopt the European norms particularly in trade and competition areas. It is noteworthy that the Customs Union Decision also invited Turkey to review the policies on public procurement. The Decision stated that "*[a]s soon as possible after the date of entry into force of this Decision, the Association Council will set a date for the initiation of negotiations aiming at the mutual opening of the Parties' respective government procurement markets*".[65] In this context, the EC-Turkey Association Council agreed on the initiation of negotiations aiming the liberalisation of services and the mutual opening of public procurement markets to begin in April 2000.[66] Even though the Decision underlined the importance of access to the public procurement markets, no explicit commitment was undertaken by Turkey on that matter.

The relations between Turkey and the European Union were accelerated after the establishment of the Customs Union. In that regard, the European Union Helsinki Council held on 10-11 December 1999 recognised Turkey as a candidate State to join the European Union on the basis of the same criteria applied to the other candidate States. This period is a breakthrough in relations between Turkey and the European Union. The official acceptance of Turkey's status as a candidate provided a new momentum to initiate the reforms to adopt the European norms in Turkey. For instance, the EU Council Decision 2001/235/EC identified short term and medium term reform priorities for the Turkish public procurement system.[67] According to this Council Decision, Turkey in short term is expected to start alignment with the Community acquis in particular by making the procurement system more transparent and accountable; and in medium term, Turkey is required to complete alignment with EU law and ensure effective implementation and enforcement.

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[65] *Id.*, Article(48).
[66] Decision No. 2/2000 of the EC-Turkey Association Council of 11 April 2000 on the opening of negotiations aimed at the liberalisation of services and the mutual opening of procurement markets between the Community and Turkey, OJ 2000 L 138/27.
[67] See, Council Decision of 8 March 2001 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey (2001/235/EC), OJ 2001 L 85/13.

On the other hand, the EU Council, during the Brussels Summit held on 16-17 December 2004, noted that Turkey sufficiently fulfilled the political criteria and decided to open accession negotiations with Turkey on 3 October 2005 which shifted the relationship between Turkey and the European Union into a new phase. Furthermore, in conjunction with the enlargement of the European Union, Turkey signed the "*Additional Protocol*" which extended the Ankara Agreement of 1963 to the new members of the European Union.[68]

The Council Decision of 2008/157/EC sets out the general principles, priorities, objectives and conditions of accession on the basis of the Copenhagen criteria regarding alignment of Turkish legislation with EU law and public procurement is the 5th chapter of official negotiations out of 35 chapters.[69] Like other candidate states, Turkey is expected to establish a public procurement system that meets EU law on public procurement.

The public procurement chapter has not been opened for official negotiations, yet. The European Union has set two benchmarks for opening the public procurement chapter for negotiations:

1st Opening Benchmark: Turkey is required by the Council Decision of 2008/157/EC to assign a public institution in charge of coordination of all areas related to legal and policy framework on public procurement in order to ensure a coherent policy during the pre-accession period. Turkey fulfilled this criterion in 2009 through designating the Ministry of Finance as the coordinator body for the legal and policy framework on public procurement.[70]

2nd Opening Benchmark: The second opening benchmark is more comprehensive and encapsulates a broad range of substantial reforms. The Council Decision of 2008/157/EC

[68] See, Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey following the enlargement of the European Union, OJ 2005 L 254/58.
[69] See, Council Decision 2008/157/EC of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC, OJ 2006 L51/4, 26.2.2008; For the repealed decision see, Council Decision 2006/35/EC of 23 January 2006 on the principles, priorities and conditions contained in the Accession Partnership with Turkey, OJ 2006 L 22/34.
[70] See, the Act numbered 5917, dated 25 June 2009, amending the Decree Law numbered 178 on Organisation and Duties of the Ministry of Finance.

invites Turkey to present a comprehensive strategy which needs to include all reforms necessary for legislative alignment and institutional capacity building in order to comply with EU law. Turkey has prepared a strategy for that purpose which elaborates a complete list of actions and time-schedules for the prospective legal reforms in order to provide full alignment with EU law.[71]

Turkey has currently fulfilled the first opening benchmark and is gradually reforming the public procurement system in order to bring it in line with EU law. However, although the EU opened membership negotiations with Turkey, there are considerable political problems that prevent Turkey from joining the EU.[72] Currently, no chapter, including the public procurement chapter, is being negotiated. The process is quite vague and there is not a definite roadmap for membership.

4.5 Conclusion

The influence of the EU on the commencement of the second comprehensive public procurement reform has been relatively limited. Although the texts enacted at the end of the reform process contain remarkable similarities with the EU directives on public procurement, the dominant actors have been the IMF and the World Bank, as the reforms were stipulated as preconditions for releasing the loans that were used during Turkey's recovery from the economic crisis. On the other hand, the reform of public procurement in accordance with the conditions laid down by the IMF and the World Bank have been subject to serious political objections as these conditions were considered as interventions to Turkey's sovereignty.[73] Despite political objections against the IMF and the World Bank, the public procurement reforms had been completed by 2002. In this context, two pieces of

[71] The strategy is available at <www.mfa.gov.tr/data/AB/ABMuktesebati/05KamuAlimlari.pdf>
[72] For a more detailed examination of this issue see Chapter(10):Section(10.2).
[73] For the discussions on sovereignty see, the records of the Grand National Assembly of Turkey, <www.tbmm.gov.tr/develop/owa/tutanak_g_sd.birlesim_baslangic?P4=6870&P5=B&page1=9&page2=9>.

legislation on public procurement, the Public Procurement Act numbered 4734 and the Public Procurement Contracts Act numbered 4735, were adopted on 22 January 2002 and entered into force on 1 January 2003.[74]

In conclusion, Turkish public procurement law has undertaken two major reform stages and the main motivations for each reform have always been unification, simplification and modernisation of the legal and institutional framework. The first comprehensive public procurement reform failed to achieve these objectives. The success of the second comprehensive public procurement reform in achieving these objectives will be scrutinised in the following chapters.

[74] The unofficial English translation of the Public Procurement Act is available at <http://www1.ihale.gov.tr/english/4734_English.pdf> and the PP Contracts Act is available at <www.ihale.gov.tr/english/english47351.htm>

CHAPTER 5

The Turkish Public Procurement Law

5.1 Introduction

The enactment of the Public Procurement Act (hereafter 'TPP Act') and the Public Procurement Contracts Act (hereafter 'the PP Contracts Act') were significant milestones in Turkey in the conceptualisation of public procurement. The new public procurement regulations are considered to be more responsive to macroeconomic developments around the world.[1] They are seen to contain a remarkable shift from the perspective that considers public procurement as a matter of domestic public financial affairs to the perspective that considers public procurement as an important aspect of international trade. Even though the prevention of corruption is the strongest rationale behind the enactment of the these new public procurement regulations, they have played a key role in the standardisation of procedures for awarding public procurement contracts and removing major obstacles that prevented suppliers from competing properly in the Turkish public procurement market. TPP Act is mainly modelled after the UNCITRAL Model Law and the European Union directives on public procurement. However, TPP Act has distinctive features and contains remarkable differences from these models which make the new legislations *sui generis,* and they are mostly tailored to the specific context in Turkey.

The main objective of this chapter is to provide an overview of the regulatory and institutional framework on public procurement in order to set the proper context for more specific analysis in subsequent chapters. In this regard, this chapter examines the main features of the current regulatory and institutional framework and analyses the extent to which it is compatible with the European Union directives on public procurement. This

[1] See, Servet Alyanak, 'An overview of the legal rules governing public procurement in Turkey' (2007) 2 *Public Procurement Law Review* 125, p. 125.

chapter also aims to answer the question of whether sustainable development has been taken into consideration in the current legal framework, and of what is the most significant barrier for pursuing sustainable development throughout the public procurement process under the current framework. Further detail on the contents of each section is provided below.

Section 5.2 examines the institutional framework and Section 5.3 examines the scope of the regulatory framework; Section 5.4 identifies the main procurement principles; Section 5.6 lays down the procedures for preparation of the tendering proceedings; Section 5.7 and subsequent sections map out the procurement procedures; Section 5.9 examines the review procedures; Section 5.10 reviews the accession of Turkey to the GPA; 5.11 examines other international agreements that have an impact on public procurement and Section 5.12 concludes the chapter.

5.2 The institutional framework

5.2.1 The Public Procurement Authority

The most important contribution of TPP Act is the establishment of the Public Procurement Authority (hereafter 'TPP Authority').[2] The EU and the World Bank (i.e. the external dynamics of the second public procurement reform) had put political pressure on Turkey at the beginning of 2000 to establish an autonomous institution in charge of implementing all legal frameworks on public procurement and to align review procedures with international standards.[3] SIGMA, a joint initiative of the OECD and the EU, considers TPP Authority as a stable and strong institution which contributed to the establishment of a modern public procurement system in Turkey.[4]

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[2] For the legal competence and institutional capacity of TPP Authority, Hasan Gül, 'Modernising public procurement and creating an independent public procurement regulatory authority' (2010) *Law in Transition Online* 57; Hasan Gül, 'Türk Kamu Alımları Sisteminde Kamu İhale Kurumu'nun Yeri ve Artan Önemi' (2010) 2 *Sayder Dış Denetim Dergisi* 5; H. Bahadır Barçın, 'Kamu Alımlarında Bağımsız İdari Otorite İhtiyacı ve Kamu İhale Kurumunun Katkısı' (2010) 2 *Sayder Dış Denetim Dergisi* 125.

[3] Barçın, note[2], p. 126.

[4] See, SIGMA - Support for Improvement in Governance and Management, Turkey - Public Procurement Assessment, May 2008, available at <www.oecd.org/site/sigma/publicationsdocuments/41638885.pdf>

TPP Authority is a public legal entity which is administratively and financially autonomous and was established through Article 53 of TPP Act. Even though TPP Authority is related to the Ministry of Finance, it is not under the administrative hierarchy or supervision of the Ministry of Finance. Most importantly, no one, including the Ministry of Finance, is entitled to issue orders or instructions for the purpose of influencing the decisions of TPP Authority.

TPP Authority has a key role in the public procurement process. TPP Authority is entitled to evaluate and conclude any complaints claiming that the proceedings carried out by any contracting authority within the period from the commencement of the tender proceedings until the signing of the contract are in violation of TPP Act. However, TPP Authority is not entitled to settle disputes arising from the performance of contracts since the performance stage is not covered by TPP Act and is subject to private law.

All contracting authorities covered by TPP Act are required to execute the decisions of TPP Authority promptly without any further execution procedure, and the contracting authorities are not permitted to question the subsidiarity of TPP Authority's decisions, which is considered to be reinforcing the autonomy of TPP Authority.[5]. The supervision duty and authority of TPP Authority contributes to the uniform implementation of TPP Act by all covered contracting authorities throughout Turkey.

TPP Authority is also entitled to prepare, develop and guide the implementation of all the regulations concerning TPP Act and the PP Contracts Act and the standard tender documents and contracts. This also contributes to uniform implementation. Another important task of TPP Authority is keeping the records of those who are prohibited from participating in tenders. These records are published online and updated regularly.[6] Keeping the records in

[5] Gül, note[2], p. 10.
[6] The database is open to public access and available at <http://vatandas.ihale.gov.tr/yasaklis.asp>.

a single national database helps the contracting authorities to save time, which eventually accelerates the procurement process and diminishes the amount of red-tape.

It is important to note that TPP Authority is not a corruption-investigation commission. The competence of TPP Authority is limited by TPP Act, and TPP Authority can only conduct investigations regarding the procurement decisions within the scope of the claims. In the same context, the claims brought before TPP Authority have to be specific, otherwise TPP Authority is entitled to dismiss any investigation claim.

5.2.2 Other related institutions

The review system conducted by TPP Authority is only one of the methods available to monitor and enforce the regulatory framework on public procurement. The Turkish administrative law provides three methods of pro-active review which are ex-ante control, internal audit and ex-post external audit.

Ex-ante control ensures efficient utilisation of public resources according to the intended official purposes and in line with the public interest and is conducted by the expenditure and financial service units of the contracting authorities. Similarly, internal audit, which is conducted by the internal auditors of the contracting authorities, evaluates the risk analysis of the contracting authority for any given project. The main legal framework governing this procedure is the Public Financial Management and Control Act numbered 5018, which is implemented by the Ministry of Finance.[7] The Act numbered 5018 delegates certain powers of the Ministry of Finance in public financial management to the individual public bodies, and reflects an approach of decentralisation in the control of public expenditure.[8]

The Act numbered 5917 of 2009 assigned the Ministry of Finance the duty to determine the key policies on public procurement in the context of general economic policies and

[7] English translation of the Act numbered 5018 is available at <www.sgb.gov.tr/Documents/Public Financial Management and Control Law No. 5018 (English).pdf>
[8] Gül, note[2], p. 10.

strategies, and to ensure coordination among the related parties in the preparation of the draft laws in this area. When this provision entered into force it was argued that the provision limited TPP Authority's powers in favour of the Ministry of Finance and it was claimed that TPP Authority lost its autonomy.[9] However, it was clarified by the Ministry of Finance that this provision was promulgated in order to carry out the negotiations with the EU with regard to public procurement reforms as the existence of such a central body is laid down by the EU as an opening benchmark of negotiations.[10] It was also clarified that the aim was to provide policy harmony in procurement related areas such as concessions and public-private-partnerships which are not covered by TPP Act and hence not within the scope of TPP Authority.

Ex-post external audits are mainly conducted by the Court of Accounts. Prior to December 2010, the Supreme Auditing Board, affiliated to the Prime Ministry, was also entitled to perform external audits on any institutions, organisations, associations, enterprises and corporations more than half of whose capital is owned by public authorities. The powers of the Board were transferred to the Court of Accounts in order to centralise the external audit system and, inter alia, to align audit practices with relevant international standards.

The State Auditing Board attached to the President of the Republic is also entitled to audit any institution and publish reports when instructed by the President. The State Auditing Board, when it was instructed by the Turkish President in 2010, audited TPP Authority and concluded that the independent and autonomous status of TPP Authority had contributed significantly to achieving the objectives of regulating and supervising the Turkish public procurement system.[11]

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[9] Ibid, p. 7.

[10] See, Ministry of Finance, 'Current Situation in Negotiations on Chapter 5: Public Procurement' available at <www.abmaliye.gov.tr/en/node/306>

[11] The State Auditing Board, 'Report no. 2010/9 of 17.02.2010' available at <www.tccb.gov.tr/ddk/ddk40.pdf>, p. 365.

5.3 The scope of the Public Procurement Act

TPP Act did not abolish the State Tender Act since the State Tender Act regulates auction tenders as well as procurement tenders. TPP Act limited the scope of the State Tender Act to the auctions and Article 68 of TPP Act provided that the State Tender Act would not be applicable for procurements covered by TPP Act.

The main purpose of TPP Act is identified under its Preamble as unification, simplification and modernisation of the Turkish regulatory framework on public procurement in conjunction with the international rules, in particular those of the EU. In order to maintain its feature of being the main legal framework on public procurement, Article 66 of TPP Act requires that any amendments to provisions of TPP Act must be arranged through annexing provisions or making changes within the main text of TPP Act. This is expected to help economic operators to easily track any changes in the legal framework on public procurement.[12]

TPP Act provides that it regulates the principles and procedures for any procurement held by any public entities and institutions (1) governed by public law, (2) under public control or (3) using public funds. Article 2 of TPP Act outlines the covered authorities and requires that the procurements of goods, services or works covered by the resources at the disposal of the covered authorities have to be carried out in accordance with TPP Act.

5.3.1 Key concepts

The distinction between goods, services and works has concrete consequences for the determination of the procurement procedure to be followed. Therefore, the contracting authorities have to ensure that their needs correspond to the correct definition of goods, services or works. In cases of uncertainty, the contracting authorities need to examine the economical and functional classification of the need or refer to the definitions under the

[12] The Preamble of TPP Act, p. 15.

analytical budget classification guidelines. TPP Authority also recommends that the contracting authorities should outline the work units and weigh the estimated cost of each unit, and decide upon the classification according to the estimated cost of unit which most outweigh.[13]

5.3.1.1 Procurement

Article 4 of TPP Act defines procurement as the proceedings which involve the award of a goods, services or works contract to the tenderer selected in accordance with the procedures and conditions laid down in the Act, and which is completed by the signing of the contract following the approval of the contracting officer. In other words, TPP Act limits its context solely to the stages starting from the call for tenders to the signing stage of the contract whereby administrative law applies. On the other hand, the concluded contract is performed in accordance with the PP Contracts Act whereby private law applies. This distinction is also related to the powers of TPP Authority, since TPP Authority is only entitled to oversight the implementation of TPP Act, whereby administrative law applies.

5.3.1.2 Goods

Goods are defined under Article 4 of TPP Act as "*any kind of purchased commodities, moveable and real properties, together with the rights thereof*". The definition covers both the properties and rights that can be the subject matter of any purchase transaction. The definition excludes the leasing of goods. In cases of leasing, the transaction falls within the scope of services. The definition of goods is not exhaustive since terms like "any kind of" provide a wide coverage.

5.3.1.3 Services

Services are defined under Article 4 of TPP Act as "*any kind of services relating to maintenance and repair, transportation, communication, insurance, research and*

[13] See, TPP Authority Decisions No. 2007/UYZ-980; 2007/UM.Z-1271; 2008/UM.I-4419.

development, accounting, market surveys and polls, consultancy, promoting, broadcasting and publication, cleaning, catering, meeting, organisation, exhibition, guarding and security, professional training, photography, film, intellectual and fine arts, computer systems and software services, lease of movable and immovable properties and the rights thereof, and other similar services". As pointed out by Oder, the definition is not exhaustive since the terms of "other similar services" provide a wide coverage to the scope.[14]

5.3.1.4 Works

Works are defined under Article 4 of TPP Act as "*all construction works such as buildings, roads, railways, highways, airports, docks, harbours, shipyards, bridges, tunnels, subways, viaducts, sports facilities, infrastructure, pipelines, communication and energy transmission lines, dams, power plants, refineries, irrigation facilities, soil improvement, flood-prevention and pickling; and their related works of installation, manufacture, preparation of site materials, transportation, completion, large scale-repair, restoration, landscaping, drilling, demolition, reinforcing and assembly works and similar construction works*". In the same context, the definition is not exhaustive since the terms of "similar construction works" provide a wide coverage to the scope.[15]

5.3.1.5 Public expenditure

TPP Act only applies to the tenders which require public expenditure. The tenders that generate revenue for public, i.e. auctions, are subject to the State Tender Act. The concept of the public expenditure is defined under Article 3 of the Act numbered 5018 as "*the payments for the goods and services acquired and for the works done pursuant to their respective laws, social security contributions, interest payments of domestic and foreign debts, general borrowing expenditures, payments resulting from the discounted sale of*

[14] Burak Oder, 'Kamu Ihale Hukuku' in Ozay Ilhan (ed), *Günisiginda Yonetim* (Istanbul: Filiz Kitabevi, 2004), p. 582.
[15] Ibid.

borrowing instruments, economic, financial and social transfers, donations and grants, and other expenditures". TPP Authority underlines that relying on the State Tender Act for the procurements which are covered by the Procurement Act is circumvention of the law and a further administrative investigation must be conducted for the procurement officers in the existence of malicious intent of circumvention.[16] Therefore, the distinction between the public expenditure and revenue has to be clarified since it has direct consequences on the determination of which legislation should be applied.

As an example, public authorities could make use of goods that they do not need by bartering them in exchange for goods they do need. Since such a barter transaction does not require utilisation of any public expenditure, TPP Act does not apply.[17] However, if a contracting authority attempts to circumvent TPP Act through offering exchange of goods, this could lead to administrative and criminal liability of the procurement officers.[18]

5.3.2 Covered authorities

TPP Act outlines the covered authorities under four categories, and provides a general rule on the public dependency in order to determine the public control or the usage of public funds.

5.3.2.1 Category I: The State, local and regional authorities

The first category of the covered authorities consists of the departments included in the general or special budget,[19] special provincial administrations,[20] municipalities, and their related revolving funds organisations, unions (except those acting as professional unions and

[16] TPP Authority, Decision No. 2007/UY.Z-3709, 19.11.2007.
[17] TPP Authority, Decision No. 2004/UM.Z-1251, 23.09.2004
[18] TPP Authority, Decision No. 2003/UK.Z-873, 22.12.2003.
[19] As listed under the Act numbered 5018, general budget covers all ministries, undersecretaries and various presidencies and head offices, while special budget covers mostly the public universities and high technology institutes.
[20] Special provincial administrations are the public entities that have administrative and financial autonomy which are established for the purpose of fulfilling the common needs of a province and of which decision-making body is constituted through election. See, the Special Provincial Administrations Act numbered 5302.

their upper bodies) and entities. This category corresponds to the definition of the contracting authorities under Article 1(9) of Public-Sector Directive.

5.3.2.2 Category II: The State Economic Enterprises

The coverage of the State Economic Enterprises (hereafter 'SEEs') by TPP Act is a significant breakthrough. Before the enactment of TPP Act, SEEs were not covered by the State Tender Act as they had their own regulations on public procurement. It is argued that the coverage of SEEs by TPP Act is a reaction to the economic crisis, which was mostly triggered due to the budgetary deficits of SEEs.[21] As discussed in Chapter 4, SEEs have played a significant role in the Turkish economy since the first years of the Republic. However, in accordance with the neo-liberalisation policies, Turkey privatised a number of state economic enterprises.

Article 165 of the Turkish Constitution defines the SEEs as enterprises in which more than half of the share directly or indirectly belongs to the State. The Decree Law numbered 233 defines SEEs in a narrow context. Accordingly, there are two types of SEE under the Decree Law numbered 233: public corporations and state economic establishments.

Public corporations are enterprises in which corporation capital entirely belongs to the State and which are established for the purpose of carrying out commercial activities under ordinary commercial terms. On the other hand, state economic establishments are the enterprises in which establishment capital entirely belongs to the State, which are established for the purpose of production or sale of goods and services carrying monopolistic characteristics by taking into account the public welfare, and are therefore considered to

[21] The main problems of the SEEs are argued to be mismanagement, inefficient use of the resources and excessive employment. See, Kadir Akın Gözel, 'Reforming public procurement sector in Turkey' in Thai K. V. (ed), *Challenges in Public Procurement: An International Perspective* (Boca Raton: PrAcademics Press, 2005), p. 54.

have concession for the activities they carry out. TPP Act covers both kinds of SEE, namely the public corporations and the state economic establishments.

5.3.2.3 Category III: The social security institutions

This category covers the social security establishments,[22] funds, entities of legal personalities that are established in accordance with special laws and are assigned with public duties (except for professional organisations and foundation institutions of higher education) and establishments with independent budgets.

5.3.2.4 Category IV: The procurements of certain public banks

TPP Act covers works procurements of three big public banks which are within the scope of the Act numbered 4603 and works procurements of any entities for which more than half of their capital, directly or indirectly, together or separately is owned by these banks. These banks are Ziraat Bank, Halkbank and Emlak Bank (which is currently being liquidated).

5.3.2.5 Category V: The public dependency test

Article 2(d) of TPP Act covers also any institutions, organisations, associations, enterprises and corporations for which more than half of their capital, directly or indirectly, together or separately is owned by those stated under Categories I, II and III.

As explained previously, TPP Act was enacted to provide harmonisation of procedures for awarding public procurement contracts. In order to provide the widest coverage, in the original text there was not any capital criterion for the institutions, organisations, associations, enterprises and corporations which directly or indirectly, together or separately are owned by those stated under Categories I, II and III. However, Uz argues that the lack of capital criterion had created significant legal disputes in Turkey, as this provision provided coverage for the institutions, organisations, associations, enterprises and corporations acting according to private law and having minor public shares or using insignificant amounts of

[22] See, Annex IV of the Public Financial Management and Control Act numbered 5018.

public funds.[23] The Turkish government decided that this excessive coverage could contradict with the purpose of TPP Act; in that regard, a capital criterion was inserted into section 4 of Article 2.

In addition to the State, local and regional authorities, Public-Sector Directive also covers the bodies governed by public law.[24] The bodies governed by public law are defined under Article 1(9)(c) of Public-Sector Directive as bodies (1) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (2) having legal personality; and (3)(a) financed for the most part, by the State, regional or local authorities, or other bodies governed by public law; (b) subject to management supervision by those bodies; or (c) having an administrative, managerial or supervisory board, more than half of whose members were appointed by the State, regional or local authorities, or by bodies governed by public law, which mostly emanates from the case-law of the Court of Justice of the European Union (hereafter 'the CJEU').[25] A non-exhaustive list of bodies and categories of bodies by public law are set out in Annex III of the Directive which is updated periodically.

The CJEU ruled that '"*[g]iven the double objective of introducing competition and transparency, the concept of a body governed by public law must be interpreted as having a broad meaning*".[26] In fact, the CJEU has also adopted a broad approach with regard to the definition of 'State' whereby the Court held that the term "the State" has to be interpreted in functional terms.[27] In particular, the CJEU has significant case-law with regard to

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[23] Abdullah Uz, *Kamu Ihale Hukuku* (Ankara: Turhan Kitabevi, 2005), p. 149.
[24] For the general and specific cases of coverage of the Procurement Directives see, Martin Dischendorfer, 'The definition of "meeting needs in the general interest" and "management supervision" within the meaning of the EC procurement Directives, Case C-373/00, Adolf Truley GmbH v Bestattung Wien GmbH' (2003) 5 *Public Procurement Law Review* NA123; Sue Arrowsmith, 'The entity coverage of the EC procurement directives and UK regulations: a review' (2004) 2 *Public Procurement Law Review* 59.
[25] Case C-44/96 Mannesmann Anlagenbau Austria AG and Others v. Strohal Rotationsdruck GmbH [1998] ECR I-73, para 20.
[26] Case C-373/00, Adolf Truley v. Bestattung Wien [2003] ECR I-1931, para. 43.
[27] Case 31/87 Gebroeders Beentjes BV v State of the Netherlands [1988] ECR 4635, para. 11-12; See also, Case C-323/96 Commission v Belgium [1998] ECR I-5063, para. 28-29.

determining the boundaries of having dependency of finance. For instance, the CJEU held that "*for the most part*" means "*more than half*".[28] In the same context, the CJEU ruled that the financing does not need to be direct.[29]

The public dependency in terms of finance laid down under TPP Act is mostly in line with Public-Sector Directive and the case-law of the CJEU. TPP Act also considers being financed more than half as a condition for an entity being covered by TPP Act. Furthermore, the method of financing is not considered important for being subject to TPP Act. TPP Act provides that the finance can be provided by those stated under Categories I, II and III directly or indirectly, together or separately.

Another category of public authorities that require the public dependency test is entities which are counted under Category I. The inclusion of entities provided a broad coverage to TPP Act since the term of 'entity' covers both public and private legal entities. According to Article 123 of the Turkish Constitution, a public legal entity can be established only by an act, or by an authority granted by an act. It is noteworthy that the public entities are in the scope of TPP Act. However, for the private entities the coverage can only be determined by the existence of a certain level of public dependency.

Under Turkish Law, associations, foundations, funds, commercial partnerships (i.e. ordinary partnerships, collective, limited, and joint stock companies) and cooperatives have legal personalities as private legal entities. Among these legal entities, only commercial partnerships, cooperatives and certain funds have a capital element. Therefore, whilst examining whether an entity should be subject to TPP Act, capital becomes determinant. However, the remaining private entities (i.e. associations, foundations and certain societies) do not encompass a capital element. The legal status of these kinds of entities is clarified by

[28] C-380/98, R v HM Treasury ex parte University of Cambridge [2000] E.C.R. I-8035, para. 33.
[29] C-337/06, Bayerischer Rundfunk and others [2007] E.C.R. I-11173, para(s) 34 and 39.

Section A(1)(d) of the PP Communication of 2004. In this regard, in order to be subject to TPP Act, private entities have to act in the similar areas to public entities and there should be a substantial dependency in terms of capital, staff or allocation of equipment by the public entities. The solution is in line with the comprehension of dependency in terms of finance, managerial supervision and appointment which is laid down in Public-Sector Directive as an element of being a body governed by public law. Nevertheless, despite the partial compliance, the Turkish law fails to completely meet the requirement of being a body governed by public law.[30]

5.3.3 Exempted authorities

5.3.3.1 The Saving Deposit Insurance Fund

The procurement of the Saving Deposit Insurance Fund and banks whose shares are partially or fully owned by this Fund are not subject to TPP Act.[31]

5.3.3.2 The Utilities

TPP Act provides that the enterprises, establishments and corporations who carry out activities in the energy, water, transportation and telecommunication sectors are excluded from the scope of TPP Act. The procurements of utilities have been exempted from the scope of TPP Act in order to provide harmony with the EU's approach, dedicating a separate directive with regard to utilities. The preparation of a new legislation in order to regulate the procurements of utilities was planned. In order to prevent any uncertainty during the transition period, the procurement of the enterprises, institutions and corporations operating in the energy, water, transportation and telecommunication sectors have been subject to sub-paragraph (g) of 3rd Article of TPP Act until their special act enters into force. Also, their

[30] For more discussions see, Alyanak, note[1], p. 132; Harun Saki, 'AB Müktesebatı Çerçevesinde Türk Kamu İhale Mevzuatı' (2010) 2 *Sayder Dış Denetim Dergisi* 246, p. 247.

[31] The Saving Deposit Insurance Fund has its own set of rules laid down under the act establishing the fund. See <www.tmsf.org.tr/index.cfm?fuseaction=public.dsp_menu_content&menu_id=12>

procurements of goods, services and works which are not within the scope of the said sub-paragraph have been subject to other provisions of TPP Act. The sub-paragraph (g) provides conditional exemption for the procurements below certain thresholds. TPP Authority is currently working on a draft law for utilities procurement; however there is not a definite timeline for the enactment. This draft is still waiting promulgation by 2013. Lack of separate rules on the procurements of utilities is a significant shortcoming of TPP Act.

5.3.3.3 The public banks within the Act numbered 4603

TPP Act only covers the works procurements of the three big public banks which are within the scope of the Act numbered 4603. In order to eliminate any doubts, TPP Act underlines that any procurement of goods and services of the Banks within the Act numbered 4603 and the entities for which more than half of their capital, directly or indirectly, together or separately is owned by these banks are not subject to TPP Act.

5.3.4 Excluded contracts

Besides the exempted authorities, TPP Act excludes a considerable number of contracts from its coverage. The exemptions were first incorporated into Article 3 of TPP Act. In the original text of TPP Act when it was adopted in 2002, there were only six categories of excluded contracts. In the course of time, Article 3 has been amended 14 times and two separate sections have been amended twice within a short period. It would be beyond scope of this study to outline and examine each excluded contract.[32] In the footnote the amendment date is intentionally provided in order to illustrate the frequency of the amendments. As illustrated in the footnote, almost every year a new exemption has been introduced to TPP

[32] For the exceptions see, the Act no. 4964 (Article 2) dated 30.7.2003; the Act no. 5148 (Article 2) dated 27.4.2004; the Act no. 5226 (Article 21) dated 14.7.2004; the Act no. 5312 (Article 25) dated 3.3.2005; the Act no. 5583 (Article 9) dated 22.2.2007; the Act no. 5726 (Article 24) dated 27.12.2007; the Act no. 5737 (Article 79) dated 20.2.2008; the Act no. 5784 (Article 28) dated 9.7.2008; the Act no. 5812 (Article 1) dated 20.11.2008; the Act no. 5917 (Article 31) dated 25.6.2009; the Decree Law no. 638 (Article 31) dated 3.6.2011; the Act no. 6111 (Article 177) dated 13.2.2011; the Act no. 6288 (Article 5) dated 31.3.2012; the Act no. 6353 (Article 27) dated 4.7.2012.

Act. Unlike the exempted authorities, in the case of excluded contracts, the contracting authority in principle remains bound to TPP Act. However, the authority is entitled to conduct specific types of procurement without following the rules of TPP Act. In other words, the exclusions provide partial exemption (depending on the specific case).

When the Preambles of these acts amending TPP Act are analysed, it is always argued that the exclusion is provided due to the nature of the procurements in question as they require more flexibility. For each exemption a separate regulation was issued by claiming that TPP Act is not suitable for certain procurements which have particular features and require flexibility.[33] However, neither the Preambles nor the main texts or other policy documents sufficiently explain the reasons why TPP Act has not been adequate. Furthermore and most importantly, various acts introduced more exemptions for certain public authorities or contracts or even for specific projects.[34] The current excluded contracts cover and go beyond the permissible excluded contracts laid down under Section 3 of Public-Sector Directive, such as secret contracts and contracts requiring special security measures (Article 14) and contracts awarded pursuant to international rules (Article 15).

Nevertheless, some of the excluded contracts could be identified as related to social procurement. For instance, according to Article 3(a) and (e) of TPP Act, the contracting authorities are entitled to directly procure services to be made from development cooperatives of forest villages and from villagers pursuant to the Forest Act, goods and services from punishment and execution institutions and the institutions of jails and workhouses affiliated to the Ministry of Justice, from rest homes and orphanages attached to the Social Services and Child Care Institution, from schools and centres involving

[33] See, the Preambles of the acts numbered 4761, 2964, 5020, 5148, 5226, 5255, 5312, 5436, 5583, 5615, 5625, 5680, 5726, 5737, 5763, 5784 and 5812.
[34] For exempted projects see, Yaşar Ateş, 'Kamu İhale Kanunu'nun Kapsamı, İstisnaları ile Kanun'da Yapılan Değişiklikler ve Yeni Kanun Taslağının Getirdikleri' (2010) 2 *Sayder Dış Denetim Dergisi* 119, p. 120; Saki, note[30], p. 247.

production attached to the Ministry of Education, from institutes and breeding stations attached to the Ministry of Agriculture and Village Affairs, and from the Printing House of the Prime Ministry on the condition that these goods and services are produced by themselves, without initiating a tendering procedure.

5.3.5 The procurement statistics

According to TPP Authority, the statistics for the procurements concluded through TPP Act and the exclusions are as follow:

Table 1 – The procurement statistics between 01.01.2012 and 31.12.2012[35]

	The number of contracts awarded		**The value of the contracts awarded (1,000 Turkish Liras)**	
	Number	**Ratio**	**Amount**	**Ratio**
Covered by TPP Act	94,173	73.74%	76,634,709	81.18%
Direct procurement	No data	No data	10,554,256	11.18%
Exclusions	33,440	26.19%	7,121,725	7.54%
Out of scope	88	0.07%	8,033	0.09%
TOTAL	127,701	100.00	94,398,722	100.00

The statistics indicate that the exclusions constitute 7.54% of the overall procurements. However, these statistics do not reflect amount of the procurements of exempted authorities.

[35] See, Kamu İhale Kurumu, *Kamu Alımları İzleme Raporu: 2012* (Ankara: Kamu İhale Kurumu, 2013), available at <www.ihale.gov.tr/Istatistikler_Raporlar/ihale_istatistikleri.htm>, p. 2.

5.3.6 The award of public service concessions and establishment of public-private partnerships

TPP Act only regulates the procurement of goods, services and works by the public bodies and entities. The award of public service concessions and the establishment of public-private partnerships are not subject to TPP Act. The award of concessions or exclusive rights and the participation of the private sector in either establishment, operation or other stages of the public services are not new phenomena in Turkey. However, despite the long-standing practice, there is not a cohesive legal framework governing these issues and there are different sector-specific (e.g. health, energy, infrastructure sectors) and model-specific legislations (Build-Operate-Transfer, Build-Operate, Build-Lease-Transfer, Transfer of Operation Rights, Long-Term Lease) and also a considerable number of case-laws of the Council of State and the Constitutional Court on these issues.[36]

In order to modernise, simplify and consolidate the legal framework, the State Planning Organisation prepared the Draft Act on Realisation of Certain Investments and Services within the Framework of Cooperation Models between the Public and Private Sector (hereafter 'the Draft PPP Act') in 2007.[37] Indeed, the DRAFT PPP Act does not create a new practice; it mostly conceptualises the existing practice and gathers all existing PPP models under the umbrella of the Draft PPP Act through revoking all related regulations. The main objective is to create a single framework for all PPP projects and to eliminate the piecemeal nature of the existing regulations. Furthermore, the Draft PPP Act establishes a public authority called the General Directorate of Public-Private Cooperation for the purpose of

[36] For a comprehensive review of the existing rules see, Abdullah Uz, 'Kamu-Ozel Ortakligi / Public Private Partnership (PPP) (Kavram ve Hukuksal Cerceve)' (2007) *Gazi Universitesi Hukuk Fakultesi Dergisi* 1165; Rabia Kalendar Ilhan, 'Public Private Partnerships in Turkey' (2011) 2 *European Public Private Partnership Law Review* 85; Şenel Tekin, 'Public-Private Partnership and The Healthcare Sector' (2012) 2 *Turkish Review* 48.

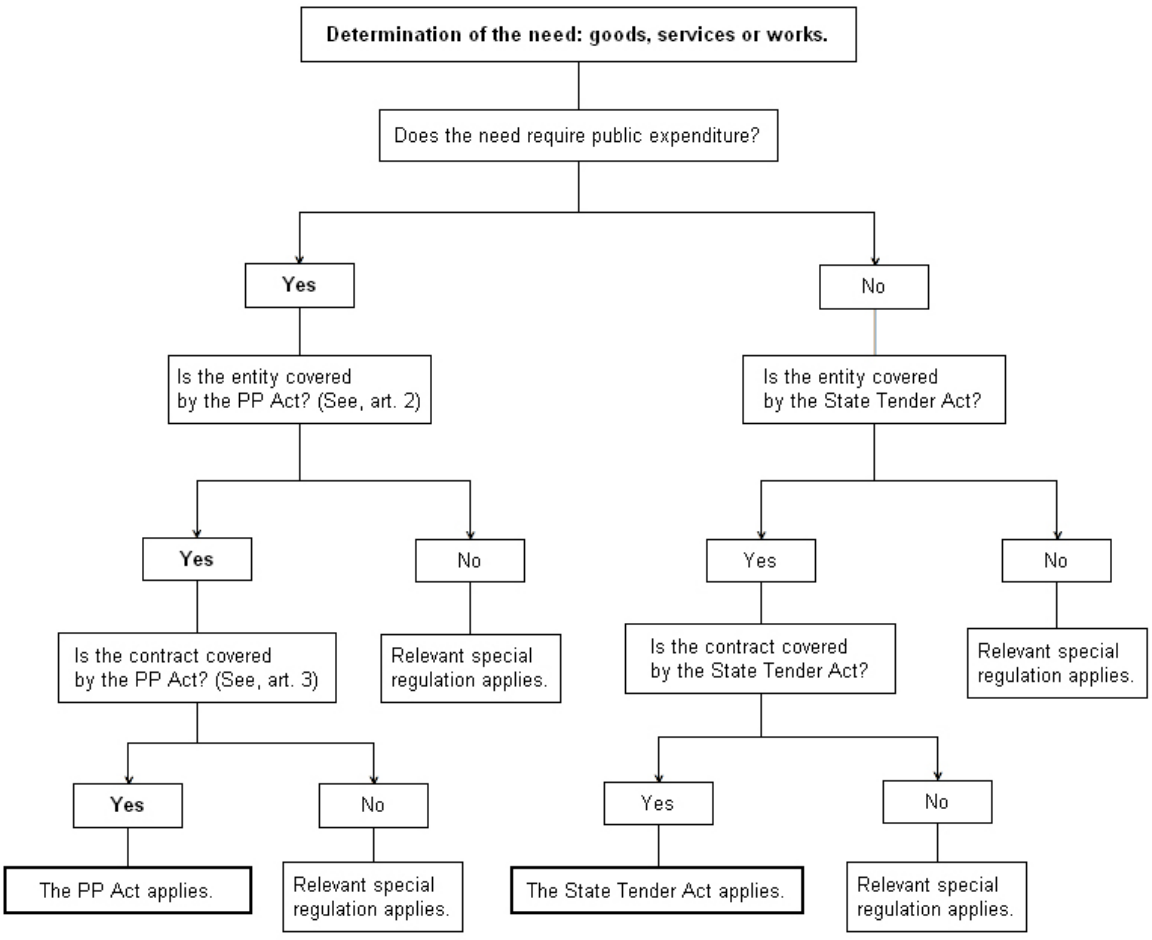
[37] The Draft PPP Act is available at <http://ekutup.dpt.gov.tr/haber/ahd/taslak.pdf>

supervising and guiding the public entities during the whole project cycle, which provides a uniform institutional framework. This draft is still waiting promulgation by 2013.

5.3.7 Determination of the procurement rules

Taking into account the exempted contracting authorities and excluded contracts, the following diagram shows the procedure that must be followed in order to determine the procurement rule to be applied:

Diagram 1 – Determination of the legislation to be applied[38]



5.3.8 Evaluation of the scope of TPP Act

The excessive number of exemptions jeopardises the objective of TPP Act on simplification and harmonisation of the procedures for awarding public procurement contracts. TPP Act

[38] This diagram is a revised version of diagram provided by Oder, note[14]. See, ibid, p. 588.

inherited the shortcomings of the State Tender Act in terms of complexity. The exemptions are not justified objectively and are not determined in a uniform way. The most concrete consequence of the lack of uniformity is the differentiation of the procurement procedures for the same contracting authorities. It is argued that the objective of ensuring harmony in practice mostly failed due to unjustified exceptions.[39]

The State Auditing Board, when it was instructed by the Turkish President to audit TPP Authority in 2010, reached the conclusion that the exceptions of TPP Act had impaired the integrity of the Turkish public procurement system.[40] In that regard, the State Auditing Board recommended a prompt reform of the system and abolishment of the unnecessary exceptions to ensure uniformity of implementation.

The scope is also the most criticised aspect of TPP Act by the EU. The EU argues that such derogations not only diminish the integrity of TPP Act but also undermine the objective of providing a comprehensive framework for public procurement.[41] This critique was repeated in each progress report published by the EU as new exemptions were introduced to TPP Act almost each year.

TPP Authority is currently working on a draft public procurement law in order to ensure full harmonisation with the EU acquis which reflects this approach. The draft law also deals with the exemptions. The draft law identifies two periods for the abolishment of the exemptions: 31 December 2014 and six months before full membership. The draft law provides that the exemptions on the procurements of contracting authorities like the State Supply Office, Turkish Petroleum Corporation, the Saving Deposit Insurance Funds and the procurements of Utilities will be abolished by 31 December 2014 and the remaining exemptions will be

[39] Ateş, note[34], p. 121; Ali Serdar, 'Kamu İhale Mevzuatı Hakkında Genel Değerlendirme' (2010) 2 *Sayder Dış Denetim Dergisi* 34, p. 35.
[40] The State Auditing Board, Report no. 2010/9 of 17.02.2010, p. 361.
[41] See, European Commission, Turkey 2005 Progress Report {COM(2005)561 final} SEC(2005)1426, p. 63; European Commission, 2002 Regular Report on Turkey's Progress Towards Accession SEC(2002)1412, p. 48-49.

abolished six months before full membership. TPP Act will only maintain the exemptions for security contracts and contracts requiring special security measures, specific exclusions in the field of telecommunications, contracts awarded pursuant to international rules and certain procurements like arbitration and conciliation services and research and development services which are legitimate to be excluded in accordance with Public-Sector Directive. This approach implies that Turkey aims to safeguard its position during the transition period and accordingly aims to conduct procurement according to its own local context until being admitted to the EU as a full member.

On the other hand, the regulation of the exempted procurements under secondary or administrative regulations (e.g. by-laws, decrees, circulars) rather than acts jeopardise the stability of the public procurement system as these kinds of administrative regulations can be changed more easily than acts. Furthermore, lack of stability diminishes confidence in the system and discourages foreign economic operators.

Another problem in this area is the method of regulation. These kinds of administrative regulations redefine the procurement process from scratch. Redefinition of the rules on public procurement by each regulation makes the public procurement system more complex and less predictable for the economic operators. Indeed, instead of regulating all concepts from scratch, the ideal solution is to regulate only issues which are different from TPP Act under these kinds of administrative regulations and to refer all remaining issues to TPP Act.

Public procurement is a strategic function of the public authorities in the delivery of public services. As explained before, the complexity is a burden on the contracting authorities as much as the economic operators. The diversity of procurement rules and excessive secondary regulations creates complexity and results in a considerable amount of different institutional practices which are believed to obstruct the proper implementation of the objectives of transparency, competition and equal treatment in the Turkish public procurement market.

The precedents of the Act numbered 2490 and the State Tender Act are prominent in that the complexity has always created the appropriate conditions for mismanagement and corruption.[42] Furthermore, the complexity has implications for the pursuit of sustainable development objectives throughout public procurement since the complexity makes it challenging to lay down a uniform vision and consistent implementation of any horizontal policies. In that regard, complexity of the public procurement rules emerges as a significant barrier to using public procurement as a policy tool to promote sustainability in Turkey.

5.4 The main principles of TPP Act

The main principles of the Turkish public procurement system are laid down under Article 5 of TPP Act, which can be divided into two categories: general principles and implementation principles.

The first category, i.e. general principles, consists of transparency, competition, equal treatment, reliability, confidentiality, public supervision, efficiency and effectiveness in public spending. These principles are imperative provisions to be considered and implemented in all stages of public procurement process regardless of either the contract value or thresholds. These principles are multidimensional and they are interconnected with each other. The contracting authorities are required to ensure full respect to these principles. A public procurement can be subject to administrative or judicial review relying on just these principles. These principles are also instructive in interpreting other provisions of TPP Act. It is important to note that the secondary regulations on public procurement need to comply with TPP Act. In that regard, the main principles of TPP Act also draw the context that the secondary regulations need to comply.

Besides TPP Act, the Act numbered 5018 also lays down certain principles to be respected while using any public funds, which mostly correspond to the first category principles laid

[42] For the relevant discussions see, Chapter(4).

down under TPP Act. The importance of the Act numbered 5018 is that it provides a set of principles on accountability and transparency that inter alia apply to all procurements including the ones excluded from the scope of TPP Act.

The second category, i.e. implementation principles, consists of prohibitions on mixed contracting and partitioning the contracts, budgeting and environmental impact assessment requirements. Unlike the general principles, the implementation principles apply only to certain stages of the public procurement process.

TPP Act confers a strong value to those general and implementation principles, and reiterates under Article 60 that the provisions on criminal liability, inter alia, apply to the contracting officers who permit and carry out procurement proceedings in violation of those general and implementation principles.

5.4.1 The general principles

5.4.1.1 Transparency

The principle of transparency requires the public procurement system to contain the mechanisms that provide openness and neutrality for all stakeholders in all stages of the public procurement. The principle of transparency plays a key role in preventing practices of discrimination, corruption, favouritism and secret agreements jeopardising the integrity of the public procurement process. Also, the principle of transparency safeguards competition between the suppliers through providing the required openness for monitoring compliance with the procurement rules. Therefore, transparency plays a major role in achieving value for money and other national policies.

The principle of transparency is considered to embody four pillars: publicity for contract opportunities, publicity for the rules governing the procurement procedure, having rule-based decision making (i.e. constraints on discretion) and providing opportunities for

verification and enforcement of the decisions.[43] The principle of transparency is a key principle of EU law and Article 2 of Public-Sector Directive requires the contracting authorities to treat economic operators equally and non-discriminatorily and in a transparent way. In the same context, the CJEU held that "*obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed*".[44]

There are a wide range of provisions under TPP Act which are laid down directly for providing compliance with the principle of transparency or which indirectly serve the principle of transparency.[45] For instance, Article 5 underlines that the prevailing procurement procedures are open and restricted procedures, and Article 13 defines the time limits and methods of advertisement for providing the widest participation which correspond to the first pillar, publicity for contract opportunities.

Article 29 of TPP Act permits amendments only in the existence of material or technical errors or deficiencies that may affect the preparation of tenders or realisation of the work provided that such changes must be informed in writing to all tenderers who have purchased the tender documents properly and in a timely manner. Similarly, Articles 12 and 27 outline the documents and information that are permitted to be requested as qualification and

[43] See, Sue Arrowsmith, John Linarelli and Don Wallace, *Regulating public procurement: National and International Perspectives* (The Hague: Kluwer Law International, 2000), p. 72-73; Peter Trepte, 'Transparency and Accountability as Tools for Promoting Integrity and Preventing Corruption in Procurement: Possibilities and Limitations' in *OECD Papers No5* (Paris: OECD,, 2005), p. 15 et seq.; Sue Arrowsmith, 'The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies' in Barnard Catherine, Markus Gehring and Iyiola Solanke (eds), *Cambridge Yearbook of European Legal Studies 2011-2012* (Oxford: Hart Publishing, 2011-2012), p. 15-20.

[44] See, C-324/98 Telaustria Verlags GmbH and Telefonadress GmbH v. Telekom Austria AG [2000] ECR I-10745, p. 61.

[45] For a comprehensive review of the principle of transparency under TPP Act, see, Muzaffer Akdoğan, *Avrupa Birliği Uyum Sürecinde Türk İhale Rejiminin Şeffaflık Açısından Değerlendirilmesi* (İstanbul: On İki Levha Yayıncılık, 2010).

selection criteria and Article 37 identifies the award criteria which correspond to the second pillar, publicity of the rules governing the procurement procedure.

TPP Act also contains provisions that correspond to the third pillar, having rule-based decision making. For instance, Articles 6 and 40 require the tender commission to justify each of its decisions respectively. Similarly, Article 37 identifies the award criteria comprehensively for ensuring a rule-based decision making process and mandates that the reasons for excluding the tender from the evaluation or not finding the tender eligible has to be justified in detail in the award decision. Furthermore, Article 47 mandates the advertisement of the result of the tenders. TPP Act also provides a remedy system for the aggrieved bidders for monitoring compliance with the procurement rules which correspond to the fourth pillar, providing opportunities for verification and enforcement of the decisions.

Koçberber notes that there has been a considerable improvement in terms of compliance with the principle of transparency in procurements conducted according to TPP Act.[46] Akdoğan, on the other hand, maintains that disputes mainly arise with regard to the principle of transparency due to the drafting of technical specifications in unclear and incomprehensible ways.[47] Akdoğan argues that in the cases where the contracting authorities fail to comply with the transparency requirements, the human capacity of the contracting officers in terms of experience and training on public procurement plays a key role.[48]

5.4.1.2 Competition

In the most basic sense, the procurement process is a competition between economic operators where the winner acquires the contract from the public authority. The principle of competition plays a key role in achieving the best value for money.[49] Increasing competition

[46] Güler Koçberer, 'Türkiye'deki Kamu Alımı Uygulamalarında Şeffaflık ve Rekabet Edilebilirliğin Değerlendirilmesi' (2010) 2 *Sayder Dış Denetim Dergisi* 131, p. 136.
[47] Akdoğan, note[45], p. 191.
[48] Ibid, p. 192.
[49] For this correlation see, Arrowsmith, Linarelli and Wallace, note[43], p. 8 and 28-31.

is expected to generate more economic outcomes since competition creates a variety of options for the contracting authorities while procuring goods, services or works. Among all procurement stages, the pre-tender stage needs a special focus and in particular the contracting authorities have to eliminate any restrictions on participation so that competition can be provided to allow the widest possible participation in tenders. The principle of competition, in that regard, is closely related to the principle of transparency as it provides the publicity for the contract opportunity and eliminates the information asymmetry between the economic operators and the contracting authorities.

Besides the pre-tendering stage, the principle of competition also has to be respected during the tendering process. In this regard, the contracting authorities have to treat all tenderers equally; the procurement procedures have to be designed in a way that promotes the widest competition and qualification, selection and award criteria have to be defined and implemented objectively throughout the procurement procedures. Furthermore, the procurement system has to contain certain mechanisms to safeguard competition and prevent the abuse of the tenders.

TPP Act provides that the prevailing procurement procedures are open and restricted procedures and permits the usage of other procurement procedures only in the existence of certain circumstances which are outlined in detail. Furthermore, TPP Act requires the cancellation of the tenders in some cases if a certain number of tenderers do not participate or propose for the tender, i.e. in the absence of sufficient competition. Furthermore, TPP Act outlines the conditions for debarment from public tenders under Article 11 and prohibits certain actions or conduct supported by criminal sanctions in order to protect the integrity of the procurement process under Article 17. Similarly, Article 11, which regulates the technical specifications, provides that technical specifications must not contain any elements impeding competition and have to ensure equal opportunity for all participants. TPP Act also

provides under Article 28 that the price of the tender documents have to be determined by the contracting authorities in a way that the amount does not exceed its printing cost and does not impede competition.

5.4.1.3 Equal treatment

The equal treatment principle requires the contracting authorities to manage the public procurement process fairly by treating all stakeholders equally and providing all information, opportunities and facilities to all stakeholders equally. The equal treatment principle is a complementary aspect of the principle of competition since proper competition would not exist if procuring authorities act in a discriminatory manner. The principle of equality is also closely related to the principle of transparency since the transparency provides the required openness to reveal any discriminatory behaviour. Furthermore, the principle of transparency also provides equal distribution of information.

The equal treatment principle, which is outlined as one of the main principles of the Turkish public procurement law, derives from a constitutional provision. Article 10 of the Turkish Constitution provides that all individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any other such considerations. However, this principle does not mean absolute equality. A landmark case-law of the Turkish Constitutional Court has provided a comprehensive definition of this principle. The Constitutional Court ruled that equality before the law applies to individuals in the same legal status and the Court held that the principle of equality aims to provide legal equality rather than practical equality.[50] Indeed, this decision is in line with the case-law of the CJEU on equal treatment, where the CJEU held that "*the equal treatment principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless*

[50] The Turkish Constitutional Court, Case No. 2009/9, Decision No. 2011/103.

such treatment is objectively justified".[51] The legal status and extent of equal treatment, however, depends on the legal context in which it is applied. Article 16 of the Turkish Constitution provides that the fundamental rights and freedoms of foreigners could be restricted by law in a manner consistent with international law. In fact, such discrimination is currently imposed against the foreign economic operators and a comprehensive preferential procurement system has been established by TPP Act, which will be fully examined in the following relevant sections.

TPP Act accepts equality as a fundamental principle and provides disciplinary penalties for the public officers who fail to comply with the principle of equal treatment. Furthermore, there are a wide range of provisions under TPP Act that serve the principle of equality. For instance, in order to eliminate any vagueness Article 29 permits the tenderers to request further information regarding the tender documents. However, in such circumstances TPP Act provides that the given clarifications must be informed to all tenderers within a reasonable time before the deadline for submission of tenders in order to ensure equal treatment as well as fair competition.

Article 12 that regulates technical specifications provides that the specifications must ensure equal opportunities for all tenderers. Similarly, Article 56 entitles TPP Authority to review the tenders for any infringement of the equal treatment principle. In the same direction, Article 65, regulating the announcement and notification principles, provides that the tools to be used in electronic communication and their technical features must be compatible with commonly used and easily available communication and information technology products and underlines that the selection of these tools must be in line with the principle of equality.

[51] Joined Cases C-21/03 and C-34/03, Fabricom v État Belge [2005] ECR I-1559, para 27.

5.4.1.4 Reliability

The principle of reliability safeguards stability and functioning of the procurement process. The procurement process can achieve its goals if all actors of the process keep their commitments in set terms. The principle of reliability is twofold. The first aspect concerns the contracting authorities. As explained under the principle of transparency, the rules governing the qualification, selection and award procedure should remain unchanged. The strict restrictions on the amendment of the tender documents and transparency requirements both serve the principle of reliability from the contracting authorities' perspective. On the other hand, the restrictions for the tenderers on the withdrawal of their bids under Article 52 serve the principle of reliability from the tenderers' perspective. Gök contends that the principle of reliability ensures fair procurement proceedings and defines a reliable procurement as one where the economic operators will not hesitate to conduct further business with the contracting authorities.[52]

5.4.1.5 Confidentiality

The principle of confidentiality is interconnected with the principles of transparency and competition. The principle of confidentiality has been mandated for securing the bids and some details of the procurement until a specified stage of procurement in order to provide competition. It requires non-disclosure of the commercial secrets of tenderers and non-revealing of information that distorts competition among the economic operators. The principle of transparency requires public acknowledgement of the conditions of the procurement except bids and estimated cost, which are significant for ensuring competition. TPP Act contains various provisions to reinforce the principle of confidentiality. For instance, restriction on the disclosure of the estimated cost until the conclusion of the

[52] Yaşar Gök, 'Kamu İhale Hukukuna Hakim Olan İlkeler' (2010) 2 *Sayder Dış Denetim Dergisi* 12, p. 17.

procurement under Article 9 of TPP Act; rules for keeping secret details regarding business details and the technical and financial composition of bidders derive from the principle of confidentiality.[53]

5.4.1.6 Public supervision

It is a right of citizens to be informed about how the government is spending public money. This interest becomes more significant particularly for money utilised throughout the public procurement process since public procurement is considered to be the government activity most vulnerable to corruption.[54] Public supervision serves as an instrument both for preventing corruption and avoiding speculation about possible corruption. The principle of transparency is a major pillar of the principle of public supervision. The provisions in TPP Act like publicity of the public procurement transactions at all stages, announcement of the results, justification of all of the decisions given by public authorities and the necessity of keeping records of all of the transactions for a specified period are all derived from the principle of public supervision.

Apart from TPP Act, the Act numbered 5018 also contains strong commitments to public supervision in public spending. Accordingly, Article 7 of the Act numbered 5018 provides that the public has to be informed in a timely manner in order to ensure supervision of the acquisition and utilisation of all types of public resources, which is related to the principle of supervision as well as the principle of transparency.

5.4.1.7 Efficiency

Efficiency is another main principle pursued by TPP Act.[55] The principle of efficiency requires the contracting authorities to target the best value for money and to prevent usage

[53] The need to restrict the disclosure of the estimated cost is further discussed under Section(5.6.2).
[54] For the statistics on that matter see OECD, *Integrity in public procurement: good practice from A to Z* (Paris: OECD Publishing, 2007), p. 9.
[55] TPP Act also requires the technical specifications must aim efficiency. The substance of this requirement will be examined in depth under Chapter(6).

of public funds for unintended purposes, in the widest context to avoid corruption. Avoiding corruption is one of the most important objectives of many public procurement systems and is commonly related to the integrity principle in public procurement. The OECD defines the principle of integrity as "*the use of funds, resources, assets, and authority, according to the intended official purposes and in line with public interest*".[56] Parallel to TPP Act, Article 8 of the Act numbered 5018 provides that the public officials who are assigned duties and granted authorities for the acquisition and utilisation of public resources of all kinds are accountable and responsible for the effective, economic and efficient acquisition, utilisation, accounting and reporting of the resources on the basis of law and taking necessary measures to prevent abuse of such resources.

As discussed in Chapter 4, the prevention of corruption has always played a key role in the regulation of public procurement in Turkey. The prevention of corruption has been a top political priority and different steps have been taken in order to eliminate/minimise corruption. For instance, Turkey has been party to the following international agreements related to corruption:

- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[57]
- Council of Europe Criminal Law Convention on Corruption[58]
- Council of Europe Civil Law Convention on Corruption[59]
- The United Nations Convention against Corruption[60]

In addition to the international commitments on prevention of corruption, the Council of Ministers adopted a comprehensive strategy in 2010 entitled Enhancing Transparency and

[56] See, the OECD Recommendation of the Council on Enhancing Integrity in Public Procurement, 16 October 2008, available at <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=131&Lang=en>
[57] Ratification: 26.07.2000, Entry into force: 24 September 2000.
[58] Signature: 27.9.2001, Ratification: 29.3.2004, Entry into force: 1.7.2004.
[59] Signature: 27.9.2001, Ratification: 17.9.2003, Entry into force: 1.1.2004.
[60] Signature: 10.12.2003, Ratification: 9.11.2006.

Strengthening the Fight against Corruption (2010-2014).[61] The strategy requires the revision of TPP Act and recommends reinforcement of principles on transparency, which is considered a major tool to prevent corruption. Moreover, the Council of Ethics for Public Service was established within the Prime Ministry according to the Act numbered 5176, to adopt and observe the implementation of ethical attitude principles such as transparency, impartiality, honesty and accountability that should be observed by the public officials. The political determination, which is reinforced by international commitment and supported by an institutional framework on public ethics, is a significant contributor for improving the public perception of public procurement in Turkey.

5.4.2 The implementation principles

5.4.2.1 The prohibitions on mixed contracting

TPP Act does not permit mixed contracting. Article 5 provides that unless there exists a natural and justifiable connection, goods, services and works cannot be consolidated in the same procurement. In other words, TPP Act requires procurements of items having different features separately. This objective is related to the objective of efficiency and effectiveness in public spending. TPP Act considers that the best value for money could be achieved better in this way. Gök contends that such a prohibition has pragmatic consequences on competition since the economic operators who have expertise in a specific area would be discouraged to participate in a complex procurement combined with different kinds of procurement units which exceed their area of expertise.[62]

5.4.2.2 The prohibitions on partitioning

In order to prevent the circumvention of the law, Article 5 of TPP Act prohibits the division of contracts into lots with the intention of avoiding threshold values.[63] Indeed, the threshold

[61] The Council of Ministers, Decision no. 2010/56, OJ 22.02.2010/27501.
[62] Gök, note[52], p. 19.
[63] For threshold values see Section(5.5).

values have a significant impact on the procurement proceedings as they determine the permitted procurement procedures, advertisement requirements, and participation of foreign economic operators in the procurement proceedings. Intentional partitioning of the contracts for avoiding either threshold values or to circumvent procurement procedures can give rise to administrative and criminal liability.

5.4.2.3 The budgeting rules

TPP Act mandates that the procurement proceedings cannot be initiated unless a sufficient budget is allocated. This requirement may be considered redundant since it would be irrational for a contracting authority to initiate tenders that exceed its financial capacity. In fact, this principle is a milestone reform. The State Tender Act did not contain such a restriction and during the implementation period of the act, a considerable amount of public money was wasted through initiating a number of tenders for which remuneration was neither reserved nor allocated in the budget.[64]

TPP Act explicitly prohibits the commencement of public tenders that lack sufficient budget. TPP Act permits the commencement of projects which cover a period exceeding one fiscal year only under certain circumstances which are laid down under Article 62, taking into account the nature of the work (such as investment projects) or unless a specific act explicitly mandates the contracting authorities to conduct long-term procurements. This budgeting requirement also guides contracting authorities while appraising feasibility of a project.

5.4.2.4 The requirement of Environmental Impact Assessment

The Environmental Impact Assessment (hereafter 'EIA') is a core instrument of promoting sustainable development. It is based on the precautionary principles, which require the evaluation of the environmental impact of activities before they occur, and necessitates the

[64] Kamu İhale Kanunu Tasarısı ve Plan ve Bütçe ve Bayındırlık, İmar, Ulaştırma ve Turizm Komisyonları Raporları (1/930) available at <www.tbmm.gov.tr/sirasayi/donem21/yil01/ss794m.htm>

adoption of required actions in order to minimise the impact on environment. This procedure also encompasses a substantial social aspect since it requires an active public participation in the decision-making process.[65] The EIA process requires involvement of individuals, groups or any stakeholders who are considered to be positively or negatively affected by a proposed project.

The EIA procedure was introduced to Environment Act in 1993 and was also incorporated into Article 5 of TPP Act through the Act numbered 4964 of 2003. TPP Act provides that where the related legislation requires an EIA report for a works project, a positive report must be obtained before the initiation of procurement proceedings. Any works procurements initiated urgently during to natural disasters are immune from the EIA requirement. TPP Act does not define the details of the EIA procedure, but only contents itself with making reference to the related legislations.

The only explicit reference to the environment pillar of sustainable development within TPP Act is the EIA requirement. The substance and extent of this requirement needs to be examined in detail to reveal the level of environmental sustainability that could be achieved through TPP Act.

Article 2 of Environment Act defines EIA as follows:

> "The studies that are conducted to determine the favourable and adverse effects of projects, which are planned to be brought to life, on environment, to establish and assess the measures to be taken to prevent or minimize the adverse effects on the environment along with the studies that will be conducted to monitor and control the implementation of the projects and to establish and assess the location of choice and the technology alternatives"

[65] The public participation aspect is evaluated in the conjunction with the participation of citizens to public decision-making through democracy. See, Abdurrahman Saygılı, *Çevre Hukuku Açısından Çevresel Etki Değerlendirmesi* (Ankara: İmaj Yayınevi, 2007), p. 213.

The EIA requirement is implemented the EIA Regulation which was first issued in 1993 and revised substantially in 2008.[66] The EIA Regulation lays down the conditions where an EIA procedure is mandatory. Annex I of the EIA Regulation exhaustively outlines works which are subject to the EIA procedure. If procurement of work falls within the scope of Annex I, the contracting authorities must obtain a positive EIA report from the Ministry of Environment and Urban Planning before initiating any procurement procedure. The Preamble of TPP Act states that requiring an EIA procedure in advance serves to the public benefit and prevents utilisation of unnecessary expenditure.

On the other hand, Annex II of the EIA Regulation outlines works which necessitate a decision of the Ministry of Environment and Urban Planning on whether an EIA process is required. If procurement of works falls within the scope of Annex II, the contracting authorities must appeal to the Ministry of Environment and Urban Planning and should not carry out the procurement procedures unless the Ministry issues a decision stating that the work does not require an EIA procedure.

The introduction of EIA requirements to TPP Act is a significant step on the way to promote sustainable development through public procurement. However, Yilmaz maintains that the coverage of the EIA requirements has been limited and certain projects have been removed from the scope in the course of time with no satisfactory justification.[67] However, certain exemptions were annulled by the Turkish Constitutional Court.[68]

The main coverage of the EIA procedure is regulated under a secondary, administrative regulation which can easily be modified. This method of regulation has facilitated the modification of requirements, which in certain cases were tailored according to the needs of

[66] OJ 17.07.2008/26939.
[67] Nükhet Turgut Yılmaz, *Çevre Politikası ve Hukuku* (Ankara: İmaj Yayınevi, 2009), p. 238.
[68] For instance, the Court annulled the exemption for activities conducted for petroleum, geothermal resources and metals. See, Case No. 2006/99, Decision No. 2009/9.

a specific project. Furthermore, it is argued that the public participation aspect of the EIA, which adds a social aspect to the EIA procedure, is not adequately implemented in Turkey; the public participation is either conducted in a limited context or the public decision is not valued and is not integrated into the final decision.[69] Nevertheless, the only explicit reference to the environment pillar of sustainable development within TPP Act is the EIA requirement.

5.5 Threshold Values

Table 3 – Updated threshold values by 2012[70]

Category I: Goods and services procurement of contracting authorities included in the general and annexed budgets	811,897 Turkish Liras (equivalent to about 340,996 EUR)
Category II: Goods and services procurement of other covered contracting authorities	1,353,164 Turkish Liras (equivalent to about 568,328 EUR)
Category III: Works procurement of covered contracting authorities	29,769,751 Turkish Liras (equivalent to about 12,503,295 EUR)

The threshold values provided under TPP Act serve different purposes. Firstly, the threshold values determine the advertisement requirements and methods of advertisements. Article 13 of TPP Act provides time limits, means of publication (i.e. newspaper, the Public Procurement Bulletin, the Official Gazette) and the type of publications (i.e. publication locally, nationally, internationally and electronically) for each threshold. Secondly, the threshold values are important when determining the procurement procedure to be followed. TPP Act permits the pursuit of restricted and negotiated and direct procurement procedures falling above certain thresholds. Thirdly and most importantly, the threshold values are

[69] Turgut Yılmaz, note[67], p. 238; For the local implementation examples of EIA procedure see, Ömer Aykul, *Ekolojik Hukuk (Eko-Hukuk)* (Ankara: Seçkin, 2010), p. 216-260. See also, Dilek Unalan and Richard Cowell, 'Adoption of the EU SEA Directive in Turkey' (2009) 29 *Environmental Impact Assessment Review* 243.
[70] These thresholds are determined and updated annually in accordance with the Wholesale Price Index of the former year. 1 Turkish Lira is equivalent to about 0.42 EUR (01.03.2012, the Turkish Central Bank FX Buying Rate).

important for the participation of foreign suppliers in the public tenders and implementation of the preferential procurement.

5.6 Preparation of the tendering procedures

5.6.1 Identification of the need

The first stage of procurement is determination of the need by the contracting authority. As explained previously, the distinction between goods, services and works has concrete consequences for the determination of the procurement procedure to be followed. Therefore, the contracting authorities need to ensure that their needs correspond to the correct definition of goods, services or works. As explained in Chapter 3, the decisions to purchase, not to purchase and what to purchase, as well as timing, amount and quantity of purchase, in the long term have consequences on energy consumption and waste production. Therefore, if the actual need is assessed properly, the public authority can contribute to the protection of the environment without making any further structural changes in the procurement procedures.[71]

5.6.2 Determination of the estimated cost

The second stage of procurement is determination of the estimated cost by the contracting authority. Before commencing the procurement proceedings, the contracting authority is required to make a comprehensive price investigation and needs to determine an estimated cost excluding the value added tax for the prospective procurement. In contrast to the State Tender Act, TPP Act grants broad discretion to the contracting authorities and permits the usage of any means of research while calculating the estimated cost. The contracting authority needs to rely on genuine figures and they need to indicate the method of calculation

[71] Chapter(3):Section(3.4.3).

and any estimates using a separate calculation chart with all justifications. Article 62(e) of TPP Act permits the contracting out of determination of the estimated cost. [72]

As highlighted by Doğanyiğit, the estimated cost is a significant element of the procurement process rather than a technical detail.[73] The estimated cost is the basis for the threshold values and other monetary limits; hence it determines the requirements and methods of advertisement, the procurement procedures that can be followed and applicability of national preferences and, inter alia, affects other significant stages of the procurement. Furthermore, as explained before, the procurement proceedings cannot be initiated unless a sufficient budget is allocated. The estimated cost indicates whether the procurement is in the financial capacity of the contracting authority, i.e. whether the contracting authority is entitled to conduct the procurement. Although TPP Act requires the contracting authorities to conduct market research to reveal an approximate cost of procurement, Serdar,[74] Doğanyiğit,[75] and Kaplan[76] contend that the contracting authorities still adopt a practice of relying on the outdated civil works price analysis while procuring works which have significant differences from the actual costs.

5.6.3 Allocation of the budget

The third stage of the procurement process is the allocation of the budget that covers the estimated cost of the prospective purchase.

5.6.4 Establishment of the tender commission

The contracting officer, who is authorised and liable to utilise spending in each public body, is required by Article 6 of TPP Act to assign a tender commission, which consists of at least

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[72] In such circumstances the contractors providing consultancy services for the subject matter of the procurement cannot participate in the tender of such work. See, Chapter(7):Section(7.2.2).
[73] Saadettin Doğanyiğit, 'İhalenin Ruhu: Yaklaşık Maliyetin Gizliliği' (2010) 2 *Sayder Dış Denetim Dergisi* 95, p. 95.
[74] Serdar, note[39], p. 37.
[75] Doğanyiğit, note[73], p. 98.
[76] Sami Kaplan, 'İdeal Bir Kamu İhale Kanunu ve İdeal Bir Kamu İhale Kurumu ve Kurulu Nasıl Olmalıdır? Fonksiyonel Bir Model Çalışması' (2012) 162 *Maliye Dergisi* 18, p. 30.

five members in odd numbers, one chairperson, at least four personnel of the related contracting authority and personnel responsible for accounting and finance, together with its substitute members. The commission decisions must be taken by majority voting and abstention is not allowed. The principal decision-making body throughout the public procurement process is the tender commission.[77]

5.6.5 Time limits and advertisement of contract opportunities

TPP Act provides various time limits taking into account the estimated cost and subject matter of procurement and relies on different mediums such as the Public Procurement Bulletin[78], local or nationwide newspapers, depending on the estimated cost of the contract:

Table 4 - Time limits and advertisement of contracting opportunities[79]

Estimated Cost Interval (2013)	Subject of Procurement	Procurement Procedure	Minimum Time Period	Means of Publication
0 - 88,578 TL	Goods Services	Open Restricted Negotiated	At least 7 days before the tender/last application date	In at least two local newspapers
0 – 177,163 TL	Works	Open Negotiated Restricted	At least 7 days before the tender/last application date	In at least two local newspapers
88,578 - 177,163 TL	Goods Services	Open Negotiated	At least 14 days before the tender date	Local newspaper and the PP Bulletin
		Restricted	At least 7 days before the last application date	
177,163 - 1,476,421 TL	Works	Open Negotiated	At least 14 days before the tender date	Local newspaper and the PP Bulletin
		Restricted	At least 7 days before the last application date	
177,163 TL - Threshold Values	Goods Services	Open Negotiated	At least 21 days before the tender date	Local newspaper and the PP Bulletin
		Restricted	At least 7 days before the last application date	
1,476,421 TL - Threshold Values	Works	Open Negotiated	At least 21 days before the tender date	Local newspaper and the PP Bulletin
		Restricted	At least 7 days before the last application date	

[77] For a comprehensive review see Chapter(8):Section(8.3).

[78] The Public Procurement Bulletin is an electronic platform, which is open to public access at <http://istekli.ihale.gov.tr>

[79] This table is an updated version of the table in Sakire Kural and Umit Alsac, 'Public Procurement Procedures in Turkey' (2006) 6 *Journal of Public Procurement* 100, p. 111-112.

Equal to or higher than threshold values	Goods Services Works	Open	At least 40 days before the tender date	The PP Bulletin
Equal to or higher than threshold values	Goods Services Works	Restricted	At least 14 days before the last application date	The PP Bulletin
Equal to or higher than threshold values	Goods Services Works	Negotiated	At least 25 days before the last application date	The PP Bulletin

5.7 The procurement procedures

The selection of the procurement procedure has substantial legal consequences for the principles of transparency, competition and equal treatment. For this reason, TPP Act permits the use of certain procurement procedures only in the existence of certain circumstances. TPP Act provides three procurement procedures: open, restricted and negotiated procedures.[80] It is to note that TPP Act does not regulate the competitive dialogue procedure, which is already regulated under Article 29 of Public-Sector Directive.

The recent statistics for the implementation of these procurement procedures and their monetary equivalent are as follows:[81]

Table 5 - 2012 Statistics on Procurement Procedures

	Number of tenders	**Percentage based on number**	**Amount (1,000 TL)**	**Percentage based on amount**
Open	71,414	75.83%	61,977,853	80.87%
Restricted	624	0.66%	7,749,420	10.11%
Negotiated	22,135	23.50%	6,907,437	9.01%
TOTAL	94,173	100.00%	76,634,709	100.00%

[80] For a detailed examination of these procedures see, ibid, p. 114-118.
[81] Kamu İhale Kurumu, note[35], p. 4.

5.7.1 Open procedure

Article 19 of TPP Act defines the open procedure as "*the procedure where any tenderers may submit their tenders*". This mostly corresponds to the definition of open procedure under Article 1(11)(a) of Public-Sector Directive, which defines open procedure as the procedure "*whereby any interested economic operator may submit a tender*". TPP Act, under certain conditions, permits the contracting authorities to restrict participation of foreign suppliers in tenders below thresholds.[82] Therefore, the right to participate in the tenders conducted through an open procedure is subject to nationality barriers.

Article 5 of TPP Act, which defines the general and implementation principles of TPP Act, lays down that open and restricted procedures are the prevailing procurement procedures and other procurement procedures can only be followed in exceptional circumstances. This approach is in line with Article 28(2) of Public-Sector Directive. The statistics demonstrate that the dominant procurement procedure applied in Turkey is the open procedure, which was used for 75.83% of the procurements, corresponding to 80.87% of total procurements in monetary terms.

5.7.2 Restricted procedure

According to Article 20 of TPP Act, restricted procedure is a procedure in which tenderers who are invited following a pre-qualification procedure are entitled to submit their tenders. This procedure is defined similarly as the procedure "*in which any economic operator may request to participate and whereby only those economic operators invited by the contracting authority may submit a tender*" under Article 1(11)(b) of Public-Sector Directive. TPP Act permits the usage of restricted procedures for:

(1) Procurement of goods, services or works where an open procedure is not applicable as the nature of the subject necessitates speciality and/or high technology,

[82] Chapter(7):Section(7.6).

(2) Procurement of works where estimated costs exceed half of threshold values.

For the first option, the contracting authority needs to evaluate the conditions and needs comprehensively and has to justify its selection by proving that the open procedure is inadequate because of the complexity of the need. However, there is no need for justification for the second option since the provision provides a wider discretion once the estimated costs exceed half of threshold values for the procurement of works. Indeed, the rule regulation the second option was challenged by the main opposition party in 2009 before the Turkish Constitution Court on the grounds that permitting the contracting authorities to follow the restricted procedure without requiring any complexity aspect have the risk of creating monopolies and cartels in the construction markets, so there was not a violation of Article 167 of the Constitution.

The Constitution Court, however, held that this provision does not bear such a risk of creating monopolies and cartels, so there was not a violation of Article 167 of the Constitution.[83] The Court established its reasoning on the other provisions of TPP Act which require meeting objective qualification criteria for being qualified as a tenderer that also apply to the restricted procedures and which require the existence of a certain number of tenderers and bids in order to conduct the procurement through the restricted procedure. Furthermore, the Court highlighted the possibilities of initiating review procedures and bringing the procurement decisions conducted through the restricted procedure as a supplementary argument, preventing the amendment from being considered a violation of Article 167 of the Constitution.

5.7.3 Negotiated procedure

In some circumstances the contracting authority may need to negotiate the technical details, implementation methods and conditions of contract directly with the suppliers and conclude

[83] See, the Turkish Constitutional Court, Case No. 2009/9, Decision No. 2011/103, Section II(2)(a).

the contract without a tendering stage. The negotiated procedure provides flexibility for the contracting authorities in such circumstances. Article 4 of TPP Act defines the negotiated procedure as "*a procedure which can be used in cases specified in this Act and conducted in two stages, whereby the contracting authority negotiated with the tenderers about the technical details, implementation methods, and, in certain cases, the price*". Article 1(11)(d) of Public-Sector Directive defines the negotiated procedure as a procedure "*whereby the contracting authorities consult the economic operators of their choice and negotiate the terms of contract with one or more of these*". The negotiated procedure regulated under TPP Act covers both the negotiated procedure with prior publication of a contract notice and the negotiated procedure without publication of a contract notice, which is regulated under Public-Sector Directive.

As stated above, the main procurement procedures are open and restricted procedures. The negotiated procedure is an exceptional procurement procedure and has to be interpreted as narrowly as possible since it curtails competition between the economic operators substantially. Taking this fact into account, TPP Act limits implementation of the negotiated procedure to the following circumstances:

a) No tender is submitted in open or restricted procedures,
b) It is imperative to conduct the tender procedures immediately, due to unexpected and unforeseen events such as natural disasters, epidemics, risk of losing lives or properties or events that could not be predicted by the contracting authority,
c) It is imperative to conduct the tender procedures immediately, due to occurrence of specific events relating to defence and security,
d) The procurement is of a character requiring a research and development process, and not subject to mass production,
e) Due to specific and complex characteristics of the works, goods or services to be procured, it is impossible to define the technical and financial aspects clearly,
f) Goods, material and service procurements by contracting authorities with estimated costs of up to 47,633Turkish Liras.

TPP Act requires advertisement for the circumstances stated in sub-paragraphs (b), (c) and (f). These circumstances mostly correspond to the negotiated procedure with prior publication of a contract notice, which is regulated under Article 30 of Public-Sector Directive. In these circumstances the contracting authority must advertise the contract and hold a competition. However, competition, compared with other procedures, is more flexible and the contracting authority has a wide discretion on discussion with each economic operator. On the other hand, for the circumstances stated in sub-paragraphs (a), (d) and (e), there is no need to make any advertisement. These circumstances mostly correspond to the negotiated procedure without publication of a contract notice, which is regulated under Article 31 of Public-Sector Directive. In such circumstances, the contracting authority can simply negotiate a contract with one or more providers, without any advertisement and without conducting any kind of competition.

The negotiated procedure is argued to be the most abused public procurement procedure, which impedes competition in the Turkish public procurement market significantly.[84] Some contracting authorities even rely on the negotiated procedure for procuring items that they require on a daily basis. TPP Authority underlines out that the negotiated procedure is an exceptional procurement procedure; hence, the contracting authority has to prove the existence of conditions objectively.[85]

Indeed, the broad margin of discretion granted to the contracting authorities to discuss each aspect of the need could also be used for addressing sustainable development considerations. As discussed in Chapter 3, there are a diverse range of constraints challenging the contracting authorities while identifying the sustainable solutions, in particular when the environmental and social standards are not comprehensively elaborated. There could be cases where data

[84] See, Uz, note[23], p. 197 et seq.
[85] For instance see, TPP Authority, Decision No. 2009/UH.I-2609, 26.10.2009.

availability and uncertainty challenge the contracting authorities since cost data is often confidential or difficult to collect. In that regard, the contracting authorities could benefit from the experience of the private sector and could use the negotiation procedure for tailoring a sustainable solution in accordance with the specific context of the contracting authority. The principle of confidentiality, which is amongst the general principles pursued by TPP Act, can provide protection during the negotiations in cases where the private sector hesitates to propose innovative solutions for the sake of protecting trade secrets.

5.8 Other procurement methods

5.8.1 Direct procurement

Article 22 of TPP Act permits the contracting authorities to directly obtain goods, services or works from the suppliers without advertising, without receiving any securities and without establishing a tender commission. In such circumstances, the need is permitted to be obtained through market price research without following any tendering proceedings.

The direct procurement method is an exceptional method and aims to help the contracting authorities while they meet their low cost needs.[86] This method has a significant impact on competition, transparency, equal treatment and public supervision, which are the general principles of TPP Act. In order to prevent possible abuses of this method, TPP Act applies a monetary limit. According to Article 62(i) of TPP Act, unless otherwise approved by TPP Authority, the monetary limits for direct procurement cannot exceed 10% of the appropriations to be allocated in contracting authorities' budgets for this purpose. As statistics indicate, procurement through the direct procurement method consisted of 11.18% of the overall procurement amounts that were conducted in 2012.[87]

[86] For a comprehensive examination of direct procurement method see, İbrahim Çeliktaş, '4964 sayılı Kanunla 4734 Sayılı Kamu İhale Kanununda Yapılan Değişikliklerin, İhale Usulleri ve Bunların Sözleşmeye Bağlanmaları Açısından Değerlendirilmesi' (2003) 50-51 *Sayıştay Dergisi* 103, p. 111-118.
[87] Section(5.3.5).

5.8.2 Design contests

Another procurement method regulated under TPP Act is design competitions. According to Article 23 of TPP Act, the contracting authorities are permitted to conduct contests, with or without prizes, in which the winner is selected through an evaluation by a jury, in order to acquire the required plans and projects relating to architecture, landscaping, engineering, urban design projects, urban and regional planning and fine arts. The only condition for this method is advertising such contests in a way to ensure a competitive environment in accordance with the principles and procedures stated in the related legislation. This approach of TPP Act is mostly in line with the approach of Public-Sector Directive laid down between Articles 66 to 74.

5.9 The review procedures

A significant contribution of TPP Act is the introduction of a review system to provide effective remedies for any aggrieved economic operators.[88] With regard to the procurement procedure, Article 54 of TPP Act provides that the potential tenderers, the tenderers and candidates who claim that they have suffered from a loss of right or damage or are likely to suffer a loss of right or damage within the tender procedures are entitled to file a complaint and appeal against the procurement decisions.

The potential tenderer, the tenderer and candidates are defined under Article 4 of TPP Act. To recap, 'the potential tenderer' means that the economic operator (natural or legal persons, or joint ventures formed by those persons) operating in the field of the subject matter of the contract who has purchased the tender or pre-qualification documents; 'the tenderer' (or bidder) stands for the supplier, service provider or works contractor submitting a bid for the

[88] For a comprehensive analysis of the legal remedies introduced by TPP Act see, Servet Alyanak, 'An overview of legal remedies in public procurement in Turkey' (2006) 5 *Public Procurement Law Review* 286; Hüseyin Bilgin, '5812 Sayılı Kanun ile Kamu İhale Kanunu'nda Yapılan Değişiklikler' (2009) 86 *Türkiye Barolar Birliği Dergisi* 339; Bahattin Işık, 'İhale Mevzuatında 5812 Sayılı Kanun İle Yapılan Önemli Değişiklikler' (2010) 2 *Sayder Dış Denetim Dergisi* 57.

procurement of goods, services, or works; and 'candidate' means natural or legal persons, or joint ventures formed by those persons submitting tenders to procurement of works.

The review system could be separated into two stages: pre-contractual review and contractual review.

5.9.1 Pre-contractual review

TPP Act established a three-tier system for pre-contractual review which applies to all procurement procedures regardless of the threshold values:

a) Complaint application to the contracting authority (administrative review)
b) Appeal application to the Public Procurement Board (hereafter 'the PP Board') (administrative review)
c) Appeal to administrative courts (judicial review)

The complaint against the contracting authority and appeal applications to the PP Board are mandatory procedures which must be exhausted before bringing any claims before the competent administrative courts.

TPP Act regulates the substantial principles of the review system and leaves details to the implementation regulation entitled the Regulation on Administrative Applications against Procurements (hereafter 'the Review Regulation'). Article 5 of the Review Regulation distinguishes between standing of potential tenderers, tenderers and candidates, and outlines the extent of claims that can be brought for each economic operator respectively.

In this context, potential tenderers are only allowed to raise complaints in relation to the matter provided in the announcement and pre-qualification documents, and the conflicts between such matters and the administrative practices. As will be discussed in Chapter 8, TPP Act lays down an additional qualification criterion which applies to all procurement procedures: purchasing the tender documents.[89] In order to be eligible to ask for review of

[89] Chapter(8):Section(8.4).

the procurement decisions (i.e. to be qualified as a potential tenderer), it is mandatory to purchase the tender documents, which indeed limits the right to review procurement decisions significantly. The candidates, on the other hand, are only permitted to make complaints against any procurement decisions given regarding implementation of qualification and selection criteria. Within the economic operators, only the bidders are entitled to ask for a review of whether award criteria, submission of tenders or conclusion of the tendering proceedings are appropriately applied to the procurement in question.

The first stage of the pre-contractual review is complaint to the contracting authority. The contracting authority could provide three remedies for the aggrieved economic operators. The first option is that the contracting authority could take corrective action. In this regard, the contracting authority could revise its decision and substitute in a new decision where the problem can be remedied without interrupting the tender proceedings. This method provides efficient recovery in the existence of minor non-compliances with the regulatory rules. On the other hand, in the existence of major non-compliances and if the problem could not be remedied through a corrective action, the only option is cancelling the tender proceedings and re-initiating the whole process from scratch. The last option is rejecting the complaint if the contracting authority considers that regulatory framework was implemented properly.

According to Article 56 of TPP Act, the second stage of the pre-contractual review for any economic operators not satisfied with the decision of the contracting authority is to complain to the PP Board, which is established within TPP Authority, within 10 days of the decision of the contracting authority. The PP Board is the competent review body before any judicial review. The candidates, the tenderers or potential tenderers who have submitted a complaint application to the contracting authority or those who have found the decision of the authority inappropriate are permitted to file an appeal to the Board before the signature of the contract. The PP Board is also entitled to hear the parties and relevant persons, if deemed necessary.

The powers of the PP Board on the procurement proceedings are parallel to the contracting authorities. All contracting authorities subject to TPP Act are obliged to execute the decisions of the PP Board immediately without any further enforcement or execution procedure. The contracting authorities do not have the discretion to question the subsidiarity of the decision of the PP Board. Similarly, the decisions of the PP Board are binding to all economic operators related to the tendering procedure. The decisions of the PP Board are only subject to judicial review by the administrative courts.[90] Taking into account the importance of public procurement for the fulfilment of public services, TPP Act provides that the proceedings taken against the PP Board have priority during the judicial proceedings.

5.9.2 Contractual review

Any claims arising following the conclusion of the contract must be brought directly before the courts. In the same direction, TPP Act does not provide compensation for damages and TPP Authority is not entitled to decide upon compensation claims. Therefore, any compensation claims could only be requested from the courts regardless of the stage, i.e. pre-contractual or contractual stages.

5.9.3 A critique on the review procedures

Even though the introduction of a special review procedure for procurement disputes is a significant reform, the system could be criticised from different aspects. Firstly, the limited recognition of standing before the PP Board significantly curtails addressing procurement violations and receiving a remedy. Furthermore, the legal standing issues are mostly regulated under the secondary administrative regulations. In order to provide full respect to the rule of law, the essentials of the legal standing must be directly regulated under the PP act rather than through secondary regulations.

[90] The recourse to judicial review derives from Article 57 of TPP Act as well as Article 125 of the Turkish Constitution which recognises recourse to judicial review against all actions and acts of public bodies.

Secondly, the PP Board imposes high application fees for lodging any appeal. Işık maintains that the high application fees are imposed in order to prevent the economic operators from abusing the review procedures.[91] Barçın compares the number of complaints lodged before the PP Board and concludes that the numbers of cases are diminishing over time, which is interpreted as a contribution and success of TPP Authority.[92] In fact, the diminishment of complaint applications could not be interpreted as success. The strict regulation of right of standing and high application fees contradicts the general principles pursued by TPP Act, in particular, the principle of public supervision.

Thirdly, Article 53(b) of TPP Act, which conferred TPP Authority the discretion to investigate ex-officio any violation of TPP Act, was abolished in 2008 through the Act numbered 5812. In other words, TPP Act is entitled to investigate a procurement dispute only if such a dispute is addressed by an economic operator. However, this amendment was brought before the Constitutional Court by the main opposition party in 2009. The opposition party argued that the amendment is undermining the public interest, which is considered to be within the scope of the definition of rule of law that is laid down under Article 2 of the Turkish Constitution as well as by case-law of the Constitutional Court. However, the Court ruled that the definition of public interest is a political matter and the legislator has the discretion to define and identify scope and substance of public interest, taking into consideration the existing needs of the country.[93] The Court highlighted that there are still possibilities to conduct pro-active reviews of any procurement decisions by the government bodies and all decisions remain subject to judicial review. In this regard, the Court dismissed the request for annulment.

[91] Işık, note[88], p. 60.
[92] Barçın, note[2], p. 127.
[93] The Turkish Constitutional Court, Decision No. 2009/9, Judgment No. 2011/103, Date:16.6.2011.

The restriction of the Authority's competence is regarded by Bilgin as an improvement since the amendment is considered to contribute to the reduction of the workload of TPP Authority.[94] In fact, TPP Authority could only provide uniform implementation of TPP Act by all covered contracting authorities throughout Turkey if it maintains its extensive powers. Therefore, the diminishment of the powers of TPP Authority and the abolishment of its power to conduct ex-officio investigations could not be justified with the excuse of a reduction of overall workload.

Another major shortcoming of the system is caused by the powers of the PP Board. As explained above, TPP Act does not entitle either the contracting authorities or the PP Board to compensation for damages. TPP Authority's powers are argued to be limited and inefficient in settling the procurement disputes.[95] Considering the EU directives addressing the review and remedy procedures in the award of public contracts and in particular, the case-law of the CJEU on 'effectiveness',[96] TPP Authority needs to have the powers and adequate capacity to guarantee effectiveness of the review system as a whole.

5.10 The accession of Turkey to the GPA

Turkey has been a member of the WTO since 1994. However, the impact of the WTO on Turkey in terms of public procurement has been relatively limited. Turkey has not yet signed the GPA. Turkey, as a developing country, has always been reluctant to join the GPA, which mostly the developed countries are party to. In that regard, Turkey has contented itself with being an observer to the GPA since 1996.[97] The GPA, in fact, attempts to balance the needs of both developing and developed countries in order to encourage wider participation.

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[94] Bilgin, note[88], p. 362.
[95] See, Kaplan, note[76], p. 42; Ateş, note[34], p. 121.
[96] For instance see, Case C-390/98 HJ. Banks & Co. Ltd v. The Coal Authority and Secretary of State for Trade and Industry [2001] ECR I-6117, para 121; Case C-92/00 Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien [2002] ECR I-5533, para 67.
[97] The current parties and observers including the countries negotiating accession to the GPA are available at <www.wto.org/english/tratop_e/gproc_e/memobs_e.htm>

Article V of the GPA outlines the extent of the special and differential treatment for developing countries and allows them to negotiate exclusions from the rules on national treatment with respect to certain entities, products or services. It is noteworthy that on 15 December 2011, the Ministers of the Parties to the GPA reached a political agreement on renegotiation of the GPA, and most importantly, the Ministers agreed that the previously negotiated revised GPA text could come into effect. The revised GPA text is considered by Anderson as clarifying and improving the transitional measures, i.e. the special and differential treatment, available to developing countries that accede to the GPA.[98]

Turkey is neither party to the GPA nor is it negotiating accession. Indeed, the participation of Turkey in the GPA needs to be evaluated together with its membership negotiations with the EU. As explained in Chapter 4, the most criticised provision under the Public Procurement Act by the EU is the provision on national preferences, and Turkey does not plan to abolish the national preferences system until it is admitted to the EU as a member state. It is apparent that Turkey will not fully open its public procurement market to developed countries before it becomes a full member of the EU. It is noteworthy that Mavroidis and Hoekman had argued in 1995 that Turkey did not join to the GPA in order to maintain the price preference policies.[99] The past few years seems to have justified this correlation put forward by Mavroidis and Hoekman since Turkey is still maintaining the preferential procurement and is not yet party to the GPA.

5.11 The international agreements having an impact on public procurement

Aside from the Customs Union agreement with the European Union, Turkey has signed free trade agreements with the European Free Trade Association (consisting of the Republic of

[98] Robert D. Anderson, 'The conclusion of the renegotiation of the World Trade Organization Agreement on Government Procurement: what it means for the Agreement and for the world economy' (2012) 3 *Public Procurement Law Review* 83, p. 85.
[99] Petros C. Mavroidis and Bernard M. Hoekman, 'The WTO's Agreement on Government Procurement: expanding disciplines, declining membership?' (1995) 2 *Public Procurement Law Review* 63, p. 73.

Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Swiss Confederation), Albania, the Former Yugoslav Republic of Macedonia, Bosnia-Herzegovina, Croatia, Tunisia, Morocco, the Palestinian Authority, Syria, Israel, Egypt and Georgia. The common feature of these free trade agreements is that they have provisions on public procurement. Each free trade agreement invites the signatory parties to consider the effective liberalisation of their respective public procurement markets. The liberalisation is considered as an integral objective of the free trade agreements. Furthermore, the free trade agreements aim to ensure reciprocal respect to transparency and non-discrimination in the public procurement markets. In this context, the free trade agreements require a gradual adjustment of the conditions governing the participation in contracts awarded by public authorities and public undertakings, and by private undertakings which have been granted special or exclusive rights.

5.12 Conclusion

The Turkish Public Procurement Law has undertaken two major reforms and the main motivations for each reform have always been unification, simplification and modernisation of the legal and institutional framework on public procurement in conjunction with the liberalisation policies. TPP Act, enacted in 2002, had succeeded in unifying the institutional framework; however, it failed to unify the legal framework due to excessive derogations which were introduced to TPP Act inconsistently. Nevertheless, TPP Act mostly shows similarities and compliance with the EU Procurement Directives. Furthermore, the Turkish EU Strategy highlights that a new public procurement reform will be conducted in order to bring the Turkish public procurement law in line with the EU Procurement Directives.

When the institutional and regulatory framework on public procurement is examined, the following conclusions could be summarised with regard to sustainable procurement. This chapter can be briefly summarised as follows:

- The diversity of procurement rules emerges as the first significant obstacle to implement sustainable development policies in Turkey. The unjustified exclusions complicate the pursuit of any coherent horizontal policies.
- Amongst the general principles, only the requirement of environmental impact assessment falls within the scope of sustainability. However, this requirement only applies to the procurement of certain works. Lack of a direct provision mandating achieving social and environmental objectives for procurements of goods, services and works is a significant shortcoming.
- On the other hand, the procurement procedures whereby the contracting authorities have a wide margin of discretion to negotiate the technical aspects could be used as tools for the pursuit of sustainable development objectives, despite the lack of an explicit mandate.
- Although different possibilities exist to address sustainable development objectives, there is a need to identify an explicit mandate requiring the contracting authorities to address the social and environmental impact of their procurement activities.

In the following chapters a more comprehensive analysis will be conducted with regard to the possibilities of addressing sustainable development objectives under the technical specifications, qualification criteria, award criteria and contract performance clauses.

CHAPTER 6

The pursuit of sustainability concerns within technical specifications

6.1 Introduction

Technical specifications are the tender documents in which the contracting authorities specify elements, components, features and any relevant functions of the goods, services and works that they intend to procure. The formulation of technical specifications has a significant impact on the competition between economic operators. On these grounds, the rules that the technical specifications need to comply with are elaborated through a detailed set of rules and have been subject to rigid regulation by both the EU and Turkey. The EU law on that matter has been developed over time and has mostly been shaped by the case-law of the CJEU. The formulation of technical specifications under the Turkish Public Procurement Act (hereafter 'TPP Act) has mostly been modelled after Public-Sector Directive.

This chapter has two main objectives. Firstly, it aims to examine the rules governing technical specifications under Public-Sector Directive and TPP Act and to evaluate the extent of compliance and non-compliance of TPP Act with Public-Sector Directive. Secondly, it aims to analyse the legitimacy of addressing sustainability concerns under the technical specifications. In that regard, this section questions to what extent the contracting authorities have discretion to address sustainability concerns at both the EU and Turkish levels.

6.2 The rules governing technical specifications under the EU law

As discussed in Chapter 3, the legal framework governing technical specifications is subject to rules that mostly emanate from the jurisprudence of the CJEU. It is therefore essential to examine the case-law of the CJEU to fully set out the legal context of technical specifications.

6.2.1 The case-law related to the TEU

The CJEU established an important principle regarding the circulation of goods throughout the internal market in its landmark decision of *Cassis De Dijon* in 1979.[1] A company named Rewe-Zentral AG intended to import *Cassis De Dijon*, a low-alcohol liqueur, into Germany from France, which was restricted on the grounds that the liqueur was not of sufficient alcoholic strength to be marketed in Germany. This action was challenged by the company as a measure having the equivalent effect as a quantitative restriction and the national court seized of the dispute referred the matter to the CJEU for a preliminary ruling on the interpretation of Articles 30 and 37 of the EEC Treaty.

The CJEU held that that marketing of the products in question must be accepted unless the rules on restricting free movement of goods satisfy mandatory requirements.[2] In this context, the Court ruled that the prohibition on imposing a measure having an effect equivalent to quantitative restrictions on imports is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State also falls within the prohibition laid down in provision where the importation of beverages lawfully produced and marketed in another Member State is concerned.[3]

The CJEU established the principle of mutual recognition, an assumption that once goods are lawfully marketed in one Member State, they should be admitted into any other market of a Member State unless the State in question appeals to the mandatory requirements. As Arrowsmith and Kunzlik highlight, Article 34 of the TFEU (ex Article 28) not only prohibits discrimination on grounds of nationality, but prohibits 'restrictions' on imports and 'measures having equivalent effect', so that a measure against the imported goods can be

[1] Case 120/78, Rewe-Zentrale v. Bundesmonopolverwaltung für Branntwein [1979] ECR 649.
[2] Ibid, para. 8.
[3] Ibid, para. 15.

deemed as prohibition even though it restricts domestic products equally.[4] Although the case was not ruled on a procurement dispute, the assumption elaborated by the CJEU has equal importance for the public procurement market with regard to identification of measures having an effect equivalent to quantitative restrictions.

Another important contribution of the CJEU's ruling in *Cassis de Dijon* is that it introduced further grounds of derogations from Article 36 of the TFEU (ex Article 28). Article 36 entitles the Member States to derogate from prohibitions on quantitative restrictions on grounds of 'public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property'. Arrowsmith and Kunzlik maintain that the rule of reason in Cassis de Dijon provides broader derogation since the prohibitions on restricting imports can be justified for the sake of (1) the effectiveness of fiscal supervision, (2) the protection of public health, (3) the fairness of commercial transactions and (4) the defence of the consumer.[5]

The European Commission has aimed to provide practical guidance to the Member States following the Cassis de Dijon case and issued two communications in 1979[6] and 1999[7]. The Council particularly welcomed the Commission's communication on mutual recognition issued in 1999 and adopted a council decision in the same year endorsing the principles laid

[4] Sue Arrowsmith and Peter Kunzlik, 'EC regulation of public procurement' in Arrowsmith Sue and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009), p. 58.
[5] Ibid, p. 73; Cassis De Dijon, note[1], para. 8.
[6] Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ('Cassis de Dijon'), OJ 1980, C 256.
[7] European Commission, Mutual recognition in the context of the follow-up to the Action Plan for the Single Market COM(1999)299.

down by the Commission.[8] The Commission issued a further interpretative communication for that purpose in 2003 in order to enhance the practical application of mutual recognition.[9]

The importance of this interpretative communication is its reference to Turkey. As explained in Chapter 4, since 1995 Turkey has been party to the Customs Union, which established a common customs policy between the European Union and Turkey and which requires the elimination of measures having an effect equivalent to customs duties between the European Union and Turkey.[10] In this context, the Commission's communication in 2003 highlights that products lawfully manufactured and/or marketed in another Member State or in Turkey have equal status. This issue is also highlighted under the recent interpretative communications issued by the Commission with regard to mutual recognition.[11]

It is important to note that Article 66 of the Customs Union Decision entitled 'interpretation' requires the implementation and application of products covered by the Customs Union to be interpreted in conformity with the relevant judgments of the CJEU. [12] The Commission under its Communication issued in 2003 clarified that principles resulting from the CJEU's case law on issues which are related to the EU Treaty, particularly the *Cassis de Dijon* case, apply to Turkey as much as they apply to the Member States.[13]

6.2.2 The case-law related to procurement disputes

6.2.2.1 The Dundalk Case

Another leading case that relates to the free movement of goods within the internal market is the Commission v Ireland case (hereafter 'the Dundalk').[14] Dundalk Urban District

[8] Council Resolution of 28 October 1999 on mutual recognition, 2000/C 141/02, OJ 2000 C 141/5.
[9] European Commission, Commission interpretative communication on facilitating the access of products to the markets of other Member States: the practical application of mutual recognition (2003/C 265/02).
[10] Chapter(4):Section(4.4.2.2).
[11] For instance see, The European Commission, Guidance document: the application of the Mutual Recognition Regulation to non-CE –marked construction products, Brussels, 13.10.2011, p. 7.
[12] Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union, OJ 1996, L 35.
[13] The European Commission, 2003/C 265/02, Section 6.3.3.
[14] Case 45/87 Commission v Ireland [1988] ECR 4929.

Council (Ireland) initiated a project known as the Dundalk Water Supply Augmentation Scheme and the Council issued an invitation to tender for this contract by open procedure which was published in the official journal on 13 March 1986. However, the technical specifications only considered compliance with the Irish standard with no reference to either European or international standards.

The European Commission brought Ireland before the CJEU and took the view that the stipulation of an Irish standard with no exception infringed Article 34 TFEU (ex Article 28) and this stipulation created a barrier to trade as it has the effect of excluding the use of pipes manufactured in other Member States. The Irish government, on the other hand, maintained that it is necessary to specify the standards to which materials must be manufactured, particularly in a case such as this where the pipes utilised must suit the existing network. In that regard, the Irish government asserted that compliance with another standard, including ISO, would not suffice to eliminate technical difficulties.

The Court ruled that the stipulation of the Irish standard infringed Article 34 TFEU (ex Article 28), since it restricted the access of other Member State's products to the Irish Government market.[15] The Court highlighted that only one undertaking, Tegras Pipes Ltd (Ireland), was certified to that standard at that time.[16] With regard to the claim of the Irish government that the Irish standard was stipulated to suit the existing network, the Court held that the concern could be met by allowing firms to supply pipes which met the Irish standard or equivalent.

The reasoning in Dundalk is significant and the core of the adjudication clarifies that the technical specifications need to be drafted according to the purchaser's performance requirements rather than by adherence to a particular national standard. Consequently, the

[15] Ibid, para. 21.
[16] Ibid, para. 22.

contracting authorities must accept any equivalent goods which meet the targeted performance. As Arrowsmith points out, this approach put forward in Dundalk reduced the commercial barriers to trade in public markets.[17]

6.2.2.2 The UNIX Case

Another leading case of the CJEU having an impact on the legal framework governing technical specifications is the Commission v Netherlands case (hereafter 'the UNIX').[18] The Netherland's Inkoopcentrum NV, a contracting authority, published a notice in 1991 in the OJ for supply and maintenance of a meteorological station. However, the notice specified a particular system, UNIX, as the operating system of the meteorological station, which is a data-processing system developed by Bell Laboratories of ITT, without mentioning the words 'or equivalent'. The European Commission, though, claimed that the Netherlands failed to fulfil its obligations under Council Directive 77/62/EEC coordinating procedures for the award of public supply contracts as well as Article 34 of the TFEU (ex Article 28) and brought the Netherlands before the CJEU.

The Netherlands Government argued that the UNIX system, in the field of information technology, is regarded as a technical specification generally recognised by traders. In that regard, the Netherlands Government maintained that it was unnecessary to add the words 'or equivalent'.[19] The Netherlands Government added that The European Commission itself referred to the UNIX system in a contract notice published after the one at issue in the proceedings.

The CJEU firstly clarified that the infringement of The European Commission cannot justify any infringement that may have been committed by the Netherlands authorities.[20] The CJEU

[17] Sue Arrowsmith, *The Law of Public and Utilities Procurement* (London: Sweet & Maxwell, 2005), p. 1108.
[18] Case C-359/93 Commission v Netherlands [1995] ECR I-157.
[19] Ibid, para. 24.
[20] Ibid, para. 16.

then looked through the substance of the UNIX system and examined whether the UNIX system itself is a technical specification rather than a specific product as claimed by the defendant. The CJEU held that the UNIX system is not standardised as claimed, and it is the name of a specific make of product.[21] In that direction, the CJEU concluded that Directive 77/62 prohibits the indication of trademarks unless it is accompanied by the words 'or equivalent' and the Court declared that the Netherlands had failed to fulfil its obligations under Directive 77/62 by failing to indicate that UNIX equivalent systems would also comply with the technical specifications.

6.2.2.3 The Vestergaard Case

Another important decision of the CJEU worth examining is the Bent Mousten Vestergaard v. Spottrup Boligselskab case (hereafter 'the Vestergaard').[22] The importance of this case is that it has been ruled for a dispute below the thresholds Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts.

A Danish public housing body, called for tender in an open procedure in 1997 for the construction of 20 social housing units in the municipality of Spøttrup. The technical specifications of this project, though, specified windows of a particular make. In that regard, the national court seized of the dispute referred the matter to the CJEU for a preliminary ruling on the interpretation compatibility of this stipulation with Community law.

The CJEU recalled its landmark Telaustria case[23] and pointed out that although certain contracts are excluded from the scope of the Community directives in the field of public procurement, the contracting authorities that conclude them are nevertheless bound to comply with the fundamental rules of the Treaty, which include the free movement of

[21] Ibid, para. 25-30.
[22] C-59/00 Bent Mousten Vestergaard v. Spottrup Boligselskab [2001] ECR I-9505.
[23] C-324/98 Telaustria Verlags GmbH and Telefonadress GmbH v. Telekom Austria AG [2000] ECR I-10745.

goods.[24] In this context, the Court provided that the contracting authorities are nevertheless bound to comply with the fundamental rules of the Treaty. Then, the CJEU reiterated its reasoning in the UNIX case, and highlighted that the failure of adding the words 'or equivalent', not only deters economic operators from taking part in the tendering procedures, but also impedes the flow of imports in the internal market.[25] Furthermore, the CJEU recalled its reasoning put forward in the Dundalk case and held that Article 30 of the Treaty precludes a contracting authority from including in the contract documents for that contract a clause requiring the use of a specified make in carrying out the contract, without adding the words 'or equivalent'.[26]

When the Dundalk, UNIX and Vestergaard cases are read together, it is seen that the approach put forward by the CJEU on the technical specifications is consistent. The case-law implies that the contracting authorities need to refrain from laying down technical specifications that might give rise to automatic exclusion of products that meet the same functional need of the contracting authorities even though the contracting authorities do not have the intention of favouring their own national products, and even though the contract is excluded from the scope of the Community directives in the field of public procurement.

6.3 The general principles of technical specifications under TPP Act

TPP Act lays down general principles on the technical specifications under Article 12, which apply regardless of the procurement procedure followed. The first principle that TPP Act lays down is that the technical specifications that specify all characteristics of the goods, services and works that constitute the subject matter of the procurement must be prepared by the contracting authority itself. The contracting authorities are only permitted to outsource

[24] Vestergaard, note[22], para. 20.
[25] Ibid, para. 22.
[26] Ibid, para. 23.

the preparation of the technical specifications in cases where it is impossible to define the characteristics of the goods, services and works.

TPP Act underlines that the technical specifications must specify the technical criteria of the goods, services and works. In that regard, (1) the technical criteria must aim for efficiency and functionality; (2) they must not consist of elements impeding competition; and (3) they must ensure equal opportunities for all tenderers.

TPP Act further lays down further implementation principles regarding standards. For instance, the technical specifications can include arrangements to ensure conformity with national and/or international technical standards. However, it is not permitted to refer to a specific brand, model, patent, origin, source or product, and no feature or definition indicating any brand or model can be included in the technical specifications. TPP Act only permits reference to a brand or model in cases where no national and/or international standards exist or where it is not possible to identify technical characteristics, provided that the brand or model is followed by the 'or equivalent' phrase.

In the following sections, the substance and extent of the general principles and the implementation principles are further examined.

6.3.1 Efficiency and functionality

According to Article 12 of TPP Act, the technical specifications need to be efficient and functional. The provisions within the regulations implementing TPP Act (the Regulation of Goods Procurement, the Regulation of Services Procurement and the Regulation of Works Procurement) are all identical and they reiterate efficiency and functionality as a general principle.

As discussed in Chapter 3, Article 23 of Public-Sector Directive permits the contracting authorities to define technical specifications as performance-based or functional, or to rely

on technical standards.[27] In cases of performance-based or functional definition, the contracting authorities identify their needs as desired outputs within the technical specifications rather than stipulating the inputs or a specific method. The acceptance of a functional definition as a general principle for the technical specifications by TPP Act indicates that TPP Act is in line with Public-Sector Directive. It is important to note that neither TPP Act nor the PP Communication gives further definition of efficiency and functionality or introduces any further constraint on that matter, which indeed provides a broad margin of interpretation for the contracting authorities while defining their needs. In that regard, once sustainability parameters are defined as desired output by the contracting authorities, the performance-based or functional specifications can also contribute to the promotion of sustainability in Turkey.

On the other hand, efficiency needs a special consideration. As discussed in Chapter 2, Turkey has endorsed a comprehensive strategy in order to promote energy efficiency in various sectors.[28] The Energy Efficiency Act numbered 5627, which was enacted in 2007, laid down the main framework in that regard and stipulated energy efficiency requirements for a wide range of goods. As explained, the Regulation Pertaining to Labelling and Standard Product Information of Energy and Other Resource Consumptions of the Products (hereafter 'the Labelling Regulation') was in 2011 by the Council of Ministers to enhance the implementation of energy efficiency. The Labelling Regulation is modelled after and in line with the Directive 2010/30/EU of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products.[29]

[27] Chapter(3):Section(3.4.5).
[28] Chapter(2):Section (2.4.3.3).
[29] Directive 2010/30/EU, OJ 2010 No. L153/1.

The significance of the Labelling Regulation is that it directly mentions public procurement and lays down rules for technical specifications. Article 10 of the Labelling Regulation provides that the contracting authorities are permitted to lay down conditions in the technical specifications in order to provide the procured goods to comply with the criteria of having the highest performance levels and belonging to the highest energy efficiency class. The contracting authorities are also permitted to require higher performance levels than existing energy efficiency classes. The overall approach is fully in line with Article 9 of Directive 2010/30/EU. As also mentioned in Chapter 2, the Turkish Energy Efficiency Plan puts an objective for public bodies, 'not to procure goods, services and works using energy which fails to meet minimum efficiency criteria, determined by the Ministry of Energy'.[30]

It is noteworthy that efficiency is amongst the general principles pursued by PP Act and it is not limited to electricity. As explained previously, TPP Act only states that the technical specifications must aim for efficiency without giving further details about what constitutes efficiency. It is the author's view that the lack of a direct regulation does not imply that the contracting authorities are not permitted to consider water consumption, waste creation or similar sustainability criterion as parameters of efficiency.

6.3.2 Promotion of competition and providing equal opportunities

TPP Act requires that the technical specifications should not consist of elements impeding competition and they must ensure equal opportunities for all tenderers. As explained in Chapter 5, competition and equal treatment are two primary principles pursued by TPP Act. To recap, these principles are imperative provisions to be considered and implemented in all stages of public procurement process regardless of either the contract value or thresholds. Nevertheless, the competition and equal treatment are reiterated within the provision

[30] Chapter(2):Section (2.4.3.3).

regulation technical specifications, which imply that the drafting of technical specifications is a key stage determining the competition throughout the procurement proceedings.

TPP Act is hypercritical on the use of specific brands or models within the technical specifications, and lays down detailed rules accordingly. According to Article 12 of TPP Act, the technical specifications cannot specify any specific brand, model, patent, origin, source or product, and no feature or definition indicating any brand or model can be included. TPP Act permits usage of brands or models in cases where no national and/or international standards exist or where it is not possible to establish technical characteristics of the subject matter of contract. Nevertheless, TPP Act requires that the brand or model must be followed by the 'or equivalent' phrase. This provision is mostly in line with the approach put forward by the CJEU in the Dundalk case. Indeed, in some cases the usage of brand or model names might be necessary in order to conduct a smooth procurement. Such necessity particularly emerges in the procurement of spare parts. Section 55.3 of the PP Communication clarifies this issue and permits the contracting authorities to mention the brand or model of the main machine for which the spare part is procured.

6.3.3 The use of standards

TPP Act, as in line with Public-Sector Directive, permits the contracting authorities to rely on technical standards within the technical specifications. TPP Act permits the contracting authorities, where possible, to incorporate arrangements to ensure conformity with national and/or international standards. In such cases, the contracting authorities need to specify technical characteristics and definitions of their need within these specifications. The national standards in Turkey are certified by the Turkish Standards Institution (hereafter 'the TS Institution'), an independent body established in 1960 through the Act numbered 132. The standards approved by the TSI are voluntary. On the other hand, the Ministries are

entitled to make usage of certain standards mandatory, provided that such standards are announced in the Official Gazette.

An important question to be answered is whether the national and international standards are equally accepted as the means of proof for compliance. TPP Act permits the usage of national 'and/or' international standards. TPP Act does not provide any further explanation about the hierarchy between the national or international standards. The lack of reference to this matter within TPP Act could be interpreted as meaning that both standards have equal status. In order to clarify this matter, it is worth examining the secondary regulations, i.e. the implementation regulations for the procurements of goods, services and works.

Article 16 of the Services Regulation and Article 17 of the Works Regulation are identical to Article 12 of TPP Act that regulates the technical specifications; the only difference only exists within the Goods Regulation. Article 14 of the Goods Regulation reiterates the provision of TPP Act that states that the technical specifications can refer to national or equivalent international standards. However, the Goods Regulation underlines that the international standard could only be used in cases where the national standard does not exist. In other words, the national standards have priority over the international standards.

As discussed in the previous sections, according to Public-Sector Directive, which is shaped by the case-laws of the CJEU, the technical specifications need to be drafted according to the purchaser's performance requirements, and the contracting authorities must accept any equivalent goods that meet the targeted performance. As underlined by Alyanak, although TPP Act permits the contracting authorities to rely on the standards, it is not mandatory, and TPP Act does not provide a general principle on the acceptance of equivalent means of proof to fulfil the requirements defined by the technical specifications.[31] In that regard, the

[31] Servet Alyanak, 'The Public Procurement System of Turkey in Comparison to European Community Procurement Legislation' (2007) 36 *Public Contract Law Journal* 203, p. 218.

approach put forward by TPP Act that does not recognise the international standards as having equal status with the national standards constitutes a significant market access restriction for goods certified by international standards.

TPP Act needs to be revised in a way that makes acceptance of equal means of proof for standards a general principle. The Turkish public procurement law could be brought in line with the EU law through abolishing the hierarchy between the national and international standards and through making the 'or equivalent' phrase mandatory for the standards.

As explained in Chapter 3, The European Commission has issued a communication in 2004 in order to enhance integration of environmental policies into European standardisation.[32] Environmental technical standards have significance for promoting green procurement on the grounds that such standards can easily be deployed and do not require any substantial structural change within the contracting authority. In that regard, bringing the Turkish standards system to an international standard would also have positive outcomes on the promotion of sustainability in public procurement.

6.4 Green procurement concerns under the technical specifications

As discussed in Chapter 3, environmental concerns can be pursued within the technical specifications and eco-labels are a frequent used method. However, Turkey does not have its own eco-label scheme equivalent to either the international Type I environmental labelling programme or the European eco-label scheme. As a candidate state for the EU membership, Turkey is expected to establish an eco-labelling scheme corresponding to the EU law on that matter. In fact, the Turkish Government set the target to work on the Bylaw on Eco-Labels under the National Program of Turkey for the Adoption of the EU Acquis of 2008.[33] The purpose of this bylaw is set as promoting environmentally friendly products to

[32] Chapter(3):Section(3.4.5.2).
[33] The National Programme, Chapter 27: Environment available at <www.abgs.gov.tr/files/UlusalProgram/UlusalProgram_2008/Tr/pdf/iv_27_cevre.pdf>, p. 313.

contribute to the efficient use of resources, and to give guidance to provide accurate, non-deceptive and scientific information to consumers on such products. However, the Bylaw on Eco-Labels, that was projected to be prepared by 2011, is still in a draft stage.

As discussed in Chapter 2, the promotion of sustainable production and consumption is included in many policy and strategy documents.[34] As explained, according to the OECD, Turkey faces a number of environmental challenges due to unsustainable production and consumption patterns.[35] As highlighted by Ulutas et al., the sustainable consumption theme of sustainable development is not implemented comprehensively and it is mostly known and applied in the context of energy efficiency.[36] Most importantly, as pointed out by Ulutas et al., sustainable consumption and production is only mentioned under the strategy and policy frameworks, not at a legislative level.[37] The lack of normative value for promoting sustainable consumption and production in Turkey, which is a core theme of sustainable development both at the international and EU level, is another significant shortcoming and is the main constraint to implementing sub-themes of sustainability, in particular eco-labelling. Furthermore, as pointed out by Yücel and Emekçiler, the public awareness on the possible benefits of eco-labelling and similar instruments is significantly low in Turkey.[38]

Considering the current status of eco-labels, it is worth examining whether the contracting authorities under the current regime are permitted to ask the tenderers to provide compliance with an international or European eco-label. TPP Act, as explained in section 6.3, adopts a strict approach according to the formulation of technical specifications. According to TPP

[34] Chapter(2):Section(2.4).
[35] OECD, *OECD Environmental Performance Reviews - Turkey* (Paris: OECD Publishing, 2008), p. 111.
[36] See, Ferda Ulutas, Emrah Alkaya, Merve Bogurcu and Goksel N. Demirer, 'The national capacity assessment on cleaner (sustainable) production in Turkey' (2012) *Sustainable Cities and Society*.
[37] See, Ferda Ulutas, Emrah Alkaya, Merve Bogurcu and Göksel N. Demirer, 'A comparative analysis of Turkish and European Union environmental legislation regarding cleaner (sustainable) production concept' (2011) 10 *Int J Environ Sustainable Dev International Journal of Environment and Sustainable Development* 246, p. 262.
[38] Mustafa Yücel and Ümit Serkan Ekmekçiler, 'Çevre Dostu Ürün Kavramına Bütünsel Yaklaşım: Temiz Üretim Sistemi, Eko-Etiket, Yeşil Pazarlama' (2008) 7 *Electronic Journal of Social Sciences* 320, p. 332.

Act, the technical specifications need to be efficient and functional. On the other hand, the Labelling Regulation only permits the contracting authorities to address energy performance issues under the technical specifications, which indeed supports the argument of Ulutas et al. that the theme of sustainable consumption is only known and applied in the context of energy efficiency. TPP Act also lays down strict rules on the standards and favours national standards over international standards. Within this context, it is the author's view that the current legal framework could not be interpreted as favouring the usage of eco-labels under the technical specifications, except for labels covered by the Labelling Regulation, i.e. energy performance labels.

6.5 Social procurement concerns under the technical specifications

As explained in Chapter 3, Public-Sector Directive refers specifically to a social consideration that legitimately can be incorporated into the technical specifications: disability and design for all.[39]

The protection of people with disabilities and easing their access to the community has been a primary social policy for the last two decades in Turkey. In 1997 the Decree Law numbered 572 introduced a wide range of provisions to the legal framework in order to implement the social policy on disability issues, in particular on accessibility. For instance, the Construction Act numbered 3194 was amended and it was laid down that in order to make the physical environment accessible and convenient for disabled people, the urban development plans, social, technical infrastructure areas and structures need to comply with the relevant TSI standards. In that regard, the relevant secondary regulations were revised with regard to that provision of the Construction Act. The Municipality Act was also revised and Article 14 of this Act laid down that the municipal services should be rendered in the most appropriate manner at the places nearest to the citizens, and it is necessary to adopt the procedure most

[39] Chapter(3):Section(3.5.2).

suitable for the disabled and old people as well as for those who are destitute and with limited income. The Disability Act numbered 5378, which was enacted in 2005, laid down a comprehensive legal framework for disabled people, covering areas such as rehabilitation, employment and education.

The Administration for Disabled People adhered to the Turkish Prime Ministry prepared the first Turkish Accessibility Strategy and National Action Plan in 2010.[40] According to this strategy and action plan, the legal rules laid down in order to protect disabled people and enhance their access to social life had not been implemented properly and efficiently.[41] The strategy and action plan considered the main reason for improper and inefficient implementation to be the lack of incentives in cases of compliance and lack of sanctions in cases of non-compliance with the rules on disability. The strategy and action plan also underlines that the TSI standards on disability are too inefficient to meet the current needs.

When TPP Act is examined, it is seen that it does not contain a similar mechanism to encourage the consideration of disability issues within the technical specifications like Public-Sector Directive. Moreover, the implementation regulations for goods, services and works are all silent on disability issues.

The PP Communication, when revised in 2011, for the very first time brought the disability issue to the forefront of the Turkish public procurement system.[42] According to Section 55.4 of the PP Communication, if the competent institutions or entities have issued technical regulations for goods to enable the disabled citizens to better benefit from the public services, the technical specifications could also take into consideration such regulations. However, this rule only applies to the procurement of goods and it does not lay down a general principle

[40] T.C. Başbakanlık Özürlüler İdaresi Başkanlığı, *Ulaşılabilirlik Stratejisi ve Ulusal Eylem Planı (2010-2011)* (Ankara: ÖİB, 2010).
[41] Ibid, p. 13.
[42] The Turkish OJ 28031/20.8.2011.

since the prerequisite of implementation of this rule is existence of predefined rules/standards for disability. This significantly restricts the discretion of the contracting authorities to address the disability issue within the procurement proceedings. Furthermore, the rule exists in the PP Communication, which is not a legally binding instrument, not in TPP Act. Therefore, addressing the disability issues does not have a strong normative value under the Turkish legal framework on public procurement as it has in Public-Sector Directive, which requires the technical specifications to take into account 'whenever possible' accessibility criteria for people with disabilities and the criteria of design for all users.

In fact, provisional Article 2 of the Disability Act requires that all existing official buildings of the public institutions and organisations, all existing roads, pavements, pedestrian crossings, open and green areas, sporting areas and similar social and cultural infrastructure areas and all kinds of structures built by the natural and legal persons serving the public should be brought to a suitable condition for the accessibility of the disabled people within seven years after the date of effect of this Act, i.e. 2005. This deadline was prolonged recently to 7 July 2015. Despite this strict deadline, TPP Act that regulates the procurement of works outlined within the Disability Act has not been touched. The awareness of using public procurement to achieve the targets of disability is quite low. In order to promote social procurement, TPP Act needs to specifically address the disability and accessibility issues. Moreover, as elaborated under the accessibility strategy and action plan, the legal rules need to introduce incentives in cases of compliance and sanctions in cases of non-compliance with the rules on disability, which could also be applied in a procurement context, such as through giving extra points in awarding contracts for the bid providing the most accessible solution. This issue will further be examined in Chapter 8, which is dedicated to award criteria.

6.6 Conclusion

The discussions within this chapter can be briefly summarised as follows:

The examination of EU law, which is shaped by the case-law of the CJEU, with regard to technical specifications revealed that the contracting authorities need to refrain from laying down technical specifications that might give rise to automatic exclusion of products that meet the same functional need of the contracting authorities, even though the contracting authorities do not have the intention of favouring their own national products, and even though the contract is excluded from the scope of the Community directives in the field of public procurement.

TPP Act, on the other hand, requires the technical specifications to be clear enough for the tenderers and TPP Act restricts amendments after the announcement of call for tenders. TPP Act requires the technical specifications to be efficient, functional, to promote competition and to provide equal opportunities for the tenderers. TPP Act also permits the contracting authorities to rely on the standards. However, TPP Act needs to be revised in a way that makes acceptance of equal means of proof for standards as a default principle. Moreover, the Turkish public procurement law could be brought in line with the EU law through abolishing the hierarchy between the national and international standards and through making the 'or equivalent' phrase mandatory for the standards, which is currently only applicable in cases of using models or brands. Both rules need to be revised in the process of negotiating for European Union membership.

When the Turkish public procurement law is examined in terms of sustainability, it is seen to a certain extent that sustainability is considered as a legitimate concern. The examination showed that only energy efficiency is explicitly recognised as a concern that could be addressed within the technical specifications. On the other hand, Turkey does not have its own eco-label scheme equivalent to either the international Type I environmental labelling

programme or the European eco-label scheme. It is the author's view that the current legal framework could not be interpreted as favouring the usage of eco-labels under the technical specifications, except for labels covered by the Labelling Regulation, i.e. energy performance labels.

With regard to social concerns, TPP Act does not explicitly recognise the legitimacy of addressing social concerns; most importantly TPP Act neither instructs nor encourages the contracting authorities to incorporate disability concerns into the technical specifications like Public-Sector Directive. Although, the PP Communication brought the disability issue to the forefront of the Turkish public procurement system, its wording is weak and it only applies to the procurement of goods. Therefore, addressing the disability issues does not have a strong normative value under the Turkish legal framework on public procurement as it has in Public-Sector Directive, which requires the technical specifications to take into account 'whenever possible' accessibility criteria for people with disabilities and the criteria of design for all users. Such a revision is also important in order to meet the requirements of the Disability Act. The current framework implies that the disability issue is only considered legitimate to a certain extent, and it is not sufficiently promoted under the Turkish public procurement system.

CHAPTER 7

The pursuit of sustainability concerns during qualification of economic operators

7.1 Introduction

The contracting authorities need to ensure that the economic operator[1] that will win the contract maintains the ability to perform and complete the contract, which is ensured through requiring candidates and tenderers to meet minimum capacity levels. The contracting authorities are required to question the eligibility of participation of the economic operators before assessing their economic and financial capacity or technical capacity or ability. In that regard, the economic operators who are considered ineligible – those not even entitled to be candidates – need to be excluded from the procurement proceedings in advance, regardless of the followed procurement procedure.

This chapter provides a detailed analysis of the qualification process in public sector procurement, which is governed by the Public Procurement Act (hereafter 'TPP Act'). It examines disqualification grounds and reasons for automatic exclusion and debarment of economic operators. It analyses the economic and financial standing of economic operators, as well as requirements relating to their technical and professional ability. Finally, the chapter provides a detailed investigation of the qualification of foreign economic operators to public tenders in Turkey. The chapter particularly examines whether any aspect of sustainability is considered throughout these stages and questions to what extent the contracting authorities have discretion to pursue any sustainability criteria.

7.2 Exclusion of economic operators

TPP Act adopts a rigid method of regulation for the exclusion of economic operators who are not found eligible to participate in public tenders, and TPP Act does not grant any

[1] The term of 'economic operator' is preferred within the study for the sake of simplification and covers the terms of 'supplier', 'service provider' and 'work contractor' as defined under Article(4) of TPP Act.

discretion to the contracting authorities on that matter. If the contracting authority does not take the necessary actions, the tenderers are also entitled to lodge complaints before TPP Authority on that matter.

Breaching the restrictions on participation has severe consequences. In all circumstances, the tenderers who participate in a procurement proceeding despite the restrictions laid down in the previous sections have to be disqualified, and their tender securities have to be registered as revenue. Moreover, in a case where the contract is awarded to one of those tenderers due to failure in detecting such a situation during the evaluation stage, the tender proceedings have to be cancelled and the tender security has to be registered as revenue.

These restrictions to the tendering procedures are disseminated within TPP Act, and there are different motivations behind each reason for exclusion. Indeed, Public-Sector Directive prefers the title of "personal situation of the candidate or tender" under Article 45 dealing with the exclusion issue, which implies that these cases are personal to the tenderer. As Trepte underlines, these grounds are not required to be linked to the ability to perform the contract, either technically or in financial terms.[2] As will be discussed below, social, ethical and environmental concerns also play an important role in the exclusion of economic operators under TPP Act.

The grounds for exclusion under TPP Act could roughly be analysed under two categories: the general grounds of exclusion, and exclusion to eliminate conflict of interests.

7.2.1 Category I: General grounds for exclusion

7.2.1.1 Bankruptcy

According to Article 11 of the TPP Act, economic operators who are bankrupt or being wound-up, whose affairs are being administered by the court, who have entered into an

[2] Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (New York: Oxford University Press, 2004), p. 337.

arrangement with creditors, who have suspended business activities or who are in any analogous situation arising from a similar procedure under their own national laws and regulations, or who are the subject of proceedings for a declaration of bankruptcy, for an order of compulsory winding up, or administration of court due to debts to creditors or of any other similar proceedings under their own national laws and regulations, are not qualified for participation in any procurement procedure subject to TPP Act.

This reason for exclusion is laid down in order to ensure that the economic operator that will be awarded the contract maintains its financial position during the performance of the contract. The reason for exclusion is identical to the reason for exclusion that is laid down under Article 45(2)(a) of Public-Sector Directive. However, exclusion in case of bankruptcy is not mandatory under Public-Sector Directive and the Member States have discretion on incorporation of this reason of exclusion into their national laws. As Williams notes, it was proposed to make exclusion in case of bankruptcy mandatory in 2002, which was rejected by the Council of the European Union since such exclusion was considered by the Council to bear the risk of "*systematic exclusion of suppliers with arrangements with their creditors and condemn them to bankruptcy*".[3] Turkey, though, has adopted a strict approach, and bankruptcy under the current legal framework gives rise to automatic exclusion.

7.2.1.2 Non-payment of social security contributions

The second reason for automatic exclusion is laid down under Article 11 of TPP Act for the economic operators who have not fulfilled obligations relating to the payment of finalised social security contributions in accordance with the legal provisions of the country in which

[3] European Parliament, Position of the European Parliament adopted at first reading on 17 January 2002 with a view to the adoption of European Parliament and Council Directive …/…/EC on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts, OJ 2002 No. C271E/176 as cited in Sope Williams, 'Coordinating public procurement to support EU objectives - a first step? The case of exclusions for serious criminal offences' in Arrowsmith Sue and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009), p. 491.

they are established or those of Turkey. This reason for exclusion is identical to the reason for exclusion that is laid down under Article 45(2)(e) of Public-Sector Directive.

The exclusion due to failure to make payments of finalised social security contributions could be classified as a social consideration. This reason for exclusion signals that public bodies only do business with economic operators who, regardless of their place of establishment, act fairly to their employees by duly making the payments of social security contributions. As Trepte points out, these grounds for exclusion are not directly related to the performance of the contract, and are instead related to the integrity of the economic operators and to what extent they respect the law.[4]

As highlighted by Trepte, the exclusion decisions of the contracting authorities need to be justified, and the contracting authorities should avoid giving arbitrary decisions.[5] The CJEU in La Cascina case, underlined that the general principles of transparency and equal treatment need to be respected while implementing exclusion criteria.[6] Article 11 of TPP Act provides that TPP Authority is entitled to determine the content and amount of social security premium debt by consulting the Chairmanship of Social Security Establishment. Moreover, the Public Procurement Communication (hereafter 'the PP Communication') specifies the amount and time interval of non-payment of taxes and social security contributions that can lead to exclusion in line with the principle of transparency.

On the other hand, the Turkish Government plans to introduce a new ground for exclusion to TPP Act. The Turkish Government has set a target to tackle unrecorded economy,[7] which

[4] Trepte, note[2], p. 346.
[5] Ibid, p. 347.
[6] Joined Cases C-226/04-C-228/04, La Cascina v. Ministero della Difesa [2006] ECR I–1347, para. 22.
[7] For comprehensive review of the concept see, Friedrich Schneider, *Handbook on the shadow economy* (Northampton, MA: Edward Elgar Pub., 2011); See also, Fethi Öğünç and Gökhan Yilmaz, 'Estimating the Underground Economy in Turkey' (2000) September, 2000 *The Central Bank of the Republic of Turkey* available at <www.tcmb.gov.tr/research/discus/dpaper43.pdf>

is considered as a major threat to the sustainable growth of the Turkish economy.[8] The share of illicit workers (or black labour market) in the labour market is significant within the total share of unrecorded economy.[9] According to the 60th Government Plan, any economic operator, who are shown to have employed illicit workers are planned to be banned from participation to the public tenders for five years.[10] Indeed, this proposal could be evaluated within social procurement since the policy will have an impact on the dissemination of employment policies which are sheltered by social security schemes.

7.2.1.3 Non-payment of taxes

Economic operators who have not fulfilled their obligations relating to the payment of finalised taxes in accordance with the legal provisions of the country in which they are established or those of Turkey are also excluded from the procurement procedures. Article 12 of TPP Act provides that TPP Authority is entitled to determine the content and amount of due taxes that will be taken into consideration for exclusion by consulting the Revenue Administration Department. This reason for exclusion aims to promote payment of taxes and it is identical to the reason for exclusion that is laid down under Article 45(2)(f) of Public-Sector Directive. This ground for exclusion is not directly related to the performance of a contract, but are related to the integrity of the economic operators and to what extent they respect the law.

7.2.1.4 Professional misconduct

Article 10 of TPP Act lays down three different grounds for exclusion which are based on varying degrees of professional misconduct. The first ground is to be convicted of an offence

[8] The size of the unrecorded economy in Turkey is estimated to reach a weighted average value of 31.3 percent of the GDP between 1999 and 2007. See, Schneider, note[7], p. 34.
[9] Presidency of Revenue Administration, Department of Strategy Development, Action Plan of Strategy for Fight against the Informal Economy (2008-2010) available at <www.gib.gov.tr/fileadmin/beyannamerehberi/Kayit_disi_2009.pdf>, p. 26.
[10] The 60th Turkish Government Programme, Action Plan - Action Code: EKO-08, available at <www.byegm.gov.tr/docs/60_Hukumet_prog.pdf>, p. 4.

concerning professional conduct by a judgement of a competent court within the five years preceding the date of the procurement proceedings, which is identical to Article 45(2)(c) of Public-Sector Directive.

The second ground is being involved in misconduct that violates work ethics or professional ethics against the contracting authority during work that the economic operator had carried out within the five years preceding the date of the tender. TPP Act provides that such misconducts can be proven by any appropriate means by the contracting authority. Uz and Doğanyiğit argue that the grounds for exclusion in such cases provide a very broad range of discretion to the contracting authorities.[11] Indeed, the corresponding provision in Public-Sector Directive, which is laid down under Article 45(2)(d), also grants discretion to the contracting authorities and permits exclusion of an economic operator who "*has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate*". However, this ground for exclusion under TPP Act, is not in line with the provision of Public-Sector Directive since Public-Sector Directive requires being guilty as the precondition of exclusion, whereas TPP Act does not require being guilty for implementing exclusion.

The third ground within this category is for an economic operator to be prohibited from professional activity by the chamber where it is registered in accordance with the relevant legislation, as of the date of the tender. Public-Sector Directive grants discretion to the Member States to lay down obligations regarding enrolment on one of the professional or trade registers, whereas Article 46 of Public-Sector Directive does not mention exclusion in prohibition from the professional or trade registers. Indeed, it could be argued that this

[11] Abdullah Uz, 'Kamu İhale Kanunu 10/4-F Hükmü Bağlamında "İhaleyi Yapan İdare" Kavramı ve Kapsamı Üzerine Bir Değerlendirme ve Sağlık Bakanlığı Örneği' (2012) 66 *Terazi Hukuk Dergisi*; Sadettin Doğanyiğit, 'İsteklilerin Kamu İhalelerine Girmesini Engelleyen Tutum ve Davranış Uygulamaları ' (2006) September *Terazi Hukuk Dergisi*; the corresponding provision in Public-Sector Directive is also argued by Trepte to be vague. See, Trepte, note[2], p. 346.

ground for exclusion fall under the concept of grave professional misconduct, which is laid down under Article 45(2)(d) of Public-Sector Directive.

Although TPP Act does not explicitly mention the possibility of considerations related to social or environmental issues, these three grounds for exclusions can be used in order to promote green and social procurement. As explained in Chapter 2, the Environment Act lays down prohibition on pollution and set principles for environmental protection.[12] The Environment Act lays down criminal and administrative sanctions to be applied in breach of environmental prohibitions so that once noncompliance with environmental legislation or repeated breach of environmental requirements are established to constitute grave professional misconduct by a competent court, or it is established by the contracting authority that such activities are against the work ethics or professional ethics, or the economic operator gets prohibited from professional activity by the relevant chamber due to breach of such environmental requirements, the economic operator can be excluded from participation in tender proceedings. In other words, as was examined in Chapter 3, professional misconduct can also be used in Turkey as an instrument to promote green procurement.[13]

Furthermore, the Labour Act numbered 4857 lays down certain principles and obligations that have social aspects. According to Article 5 of the Labour Act entitled 'principle of equal treatment' prohibits any kind of discrimination unless biological reasons or those pertaining to the work qualifications oblige. According to Article 77 of the Labour Act, employers are obliged to take all measures and make all equipment required to ensure occupational health and safety at workplaces. Once it has been established that discrimination on various grounds (e.g. race, gender, disability, age, sex, religious belief), failing to employ people from

[12] Chapter(2):Section(2.4.2).
[13] Chapter(3):Section(3.4.6).

disadvantaged groups or disregarding health and safety at workplaces has constituted grave professional misconduct by a competent court, or it is established by the contracting authority that such activities are against work ethics or professional ethics, or the economic operator gets prohibited from professional activity by the relevant chamber due to breach of such non-compliance, the economic operator can be excluded from participation in tender proceedings. In other words, as examined in Chapter 3, professional misconduct can also be used in Turkey as an instrument to promote social procurement.[14]

7.2.1.5 Failure to provide appropriate documentation

The latest ground for exclusion in this category and specified under Article 10 of TPP Act is failure of submission of the information and documents required for the assessment of eligibility of qualification, or submission of misleading information and/or false documents, which is identical to Article 45(2)(g) of Public-Sector Directive.

7.2.2 Category II: Exclusion to eliminate conflict of interests

TPP Act aims at maintaining the integrity of the procurement proceedings through preventing any possible conflict of interests that might emerge between the contracting authorities and the tenderers or the candidates. In that regard, the following persons or entities are not permitted to participate in any procurement procedure. Article 11 of TPP Act underlines that the restrictions also apply in cases where the following persons or entities act as sub-contractors, either on their own account or on behalf of others:

(a) The contracting officers of the contracting authority carrying out the procurement proceedings, and the persons assigned in boards having the same authority;
(b) Those who are assigned to prepare, execute, complete and approve all procurement proceedings relating to the subject matter of the procurement held by the contracting authority;

[14] Chapter(3):Section(3.5.3).

(c) The spouses, relatives up to the third degree and marital relatives up to the second degree, and foster children and adopters of those specified under paragraphs (a) and (b);
(d) Any partners and companies of those specified under paragraphs (a), (b) and (c) (except for joint stock companies where they are not a member of the board of directors or do not hold more than 10 % of the capital);
(e) The contractors who provided any consultancy services for the procurement in question are also prohibited from being tenderers in the procurement procedures. These prohibitions *inter alia* apply for the companies with which they have a partnership and management relation and for joint stock companies where they own more than half of the capital, and for the companies where more than half of the capital is owned by above-mentioned companies;
(f) The establishments, associations, unions, funds and other entities included within the body of the contracting authority carrying out the procurement in question, or related to the contracting authority or the companies in which the contracting authority is a partner, are prohibited from participation in any procurement conducted by such contracting authorities.[15]

The Act numbered 2531 on Actions Prohibited for Those Resigned from Public Offices also lays down certain restrictions that have an impact on participation in public tenders. The purpose of the Act numbered 2531 is to eliminate any conflict of interests between the public bodies and public officers after their resignation through prohibiting public officers directly or indirectly from entering into contracts with the public body, to undertake any commitments, to brokerage or to make any kind of representation activity related to the operation tasks and activities of the public body for three years. The Municipality Act numbered 5393 also stipulates similar restrictions for mayors and council members.

[15] UZ argues that this ground also promotes competition since such corporations have been benefiting from privileged position within the procurements conducted by the contracting authorities they are affiliated to. See, Abdullah Uz, *Kamu Ihale Hukuku* (Ankara: Turhan Kitabevi, 2005), p. 264.

7.3 Debarment of economic operators

TPP Act prohibits certain actions, conduct and unethical behaviours to ensure full compliance with the main principles of TPP Act, in particular the principles of competition and equal treatment. In this regard, Article 17 of TPP Act prohibits:

(a) to conduct or attempt to conduct procurement fraud by means of fraudulent and corrupt acts, promises, threats, unlawful influence, undue interest, agreement, bribery or other actions;

(b) to cause confusion among tenderers, to prevent participation, to offer agreement to tenderers or to encourage tenderers to accept such offers, to conduct actions which may influence competition or tender decision;

(c) to forge documents or securities, to use forged documents or securities or to attempt these;

(d) to submit more than one tender by a tenderer on his own account or on behalf of others, directly or indirectly, as the principal person or as a representative of others, apart from where submitting alternative tenders is allowed;

(e) to participate in procurement proceedings although prohibited pursuant to Article 11;

(f) to refrain from signing the awarded contract (except in cases of force majeure).

TPP Act lays down the mechanism of debarment to ensure full compliance with these principles and to safeguard the integrity of the procurement process.[16] According to Article 58 of TPP Act, those who have been established to be involved in the outlined acts and conduct are prohibited from participation in any tender for at least one year and up to two years depending on the nature of the said acts and conduct. It is noteworthy that the prohibition covers all procurement tenders carried out by all public institutions and

[16] For a comprehensive analysis of legal status of the debarment decisions see, Begüm İsbir, *Kamu İhalelerine Katılma Yasağı* (Ankara: Turhan, 2011)

authorities, including the procurement tenders that are exempted from TPP Act. As Arslan highlights, the principles of TPP Act could only be achieved if these restrictions are implemented consistently.[17]

Article 59 of TPP Act also provides that those who have been subjected to criminal prosecution related to the public tenders conducted within the scope of TPP Act cannot participate in the procurement held by public institutions and authorities included within the scope of TPP Act, until the end of judgment proceedings. In fact, this provision was brought before the Turkish Constitutional Court in 2007 with the claim that the provision violates the principles of presumption of innocence as laid down under Article 38, the freedom to work and conclude contracts as laid down under Article 48, and the principle of equality as laid down under Article 10 of the Turkish Constitution.[18] However, the Constitutional Court ruled that the provision which requires mandatory debarment of economic operators who have been subjected to criminal prosecution is a proportional measure. Inan argues that the ruling of the Constitutional Court is open to criticism in the view that the decision does not properly address the legitimacy and proportionality of debarment, which only relies on the indictment of a public prosecutor, without requiring neither an interim decision of a court or a verdict.[19]

Article 11 of TPP Act also lays down further reasons for exclusions which are to be convicted of crimes under the scope of the Prevention of Terrorism Act numbered 3713, or of organised crimes, or of bribery crimes in their own country or in a foreign country. These grounds for exclusion which lead to debarment are based on serious criminal offences such as fraud,

[17] Cetin Arslan, *Ihaleye Fesat Karistirma Sucu* (Ankara: Adalet Yayinevi, 2010), p. 49.
[18] The Turkish Constitutional Court, Case 2007/68 of 14 January 2010.
[19] Atilla İnan, 'Kamu İhalelerinde Yasaklama Kararlarının Anayasa Hukuku Açısından Değerlendirilmesi' (2010) 2 *Sayder Dış Denetim Dergisi* 153, p. 159.

organised crime and bribery, and mostly correspond to the mandatory grounds of exclusion under Article 45(1) of Public-Sector Directive.

In cases of corruption, exclusion and debarment need to be evaluated within the context of the Turkish Criminal Act. The objectives underpinning the policy against corruption at the EU level is argued by Williams as safeguarding the community finances, providing an area of freedom, security and justice and facilitating the liberalisation of the internal market, which is deemed as a promoter of competition.[20] The prevention of corruption, as explained in Chapter 4, has historically been the main impetus of the public procurement reforms in Turkey. TPP Act also maintains the same notion. In order to provide deterrence, the prohibitions laid down Article 17 of TPP Act are also defined as crime within the Article 235 of Turkish Criminal Act, which is punished with imprisonment from three years to seven years.[21]

7.4 Economic and financial standing

Article 11 of TPP Act outlines the documents that can be requested from the tenderers in order to prove their economic and financial standing. These documents are the bank statements relating to the financial standing of the tenderer; the balance sheet of the tenderer which is obligatory to be published in accordance with the related legislation, or required sections of the balance sheet, or, if those are not available, equivalent documents; and the statement of the tenderer's overall turnover or documents indicating the volume of the work being carried out and completed by the tenderer relating to the subject matter of the procurement proceedings. The documents outlined herewith are in line with Article 47 of Public-Sector Directive.

[20] Williams, note[3], p. 485.
[21] As discussed in Chapter 5, Turkey has been party to the various international agreements related to elimination of corruption. See, Chapter(5):Section(5.4.1.7).

7.5 Technical and/or professional ability

The contracting authorities need to ensure the technical and professional ability of the economic operators and their capacity in terms of skills, equipment, tools, manpower and past experience, and might prescribe certain technical capacity criteria. At this stage, the contracting authorities can also query the capacity of the economic operators to cope with the environmental and social issues and can lay down qualification conditions referring to the sustainability concerns.

7.5.1 The general principles of qualification

As explained in Chapter 3, Public-Sector Directive draws the limits of the contracting authorities' discretion on qualification and exclusion of economic operators and also determines the procedure, including the evidence that can be used accordingly.[22] In the same context, TPP Act exhaustively lists the means by which the technical or professional abilities of the economic operators are to be assessed. Article 10 of TPP Act follows the approach put forward by Public-Sector Directive of Article 48 and outlines the means of proof, which are:

(a) with regard to the subject matter of the procurement or similar works undertaken by the tenderer under a contract having a value in the public or private sector, documents proving the experience;

(b) documents relating to the production and/or manufacturing capacity, research-development activities and quality assurance practices of the tenderer;

(c) information and/or documents relating to the organisational structure of the tenderer, proving that he/she employs or will employ an adequate number of staff in order to fulfil the subject matter of the procurement;

[22] Chapter(3):Section(3.4.6).

(d) in cases of procurement of services or works, documents demonstrating the educational and professional qualities of the managerial team and the technical staff of the tenderer;
(e) documents relating to facilities, machinery, devices and other equipment required for fulfilment of the work that is the subject matter of the contract of the procurement;
(f) documents relating to the technical staff or technical institutions responsible for quality control, whether they are directly attached to the tenderer or not;
(g) certificates granted by quality control institutions accredited in accordance with the international rules, certifying the conformity of the work in question with the standards specified in the tender document;
(h) in cases requested by the contracting authority for the confirmation of accuracy, samples, catalogues and/or photographs of the goods to be supplied.

The documents outlined above are in parallel with the documents laid down under Article 48 of Public-Sector Directive with one exception. The exception is that TPP Act does not count environmental management systems among the documents to be used for qualifications as laid down under Article 48(2)(f) of Public-Sector Directive. This requirement will be further examined in the following sections.

Article 10(2) of TPP Act requires that the information or documents that will be required for qualification and evaluation with regard to the subject matter of procurement have to be laid down within the tender documents and pre-announced in the tender notices. This requirement aims to enhance transparency, which is one of the main principles pursued by TPP Act. The explicit formulation of qualification criteria is a significant contribution of TPP Act since the State Tender Act regulated the qualification criteria in an open-ended way. The lack of a uniform set of criteria for qualification is argued by Uz as a major shortcoming

of the State Tender Act, which substantially impeded competition in the Turkish public procurement market.[23]

The implementation regulations of TPP Act (the Regulation of Goods Procurement, The Regulation of Services Procurement and the Regulation of Works Procurement) specify the details of documents that are permitted to be requested for the procurement of goods, services and works respectively. However, Alyanak argues that the documentation requirements under the current legal framework go beyond the requirements of Public-Sector Directive, which is alleged to be time-consuming and discouraging for economic operators.[24] Gül also argues that the excess of documentation creates significant red-tape, particularly in works procurement.[25] Indeed, Article 44(2) of Public-Sector Directive provides that the extent of the information and the minimum level of ability required for a specific contract must be related and proportionate to the subject matter of the contract. As Trepte rightly points out, the production of unnecessary information and documents is not without cost, which is passed by the economic operators onto the contracting authorities.[26] Although the excess documentation under TPP Act and the implementation regulations are open to criticism, the uniform system of documentation established by TPP Act is a significant public procurement reform in Turkey, as it is more predictable and reinforces the principle of transparency as well as equal treatment.

Article 28 of TPP Act lays down an additional qualification criterion which applies to all procurement procedures: purchasing the tender documents. TPP Act provides that the tender documents and pre-qualification documents can be seen at the place of the contracting

[23] Uz, note[11], p. 257.
[24] Servet Alyanak, 'The Public Procurement System of Turkey in Comparison to European Community Procurement Legislation' (2007) 36 *Public Contract Law Journal* 203, p. 219.
[25] Hasan Gül, 'Türk Kamu Alımları Sisteminde Kamu İhale Kurumu'nun Yeri ve Artan Önemi' (2010) 2 *Sayder Dış Denetim Dergisi* 5, p. 11.
[26] Trepte, note[2], p. 353.

authority free of charge. However, it is compulsory to purchase this document in order to participate in the procurement proceedings.

In 2012, the Act numbered 6353 introduced a new rule to Article 28 of TPP Act. According to the new rule, if the procurement procedure does not require publication of a tender notice, the tender document can only be sold to the economic operators who are invited by the contracting authority. The Preamble of the Act numbered 6353 does not provide any satisfactory explanations regarding the motivation behind this amendment. As explained in Chapter 5, it is not compulsory to issue publication of a notice while procuring through the negotiated procedure under certain circumstances, and the contracting authorities have a broad margin of discretion while inviting economic operators to the negotiated procedure.[27] The new rule implies that only the invited economic operators will be qualified for the negotiated procedure and will have the full text of the tender documents at their disposal and remaining economic operators will only be able to see the tender documents at the place of the contracting authority. In the same context, this new rule implies that only the tenderers that the contracting authority sells the tender documents to will be qualified to lodge complaints before TPP Authority. The PP Communication, which guides the contracting authorities on the implementation of TPP Act, has not been amended yet. It is the author's view that if the new rule is interpreted narrowly and implemented rigidly, transparency, competition and public supervision, which are amongst the general principles pursued by TPP Act, will be violated. Indeed, TPP Authority, in a recent decision, adopted a strict approach and dismissed the hearing of claims of an economic operator with regard to the substance of a procurement conducted through negotiated procedure on the ground that the tender documents were not sold to that particular economic operator.[28]

[27] Chapter(5):Section(5.7.3).
[28] TPP Authority, Decision No. 2012/UH.I-3528 of 05.09.2012.

On the other hand, the Turkish Competition Authority suggests incorporation of a new provision related to the qualification of economic operators that "*the qualification criteria shall be determined in a way that does not distort equality of opportunities and competition*".[29] Indeed, the principles of equal treatment and competition are amongst the general principles pursued by TPP Act. The Competition Authority, though, considers that inclusion of a separate general principle of qualification could reinforce the principles of equal treatment and competition insofar as it could raise awareness of the contracting authorities while intentionally or unwittingly setting qualification criteria that create additional barriers to entering the public procurement market.

7.5.2 The pursuit of sustainability concerns

7.5.2.1 Environmental concerns

As explained in Chapter 3, the contracting authorities can query the capacity of the tenderers to cope with environmental problems related to the subject matter of the contract and the contracting authorities can use environmental technical capacity criteria and environmental management schemes while addressing environmental concerns during qualification stage.[30]

As explained previously, TPP Act does not count environmental management systems among the means to be used for qualifications as it is laid down under Article 48(2)(f) of Public-Sector Directive. In fact, the environmental management systems were introduced to the Turkish public procurement law through the amendment of the implementation regulations of TPP Act in 2006.[31] Even though the method of regulation (i.e. regulation through secondary regulations, not acts) is open to criticism, the introduction of

[29] See, the Turkish Competition Authority, 'Kamu İhale Kanununda ve Kamu İhale Sözleşmeleri Kanununda Değişiklik Yapılması Hakkında Kanun Tasarısı', p. 3 available at <www.rekabet. gov.tr/dosyalar/gorusler/gorus146.pdf>
[30] Chapter(3):Section(3.4.6).
[31] OJ 26092/26/02/2006.

environmental management systems to the Turkish public procurement law is a breakthrough in terms of the transition to sustainability in public procurement.

When the substance of the implementation regulations is examined, it is seen that the implementation requirements of environmental management systems differ for procurements of goods, services and works respectively:

Goods: The environmental management systems can be used as a qualification criterion while procuring goods provided that the goods in question require special production. Special production is defined under Article 3(g) of the Regulation on Implementation of Goods Procurement (hereafter 'the Goods Regulation') as the goods that are not available in the market, and could only be produced on demand or by design that requires specific expertise and production techniques. Article 42 of the Goods Regulation permits the contracting authorities to require from the tenderers an environmental management system certificate only in cases of special production. Public-Sector Directive, on the other hand, limits the application of environmental management systems to the procurements of services and works.

Services: In cases of services procurement, the discretion of contracting authorities is wider. According to Article 42 of the Regulation on Implementation of Services Procurement (hereafter 'the Services Regulation'), the contracting authorities are permitted to ask for an environmental management certificate if the procurement in question requires special treatment. The discretion is left to the contracting authority to decide upon whether the procurement of service in question requires special treatment.

Works: In cases of works procurement, the discretion of contracting authorities depends on the threshold values. According to Article 30 of the Regulation on Implementation of Works Procurement (hereafter 'the Works Procurement Regulation'), the contracting authorities are only permitted to ask for an environmental management certificate from tenderers for

procurements of which the estimated cost is equal to or above half of the threshold values. The updated threshold value is 29,057,835 Turkish Liras (equivalent to about 12,674,620 EUR) for the works contracts by any of contacting authorities covered by TPP Act. In other words, once the estimated cost of work procurement is equal to or above 6,337,310 EUR, the contracting authorities are entitled to question the tenderers' environmental capacity. Half of the threshold values is still higher than the threshold values that determine application of the procurement directives (i.e. 5 Million EUR, 2012 application threshold for works contracts), and this could be considered as a shortcoming of TPP Act.

The environmental management certificate that is referred to within the regulations stands for the ISO 14001 standard[32] and relates to specific environmental aspects. The contracting authorities, therefore, need to justify the stipulation of an environmental management certificate with the merits of the procurement in question, so that the requirement has to be linked with the subject matter of the procurement. TPP Authority held that the stipulation of an environmental management certificate for a procurement where such a requirement is inapplicable due to the nature of the procurement is a breach of the procurement rules.[33] In other words, the requirement needs to be linked to the subject matter of the contract.

7.5.2.2 Social concerns

TPP Act does not make any explicit reference to social concerns as qualification criteria. Therefore, the contracting authorities need to investigate the general principles of qualification for their suitability to pursue a specific social target. As explained previously, the general principles of qualification laid down under TPP Act are modelled after Public-Sector Directive. As exemplified by the European Commission in the Buying Social Handbook, when the procurement in question requires specific 'know-how' in the social

[32] For the technical aspects of the standard see, International Organization for Standardization (ISO), *ISO 14001:2004 - Environmental management systems* (ISO: Switzerland, 2009)
[33] TPP Authority, Decision No. 2006/UH.Z-1519 of 26.06.2006; Decision No. 2008/UH.II-5162 of 29.12.2008.

field, the contracting authorities can question whether the economic operators employ or have access to personnel with the knowledge and experience required to deal with the social issues of the contract; whether the economic operators own or have access to the technical equipment necessary for social protection; and whether the economic operators have the relevant special technical facilities available to cover the social aspects.[34] In that regard, the contracting authorities subject to TPP Act can follow the same methodology exemplified by the European Commission in order to address social considerations within the qualification criteria, provided that the criteria correlates to the subject matter of the contract.

As explained in Chapter 3, the EU Procurement Directives introduced a special qualification criteria promoting social cohesion: workshops for workers with disabilities.[35] On the other hand, TPP Act does not lay down a general principle for sheltered workshops for disabled people, which constitutes a significant aspect of social procurement in the EU. According to research conducted by the Administration for Disabled People attached to the Prime Ministry, the majority of sheltered workshops operated by disabled people consider the barriers to participating in public procurement procedures as a major marketing problem.[36] In order to enhance socially responsible procurement policies, TPP Act needs to set aside public contract opportunities for the sheltered workshops operated by disabled people, since such workshops would not be able to obtain a contract in a competitive market.

It is worth examining the possibility of using the Social Accountability 8000 (hereafter 'SA-8000'), an international standard setting out the voluntary requirements to be met by employers in the workplace, dealing with such issues as child labour, forced and compulsory labour, health and safety, freedom of association and right to collective bargaining,

[34] See, European Commission, *Buying social: a guide to taking account of social considerations in public procurement* (Luxembourg: Official Publications of the European Communities, 2010), p. 36.
[35] Chapter(3):Section(3.5.3).
[36] Canan Aktaş and others, 'Sheltered Workshops in Turkey' (2004) 1 *ÖZ-VERİ*, p. 2.

discrimination, disciplinary practices, working hours, and remuneration.[37] According to Social Accountability International,[38] the institution determining the substance of SA-8000, the normative elements of this standard are based on national law, international human rights norms and the conventions of the ILO. SA-8000 dates back to 1997 and underwent a major revision in 2008. However, SA-8000 is still a voluntary standard, not recognised either by the Mutual Recognition Agreement for International Accreditation Forum or the European cooperation for Accreditation.

The legitimacy of requiring SA-8000 to ensure the tenderers' social behaviours in their workplaces has created controversy under the Turkish public procurement law. In order to clarify the issue, TPP Authority has asked for the legal status of SA-8000 from the Turkish Accreditation Institution on 29.11.2006. The Turkish Accreditation Institution held that the SA-8000 is not a recognised standard, therefore it is not suitable to be used within the public procurements held in Turkey, and this was then endorsed by TPP Authority as institutional policy regarding the SA-8000. However, certain contracting authorities covered by TPP Act kept requiring the SA-8000 as a mandatory certification with regard to ensuring compliance with social issues, which were annulled by TPP Authority.[39] The PP Communication was revised by TPP Authority in 2011 and it was underlined that the contracting authorities are not permitted to require the tenderers to have the SA-8000 certification.[40] As discussed in Chapter 6, TPP Act adopts a strict approach regarding the standards and favours national standards over international standards.[41] TPP Authority reinforced this approach through prohibiting the contracting authorities to request from the tenderers SA-8000 certification

[37] See, Social Accountability International, *Social Accountability: 8000* (New York: SAI, 2008), available at <www.sa-intl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf>.
[38] SAI is a non-governmental, international, multi-stakeholder organization dedicated to improving workplaces and communities by developing and implementing socially responsible standards. See <www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&pageId=490>.
[39] For instance see, TPP Authority, Decision No. 2007/UH.Z-1502, 03.05.2007 and Decision No. 2007/UH.Z-3311, 08.10.2007.
[40] See, sections 54.2 and 74.4 of the PP Communication.
[41] Chapter(6):Section(6.3.3).

on the grounds that this standard has not been transposed by the Turkish Standards Institute as a Turkish standard.

7.5.2.3 Other methods for promoting sustainability

As explained in Chapter 5, one of the procurement procedures regulated under the PP Act is direct procurement.[42] In the original text, the direct procurement method was regulated as a separate procurement procedure under Article 18 of TPP Act. However, the direct procurement method was removed from the procurement procedures by 30 July 2003 and regulated as a distinct procurement method under a separate section of the law under Article 22 of TPP Act.

Article 22 of TPP Act permits the contracting authorities to directly obtain goods, services or works from the suppliers without advertising, without receiving any securities and without establishing a tender commission. Therefore, the restrictions explained in this chapter do not apply to the procurements concluded through the direct procurement method. In that regard, the contracting authorities are not required to conduct research on the existence of grounds for exclusion, or compliance with the technical or professional capacity.[43] As explained, the direct procurement method is not revised consistently and the current provision confers a broad discretion to the contracting authorities that have the risk of circumvention of tender proceedings and impedes competition significantly, which could be identified as a loophole and shortcoming of TPP Act. Being exempted from the review of TPP Authority enhances flexibility and room to manoeuvre area for the contracting authorities. On the other hand, this shortcoming could be used as an advantage for pursuing social or environmental considerations. Taking into consideration the flexibility and discretion provided within the

[42] Chapter(5):Section(5.8.1).
[43] As UZ highlights that the discretion in direct procurement is related to the public procurement law, and the contracting authorities remain bound to criminal law provisions (in particular to the criminal provisions regarding corruption in public procurement) even though they use the direct procurement method. See Uz, note[11], p. 270.

direct procurement method, the contracting authorities could use their power of purchase in the direct procurement method. In that regard, the contracting authorities could opt to offer the contract opportunity to the economic operators showing full compliance with social and environmental regulations or ethical considerations, and could prefer to do business with the economic operators showing higher standards. The same methodology in direct procurement could also be applied for the contracting authorities exempted from the scope of TPP Act.

7.6 The participation of foreign economic operators

Article 63 of TPP Act permits the contracting authorities, in cases where the estimated costs are below the threshold values, to limit tenders only to domestic tenderers regardless of the type of procurement. In other words, the participation of foreign economic operators to the public tenders in Turkey is conditional.

The update threshold values applicable for the implementation of Article 63 are determined under Article 8 of TPP Act as follows:

a. 792,482 Turkish Liras (equivalent to about 345,669 EUR) for procurement of goods and services by the contracting authorities operating under the general or the annexed budget;
b. 1,320,805 Turkish Liras (equivalent to about 576,116 EUR) for procurement of goods and services by other contracting authorities within the scope of TPP Act;
c. 29,057,835 Turkish Liras (equivalent to about 12,674,620 EUR) for the works contracts by any of contacting authorities covered by TPP Act.

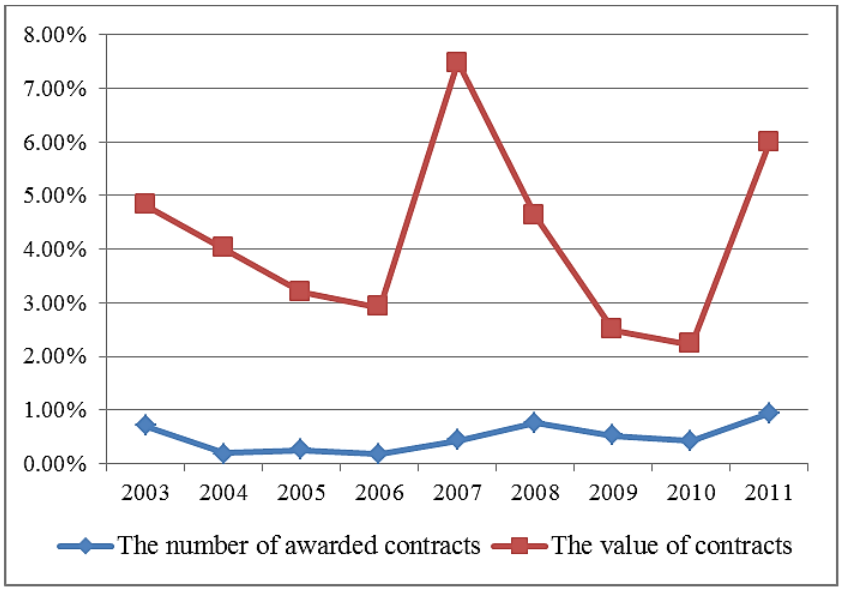
Article 4 of TPP Act defines domestic tenderers as the citizens of the Republic of Turkey and the legal persons established in accordance with the laws of the Republic of Turkey. Citizenship is the legal basis for identification as a domestic tenderer for natural persons. Article 66 of the Turkish Constitution provides that everyone bound to the Turkish state through the bond of citizenship is a Turk and citizenship can be acquired under the conditions stipulated by law and can be forfeited only in cases determined by law. In the same respect, Article 3 of the Turkish Citizenship Act numbered 5901 defines aliens as '*anyone who has*

no citizenship bonds with the Republic of Turkey'. Turkish citizenship can be acquired by birth or after birth. For the implementation of the provision on domestic tenderers, however, the method of acquisition of citizenship has no legal impact. Similarly, dual nationality does not prevent anyone from being qualified as a domestic tenderer.

On the other hand, for the legal persons the method of establishment plays a key role in order to be identified as a domestic tenderer. The original text of the Public Procurement Act had defined the domestic tenderer for the legal persons as '*the legal entities established by the Turkish citizens*'. This definition was amended on 30 July 2003 through the Act numbered 4964 whereby the reference to citizenship has been revoked and the legal persons are qualified as domestic tenderers only if they are established in accordance with the laws of the Republic of Turkey. The reason for this revision is laid down under the preamble of the Act numbered 4964 as facilitating the foreign capital inflow to Turkey and boosting competition in the public procurement market. There is no restriction in the terms of the nature of the entity or the number of shareholders to be established. However, the revision in 2003 is considered controversial by Kortunay and Sezer as the revised definition permits any foreign economic operator to benefit from the preferential procurement by establishing a legal entity in Turkey.[44] Taking into account the revised text it could be argued that, even though there are still legal burdens to be fulfilled, nationality is not a significant constraint for foreign economic operators when accessing the Turkish public procurement market.

[44] Ayhan Kortunay and Yasin Sezer, 'Kamu Ihale Hukukunun 63. Maddesinin AB Hukuku Perspektifinden Değerlendirilmesi' (2007) 56 *AUHFD* 137, p. 161.

Figure 1 - The approximate number and value of contracts awarded to foreign economic operators in the Turkish public market between 2003 and 2011



According to the statistics published by TPP Authority, the number of contracts awarded to foreign economic operators could not exceed 1% of the overall contracts whilst the value of these contracts could not exceed 8% of the total value of contracts between 2003 and 2011.[45] The national economic operators still maintain their dominant position in the Turkish public procurement market according to the recent statistics.

According to article 24 of TPP Act, it is mandatory to include the information in the notices whether the tender is closed to the foreign economic operators. Otherwise, any measure taken against the foreign economic operators or non-domestic goods would be violating the principle of equal treatment which is one of the main principles pursued by TPP Act. Furthermore, the contracting authorities, which do not restrict participation of the foreign economic operators, are required to accept any equivalent documentation or means

[45] For a detailed examination of participation of foreign economic operators to the Turkish public procurement market and details of the statistics see, Mehmet Bedii Kaya, 'The Legitimacy of Preferential Procurement and International Competition under the Turkish Public Procurement Law' (2012) 5 *Law & Justice Review* 121, p. 140.

submitted by the foreign economic operators to prove their economic, financial, technical or professional capacity.

7.7 Conclusion

TPP Act remarkably improved the process of qualification of economic operators to public tender proceedings. Although the excess of documentation requirement is criticised, TPP Act established a uniform and standardised system. The provisions laid down for that purpose are mostly in line with Public-Sector Directive.

When the grounds for exclusion are examined, it is seen that those that are based on varying degrees of professional misconduct are convenient means for promoting both green and social procurement. Furthermore, the Turkish Government's plan to introduce a new ground for exclusion for the economic operators who are established to employ illicit workers could also be evaluated as a social consideration.

In the same context, the technical capacity criteria permit the pursuit of green and social procurement considerations (in particular green). To recap, TPP Act permits the contracting authorities to ask tenderers for an environmental management certificate, which enables the economic operators to weigh the environmental impact of their activities. On the other hand, TPP Act does not make any explicit reference to social concerns as qualification criteria. Therefore, the contracting authorities need to investigate the general principles of qualification for their suitability to pursue a specific social target provided that the social target is related to the subject matter of contract.

CHAPTER 8

The pursuit of sustainability concerns under award criteria

8.1 Introduction

The contract award stage, as explained in Chapter 3, is an important and complex stage of procurement for addressing sustainability concerns. As Caranta points out, "*award criteria have been the battleground over which sustainability considerations have fought for recognition*".[1] The rules governing this issue are regulated under the EU Procurement Directives, which mostly emanate from the case-law of the CJEU. In particular, North-Holland case provided a new insight for the pursuit of sustainability concerns throughout award criteria.

The Public Procurement Act (hereafter 'TPP Act') lays down a detailed set of rules governing the contract award procedures. As explained in Chapter 5, TPP Act has been mainly modelled after Public-Sector Directive. The Preamble of TPP Act also reiterates this objective of aligning award procedures with the EU law.[2] The most important contribution of TPP Act is that it introduced a new methodology for awarding contracts: the most economically advantageous tender (hereafter 'the MEAT'). The introduction of the MEAT by TPP Act is a breakthrough development in the way of modernising public procurement in Turkey on the grounds that it confers a broader discretion on the contracting authorities to consider a range of factors while awarding the contracts.

This chapter has two main objectives. Firstly, it aims to examine the general rules governing award criteria under TPP Act and to evaluate the extent of compliance and non-compliance of TPP Act with Public-Sector Directive. Secondly, this chapter aims to analyse the legitimacy of addressing sustainability concerns under the award criteria. In that regard, this

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[1] Roberto Caranta, 'Sustainable Public Procurement in the EU' in Caranta Roberto and Martin Trybus (eds), *The Law of Green and Social Procurement* (Copenhagen: DJØF Publishing, 2010), p. 43.
[2] The Preamble of TPP Act, p. 9.

chapter questions to what extent the contracting authorities have discretion to address sustainability concerns within the award criteria.

8.2 The general rules on submission of tenders

As discussed in Chapter 7, Article 28 of TPP Act lays down an additional qualification criterion which applies to all procurement procedures: purchasing the tender documents.[3] The tenderers who purchase the tender documents need to follow a strict procedure in order to submit their tenders. These rules are not minor procedural rules since breach of any of those conditions set forth could give rise to rejection of the submitted tenders.

The submitted tenders cannot be withdrawn or changed for any reason whatsoever, except in the case of an addendum arrangement. This requirement stems from the principle of reliability, which is amongst the general principles pursued by TPP Act.[4] According to Article 32 of TPP Act, the contracting authorities are required to specify under the tender documents a period for validity of the tenders to be submitted. Uz highlights that laying down a specific period for validity of the tenders protects the bidders and puts pressure on the contracting authorities to complete the procurement proceedings in time.[5]

8.3 The institutional framework

The principal decision-making body throughout the public procurement process is the tender commission. In parallel with the powers granted to the tender commission, an equivalent liability is stipulated for its decisions. Article 6 of TPP Act provides that members of the tender commission are responsible for their votes and decisions. Dissenting members, if any, must also write down their justifications in the record of commission minutes. This provision is an extension of the principle of public supervision as well as the principle of transparency.

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[3] Chapter(7):Section(7.5.1).
[4] Chapter(6):Section(6.4.1.4).
[5] Abdullah Uz, *Kamu Ihale Hukuku* (Ankara: Turhan Kitabevi, 2005), p. 280.

In fact, during the implementation of the State Tender Act there was a widespread practice of establishing separate commissions for qualification and technical assessment of the tenderers. Uz points out that the fragmentation of the decision-making body diminished efficiency and resulted in poor decisions.[6] On the other hand, TPP Act centralised the decision-making body and prohibited establishment of any additional commissions. In that regard, TPP Act requires the tender commission to be competent in all aspects of the procurement. Therefore, TPP Act stipulates that at least two members of the tender commission must be experts on the subject-matter of the procurement. Furthermore, TPP Act permits the contracting authorities to invite experts from other contracting authorities that are subject to TPP Act in cases of absence of personnel in adequate numbers or qualifications. Dedeoğlu maintains that the sole discretion about determining the degree of expertise needed for being a member of commission belongs to the contracting officer.[7]

As explained in Chapter 3, the incorporation of sustainable development objectives into the public procurement procedures necessitates commercial and analytical skills in order to ensure that the costs and benefits are weighed adequately. The approach of TPP Act (i.e. the centralisation of the decision-making process, the requirement of having experts in the tender commission and the possibility of inviting experts from other public bodies) has positive implications in that regard. The contracting authorities that opt to address certain horizontal policies in their procurements could employ experts or invite experts from the relevant public bodies who have expertise in that specific horizontal policy.

[6] Ibid, p. 251.
[7] Erdoğan Dedeoğlu, '4734 Sayılı Kamu İhale Kanunu'na Göre Oluşturulan İhale Komisyonları' (2010) 2 *Sayder Dış Denetim Dergisi* 195, p. 197.

8.4 Initial procedures before the award stage

8.4.1 Checking documentation

When the tenderers submit their files which include bids and supporting documents, the contracting authorities are required to check for the existence of any missing documents or information within the submitted files and ask for clarification from the tenderers. Article 37 of TPP Act, however, underlines that the clarification process cannot be conducted with the intention of making a change in the tender price, or converting any ineligible tender according the conditions in the tender documents to an eligible one.

8.4.2 Abnormally low tenders

As stated in Chapter 5, both the Act numbered 2490 and the State Tender Act lacked the mechanism to deal with abnormally low tenders, which left the public tendering system open to abuse by tenderers offering unrealistic and unfeasible bids for the sake of winning the contract.[8] As explained, the contracts awarded to those kinds of tenderers caused significant delays in the delivery of public services in Turkey and resulted in substantial public losses. TPP Act for the very first time introduced a mechanism to deal with such cases which permits the contracting authorities to question the feasibility of the submitted tenders. The main impetus of this mechanism is to improve the quality of the tendering process through eliminating economically unfeasible tenders.

The tender commission is required by Article 38 of TPP Act to compare the submitted tenders to the estimated cost determined by the contracting authority and to the other tenders. Once the tender commission establishes that a submitted tender is abnormally low (comparing it to the estimated cost and other tenders), TPP Act requires the tender commission to request from the relevant tenderer the details relating to significant components of the tender in writing and within a specified period. TPP Act identifies the

[8] Chapter(4):Section(4.2) and Section(4.3.5).

substance of explanations that need to be provided by the tenderers. This provision is in line with the provision of abnormally low tenders under Article 55 of Public-Sector Directive.

8.5 The evaluation of the tenders

According to Article 40 of TPP Act, the contracting authorities are required to award the contract to the tenderer who submits the most economically advantageous tender (hereafter 'the MEAT'). TPP Act gives further clarification to the MEAT and provides that the MEAT can be determined solely on the basis of price or together with the price by taking into account non-price factors, 'such as': (1) operation and maintenance costs, (2) cost-effectiveness, (3) productivity, (4) quality and technical merit. When the MEAT is determined by taking into account non-price factors alongside the price, TPP Act requires that these factors must be expressed in monetary values or relative weights in the tender documents. This provision is substantially modelled after Public-Sector Directive and is in line with Article 53 of Public-Sector Directive.

The very first question that needs to be addressed for the purpose of this chapter is whether non-price factors specified under TPP Act are exhaustive. Uz points out that the use of 'such as' implies that non-price factors are outlined non-exclusively.[9] Indeed, the implementation regulations of TPP Act all reiterate the very same wording of TPP Act and repeat the wording of 'such as'. In that regard, non-price factors are outlined non-exclusively.

According to Article 40 of TPP Act, the contracting authorities are entitled to determine the MEAT by either relying on price or price accompanied by non-price factors. In fact, the original text of TPP Act, when it was adopted in 2002, did not provide such a discretion to the contracting authorities and required the contracting authorities to first determine the MEAT by relying on price, and only then were they allowed to use non-price factors if the criteria could not be determined by price alone.

[9] Uz, note[5], p. 307.

Article 40 of TPP Act, when it was revised in 2008 through the Act numbered 5812, conferred the current discretion to the contracting authorities. The Act numbered 5812 made a minor wording change that some scholars have argued did not create a substantial change in terms of formulating award criteria.[10] In fact, the previous text of Article 40 of TPP Act stated that the non-price factors such as operation and maintenance costs, cost-effectiveness, productivity, quality and technical merit could only be used if the MEAT could not be determined through the lowest price criterion. Uz discusses that the extent of the discretion powers of the contracting authorities in relying on non-price factors was controversial and the PP Board's decisions were not consistent.[11] The Preamble of the Act numbered 5812 that reformed Article 40 of TPP Act provided that on the contrary to the current practice, the revision grants discretion to the contracting authorities to choose between the lowest price or non-price factors beside the price while specifying the MEAT.[12] The Preamble also maintains that it aimed to enhance the quality of procurement of goods, services and works according to the nature of the procurement in question and the needs of the individual contracting authorities. As highlighted by Kaplan, the MEAT has functional outcomes and drives the market for more research and development in order to meet the functional needs of contracting authorities.[13]

The secondary regulations implementing TPP Act lay down further rules with regard to the formulation of non-price factors. The rules specified under the Goods Regulation (Article 60), the Works Regulation (Article 62) and the Services Regulation (Article 61) are almost identical. The common rules are as follows:

[10] For instance see Hüseyin Bilgin, '5812 Sayılı Kanun ile Kamu İhale Kanunu'nda Yapılan Değişiklikler' (2009) 86 *Türkiye Barolar Birliği Dergisi* 339, p. 356.
[11] Uz, note[5], p. 309.
[12] The Preamble of the Act numbered 5812, p. 18.
[13] Sami Kaplan, 'İdeal Bir Kamu İhale Kanunu ve İdeal Bir Kamu İhale Kurumu ve Kurulu Nasıl Olmalıdır? Fonksiyonel Bir Model Çalışması' (2012) 162 *Maliye Dergisi* 18, p. 32.

Rule (1): Non-price factors such as operation and maintenance costs, cost-effectiveness, productivity, quality and technical merit need to be determined by taking into consideration the characteristics of the subject matter of contract.

The substance of this requirement will be further analysed in the following section.

Rule (2): When the MEAT is determined by taking into account non-price factors besides the price, these factors must be publicised in monetary values or relative weights under the tender documents together with the calculation method to be applied. The contracting units or officers who determined non-price factors, monetary values or relative weights and calculation methods must prepare a detailed justification document, which must be attached to the tender documents.

This requirement reinforces the principle of transparency. Furthermore, the requirement of laying down detailed explanations accompanied by calculation methods enhances the precision and objectivity of the formulation manner of the award criteria.

Rule (3): Non-price factors cannot be determined in a way impeding competition by relying on specific trademarks or models.

This requirement reinforces the principle of competition. Furthermore, this requirement also implies that the non-price factors must be determined in a functional way.

The Goods Regulation also adds one more rule for the determination of non-price factors. According to Article 60(3) of the Goods Regulation, the financial and economic standing criteria and works experience documents cannot be determined as non-price factors. This requirement aims to distinguish selection criteria and award criteria. As explained in Chapter 3, the CJEU's case-law clarified that although it is possible to conduct the processes of selection and award simultaneously, the two procedures are governed by different rules.[14]

[14] See, Case 31/87 Gebroeders Beentjes BV v State of the Netherlands [1988] ECR 4635, para. 16; Case C-532/06 Emm. G. Lianakis AE and Others v Dimos Alexandroupolis and Others [2008] ECR I-251, para. 27-

As explained, selection criteria relate to the characteristics of the tenderers while the award criteria relate to the relative merits of the tenders. The requirement laid down under the Goods Regulation is in line with this approach. However, there is no justification with regard to bringing such a rule only for the procurement of goods and leaving works and services procurement out of the scope.

Considering all these rules, the very first conclusion that could be drawn accordingly is that the contracting authorities have the ultimate discretion to refer to non-price factors while determining the MEAT, provided that the criteria are determined objectively and announced adequately. The question that needs to be addressed in that regard is the extent of the discretion. In other words, there is a need to question whether non-price factors accommodate the pursuit of sustainability concerns.

In order to answer these questions a three step examination needs to be conducted on TPP Act: (1) Is there any explicit mandate for the pursuit of sustainability concerns? (2) Is there any implied mandate for favouring the pursuit of sustainability concerns? (3) Is there any explicit restriction preventing the contracting authorities from pursuing sustainability concerns, and what are other possible constraints exist (e.g. legal, institutional or practical constraints)?

(1) Is there any explicit mandate for the pursuit of sustainability concerns?

As explained in Chapter 3, an important outcome of green procurement is that it can promote savings or eliminate additional costs.[15] In certain areas such outcomes also promote more efficient use of public resources (e.g. when life-cycle costing is used) as much as the protection of the environment. In fact, TPP Act itself gives examples of non-price factors as

28; For a detailed examination of this distinction see, Steen Treumer, 'The distinction between selection and award criteria in EC public procurement law - a rule without exception?' (2009) 3 *Public Procurement Law Review* 103.

[15] Chapter(3):Section(3.4.1).

cost-effectiveness and efficiency. Furthermore, as explained in Chapter 5, efficiency is one of the main principles pursued by TPP Act. Therefore, any resource efficiency concerns can legitimately be addressed within the award criteria. In that regard, the answer to the question of 'is there any explicit mandate for the pursuit of sustainability concerns' is positive for resource efficiency concerns (i.e. concerns that have economic outcomes).

(2) Is there any implied mandate for favouring the pursuit of sustainability concerns?

As explained previously, the regulations implementing TPP Act (the Goods Regulation (Article 60), the Works Regulation (Article 62) and the Services Regulation (Article 61)) require that "Rule (1): Non-price factors such as operation and maintenance costs, cost-effectiveness, productivity, quality and technical merit need to be determined by taking into consideration the characteristics of the subject matter of contract". If this rule is interpreted narrowly, it could be argued that only requirements related to the functionality of the subject-matter of a contract could be used as non-price factors.[16]

In order to reveal the extent of the discretion of contracting authorities there is also a need to look the principles governing the Turkish administrative law. For instance, Article 123 of the Turkish Constitution requires the structure and functions of any administrative bodies by a legislative act, which is also recalled as the legality principle. In that regard, administrative bodies are only entitled to perform duties within the scope of their individual legal framework. This rule also implies that administrative bodies are by default considered not authorities to perform an action unless a specific act explicitly entitles them to do so. Although TPP Act does not mention environmental considerations as legitimate concerns that could be pursued within the award criteria and although an explicit mandate does not exist under TPP Act, the sustainable development context that has been elaborated in Chapter 2 provides a strong normative background.

[16] For instance Uz adopts such a strict approach while interpreting non-price factors. See, Uz, note[5], p. 38.

As explained in Chapter 2, Article 56 of the Turkish Constitution recognises that 'everyone has the right to live in a healthy, balanced environment' and mandates that 'it is the duty of the State and the citizens to improve the natural environment, and to prevent environmental pollution'.[17] This provision establishes an explicit normative background for the environmental pillar of sustainable development. Furthermore, as explained in Chapter 2, the Environment Act is the pioneering legislation that introduced the concept of sustainable development into Turkish law.[18] Article 3(a) of the Environment Act recognises that everybody, but primarily the public bodies, chambers of commerce, associations and non-governmental organisations, are responsible for protecting the environment and preventing pollution, and they are obliged to adhere to the measures taken and principles established on the subject. Furthermore, Article 3(f) of the Environment Act requires that for the purpose of utilising natural resources and energy in an efficient manner in all the activities undertaken, it is essential to utilize environmentally compliant technologies that reduce the waste at the source and enables the recovery of waste. The policy frameworks and strategy documents that were explained in Chapter 2 also reinforce the applicability of these rules.[19]

It is the author's view that these rules provide a strong normative background for the formulation of any environmental concerns as non-price factors, even though such criteria do not provide an immediate economic benefit for the contracting authority, even though the criteria do not affect the intrinsic characteristics of the product itself, and even though the criteria neither affect the consumption characteristics for the contracting authority nor provide extra efficiency.

On the other hand, for social concerns, the answer is not straightforward, aside from disability concerns on the grounds that they relate to the functionality of the subject-matter

[17] Chapter(2):Section(2.4.1).
[18] Chapter(2):Section(2.4.2).
[19] Chapter(2):Section(2.4.3).

of a contract. The strict requirements of the Disability Act, which is explained in Chapter 6, also support the pursuit of disability issues within the award criteria.[20] However, when it comes to other social concerns such as ethical concerns, an explicit mandate cannot be easily established. As explained in Chapter 2, the environmental pillar of sustainable development in Turkey has a strong normative value, whereas the social pillar has a relatively weak value. It is the author's view that there is a need for an explicit mandate permitting the pursuit of such social concerns within the award criteria as they are specified under Article 53 of Public-Sector Directive.

(3) What are other possible constraints (e.g. legal, institutional or practical constraints)?

Although there is not any explicit restriction preventing the contracting authorities from pursuing sustainability concerns, there might be other constraints limiting the practical use of the power of discretion of the contracting authorities bound to TPP Act.

Kaplan argues that the contracting authorities bound to TPP Act maintain their old practices; they refrain from taking any risks for establishing award criteria based on non-price factors and they frequently rely on the lowest price as the award criteria and award the contract to the lowest bid.[21] The Turkish literature does not provide sufficient research or work supporting this argument. It would be beyond the scope of this study to conduct an empirical analysis of the contracting authorities' tendency to establish award criteria. Indeed, this tendency could be explained by the dynamics of public procurement reforms in Turkey.

As discussed in Chapter 3, granting discretion to the procurement officers is considered to be the most important cost of implementing horizontal policies.[22] However, the benefits of sustainable procurement policies could only be gained by exercising broad discretion.

[20] Chapter(6):Section(6.5).
[21] Kaplan, note[13], p. 32.
[22] Chapter(3):Section(3.4.2).

Therefore, having broad discretionary powers could promote sustainable procurement and best value for money as much as it can lead to corruption. Once the procurement system is designed wisely, corruption can be minimised whilst sustainability is promoted.

As discussed in Chapter 4, corruption in Turkey, like other developing countries, has always been considered as a major threat to the public administration and an obstacle to economic development.[23] The main dynamic behind public procurement reforms have always been to prevent corruption in public spending. As explained, TPP Act has introduced different measures to prevent corruption such as increasing transparency, eliminating conflicts of interest, imposing procurement sanctions on bidders and criminal and disciplinary sanctions in order to eliminate corruption. Turkey has also been party to the various international agreements related to corruption.[24] In particular, the dissemination of electronic means in the public procurement process is considered to significantly contribute to the principles of transparency and public supervision, and to the elimination of the perception of corruption in public procurement in Turkey.[25]

As explained in Chapter 3, in order to implement sustainable procurement policies, the procurement officers need to have the commercial and analytical abilities, competencies and tools to judge the long-term benefits of sustainable development and weigh the required sustainability parameters adequately. As explained in Section 8.3, TPP Act requires the tender commission, which is the principal decision-making body throughout the public procurement process, to be competent with regard to the procurement in question. As stated, the approach of TPP Act with regard to the tender commission (i.e. the centralisation of the

[23] Chapter(4):Section(4.4).
[24] Chapter(5):Section(5.4.1.7).
[25] See, Hasan Gül, 'Türk Kamu Alımları Sisteminde Kamu İhale Kurumu'nun Yeri ve Artan Önemi' (2010) 2 *Sayder Dış Denetim Dergisi* 5, p. 11; H. Bahadır Barçın, 'Kamu Alımlarında Bağımsız İdari Otorite İhtiyacı ve Kamu İhale Kurumunun Katkısı' (2010) 2 *Sayder Dış Denetim Dergisi* 125, p. 129; Güler Koçberer, 'Türkiye'deki Kamu Alımı Uygulamalarında Şeffaflık ve Rekabet Edilebilirliğin Değerlendirilmesi' (2010) 2 *Sayder Dış Denetim Dergisi* 131, p. 132.

decision-making process and the requirement of having experts in the tender commission and the possibility of inviting experts from other public bodies) has positive implications in that regard.

As explained in this chapter, TPP Act enhanced the discretionary power of the contracting authorities significantly while formulating the award criteria (in particular after the revisions of 2008). Despite the enhancement of the power of discretion and the empowerment of the decision-making process and despite the other measures to ensure integrity of the procurement proceedings, it is argued that the contracting authorities bound to TPP Act refrain from exercising their discretion and merely use price as the main award criteria.

As discussed in Chapter 3, the institutional or organisational factors also have an impact on the implementation of sustainable procurement policies.[26] In particular, cases of budgetary limitations and institutional performance criteria have significant implications. As explained, once cost-savings or cash-related savings are considered as personal performance measurement criteria, the organisational factors hamper the progress towards sustainable procurement as the long-term benefits are avoided for the sake of daily savings. In the same context, in cases where the procurements require high capital costs, long-term sustainability might be avoided due to financial pressure, which might lead to the preference of lowest cost options instead of best value options that generate long-term sustainable outcomes. Therefore, the individual institutional and organisational frameworks are important factors that must be considered while evaluating the practical use of the power of discretion of the contracting authorities bound to TPP Act.

Beside the institutional and organisational factors, psychological factors could lead the contracting authorities bound to TPP Act to refrain from exercising their powers of

[26] See in particular, L. Preuss and H. Walker, 'Psychological barriers in the road to sustainable development: Evidence from public sector procurement' (2011) 89 *Public Administration* 493; See also, Chapter(3):Section(3.4.2).

discretion. As explained in Chapter 7, corruption in public procurement is a significant crime in Turkey which is punished severely: it carries a sentence of imprisonment from three years to seven years.[27] It could be argued that the possibility of receiving such a severe punishment could lead the contracting authorities bound to TPP Act to avoid any risky actions, and they could therefore opt to rely on the lowest price as the award criteria rather than establishing award criteria based on non-price factors.

Another possible constraint could be the low awareness of the use of non-price factors within the award criteria. The familiarity of institutions with sustainable procurement policies is a significant factor that contributes to the success of achieving sustainability through public procurement. As explained in Chapter 3, the European Commission has taken an active role for increasing the awareness of benefits of sustainable procurement, has issued handbooks for eliminating uncertainty about legal possibilities to include sustainability criteria in tender documents, and has established portals for coordinating the exchange of best practice information.[28] In that regard, TPP Authority needs to take an active role in guiding the contracting authorities bound to TPP Act.[29]

TPP Authority has contributed to a uniform implementation of TPP Act throughout Turkey. Indeed, TPP Authority could take an active role in assisting the contracting authorities with regard to the incorporation of sustainable development objectives of Turkey, as specified in Chapter 4, into the public procurement procedures. In that regard, the assistance could be conducted in different forms such as general training and capacity building exercises, setting examples for the sustainable procurement policies, giving consultancy services on-demand, and employing sustainable development and procurement experts who could be invited by the contracting authorities to the tender commissions when needed.

[27] Chapter(7):Section(7.3).
[28] Chapter(3):Section(3.4.2).
[29] For the competence of TPP Authority see, Chapter(5):Section(5.2.1).

TPP Authority, however, does not provide consultancy services on demand to either contracting authorities or economic operators in cases where the practitioners remain hesitant with regard to implementation of a public procurement rule. Such a service was provided for a very short time between 2002 and 2003 and was completely abolished in 2013.[30] As pointed out by Serdar, such consultancy services could diminish the workload of TPP Authority as it could pre-emptively prevent any legal disputes emanating from different interpretations of the vague procurement rules.[31] In fact, such a consultancy service is already provided by the Turkish tax authorities and has a long-standing and successful practice in terms of eliminating tax disputes. Furthermore, such a service could also raise awareness with regard to possibilities of incorporating social and environmental considerations into the public procurement process.

As stated at the beginning of this section, the Turkish literature does not provide sufficient work on this matter. Furthermore, the methodology adopted in this study could not completely reveal the factors affecting the tendencies of the contracting authorities while formulating the award criteria. Such an answer could only be revealed through an empirical analysis. Nevertheless, it is the author's view that institutional or organisational factors, low awareness of the pursuit of horizontal policies within the award criteria, uncertainty about the legal possibilities of using non-price factors and severe criminal liability could be the factors preventing the contracting authorities from exercising their powers of discretion and instead mainly relying on the lowest price as the award criteria.

[30] TPP Authority, Decision No. 2003/DK.D-371 of 27.10.2003.
[31] Ali Serdar, 'Kamu İhale Mevzuatı Hakkında Genel Değerlendirme' (2010) 2 *Sayder Dış Denetim Dergisi* 34, p. 40.

8.6 The procurement of green electricity

As explained in Chapter 3, the procurement of green electricity is an important aspect of sustainable procurement.[32] The generation, transmission and distribution of electricity had been under a complete public monopoly until 1984 in Turkey. The Turkish electricity market opened its doors to private entrepreneurs during this period and the private entities started to undertake commitments for generation, transmission and distribution of electricity.

The Electricity Market Act numbered 4628, which was mostly modelled after the EU law, entered into force in 2001 and was supported by the Strategy Paper of 2004 setting the policy framework for privatisation of distribution and generation assets.[33] Although remarkable steps were taken, the Turkish electricity market has not been fully liberalised yet and Turkey's electricity sector is mostly dominated by the public sector, as pointed out by Bagdadioglu and Odyakmaz.[34] In the same context, although all public electricity utilities are corporatized, they still remain under public control in terms of decision making and lack of managerial autonomy, and the public acts as both owner of the energy plants and decision-maker.[35] Nevertheless, the Electricity Market Act contributed significantly to eliminating the monopolistic and centralized regime. The most important contribution is that starting from 3 March 2003 the electricity customers who qualify as eligible consumers have become free to choose their suppliers. The provisional Article 7 of the Electricity Market Act laid down that all consumers directly connected to the transmission system and consumers whose electricity consumption in the previous year exceeded nine million kilowatt hours qualify as eligible consumers.

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[32] Chapter(3):Section(3.4.7.2).
[33] The Electricity Sector Reform and Privatization Strategy Paper of 2004 is available at <www.oib.gov.tr/program/2004_program/2004_electricity_strategy_paper.htm>
[34] See, Necmiddin Bagdadioglu and Necmi Odyakmaz, 'Turkish electricity reform' (2009) 17 *Utilities Policy* 144, p. 145; For a comprehensive structure of the electricity market also see, Energy Market Regulatory Authority (EPDK), *Turkish Energy Market: An Investor's Guide* (Ankara: EPDK, 2012).
[35] See, Bagdadioglu and Odyakmaz, note[34], p.146.

Upon the recognition of the right for eligible consumers to choose an electricity supplier through the Electricity Market Act, the contracting authorities within TPP Act asked TPP Authority to clarify the legal status of the procurement of electricity, which is not directly regulated under TPP Act. In that regard, TPP Authority adopted a general board decision in 2011 to clarify this issue.[36] According to TPP Authority's decision numbered 2011/DK.D-105, if the contracting authority is qualified as an eligible consumer according to the Electricity Market Act, the procurement of electricity should follow the rules laid down for the procurement of goods. The liberalisation of the electricity market in Turkey is continuing gradually. Therefore, all contracting authorities subject to TPP Act are not qualified as eligible consumers, yet.

Electricity generation in Turkey is mostly dependent on imported sources of energy.[37] Although Turkey has considerable potential sources of renewable energy, the generation of electricity from renewable sources does not constitute a significant portion of the overall electricity production and the main source of generation is mainly based on thermal plants.[38] The Ministry of Energy has set the target of "*creating a sustainable electricity energy market, taking into consideration climate change and environmental impacts in activities in all areas of the industry*".[39] The first legal framework governing the generation of electricity through renewable energy resources was introduced in 2005. Article 3 of the Act numbered 5346 on Utilization of Renewable Energy Resources for the Purpose of Generating Electrical Energy which entered into force on 18 May 2005, which defines renewable energy sources as "*non-fossil energy resources such as hydraulic, wind, solar, geothermal, biomass, biogas,*

[36] TPP Authority, Decision No. 2011/DK.D-105, 17.06.2011.
[37] Harun Kemal Ozturk, Ahmet Yilanci and Oner Atalay, 'Past, present and future status of electricity in Turkey and the share of energy sources' (2007) 11 *Renewable and Sustainable Energy Reviews* 183; Kamil Kaygusuz, 'Sustainable energy, environmental and agricultural policies in Turkey' (2010) 51 *Energy Conversion and Management* 1075, p. 1077.
[38] Ozturk, Yilanci and Atalay, note[37], p. 200; See also, Kaygusuz, note[37], p. 1077.
[39] The Ministry of Energy and Natural Resources, Electricity Energy Market and Supply Security Strategy Paper available at <www.enerji.gov.tr/yayinlar_raporlar_EN/Arz_Guvenligi_Strateji_Belgesi_EN.pdf>.

wave, current and tidal energy". The Act numbered 5346 introduced price and purchase guarantees for electricity produced from renewable energy sources by the certified legal entities, lower license fees, license exemption in exceptional circumstances and various practical problems in project preparation and land acquisition. The Turkish Government is also planning to promote renewable energy sourced electricity generation through ensuring priority to renewable energy throughout the connection points of generation facilities.[40]

As discussed in Chapter 3, the main problem of procurement of green electricity is that the electricity produced from renewable energy sources is no different from the electricity produced from traditional sources.[41] In that regard, green electricity neither affects the consumption characteristics for the consumer nor provides extra efficiency. As provided under TPP Authority's decision, the procurement of electricity is subject to the rules governing the procurement of goods. The decision, however, does not provide any guidance with regard to the possibility of favouring green electricity, which neither affects the consumption characteristics for the consumer nor provides extra efficiency for the consumers. As explained in the previous section, despite the lack of an explicit mandate, the legal and policy frameworks of sustainable development provide a strong normative background for the pursuit of any environmental concerns within the award criteria. In that regard, the same methodology could be applied for favouring the procurement of green electricity.

When the electricity market gets fully liberalised (particularly the transmission networks) and the consumers, regardless of their transmission network, are qualified as eligible consumers who have the right to choose their electricity provider, the significance of procurement of electricity will increase. Therefore, the procurement of electricity by the

[40] Kaygusuz, note[37], p. 1081.
[41] Chapter(3):Section(3.4.7.2).

contracting authorities bound by TPP Act needs to be regulated at the legislation level rather than by a board decision of TPP Authority. In order to ensure sustainability while procuring electricity, TPP Act need to explicitly recognise the legitimacy of favouring green electricity (electricity produced from renewable energy sources), despite the fact that green electricity neither affects the consumption characteristics for the consumer nor provides extra efficiency.

8.7 The impact of preferential procurement on the promotion of sustainability

As explained in Chapter 7, the participation of foreign economic operators in the public tenders in Turkey is conditional and Article 63 of TPP Act permits the contracting authorities, in cases where the estimated costs are below the threshold values, to limit tenders only to domestic tenderers regardless of the type of procurement.[42] The same provision also grants discretion to the contracting authorities bound by TPP Act to: (a) grant preferences to 'domestic tenderers'[43] up to 15 per-cent in the procurement of services and works; and (b) grant preferences to any tenderers offering domestic goods up to 15 per-cent during the award stage.

Article 4 of TPP Act defines goods as any kind of purchased commodities, moveable and real properties, together with the rights thereof. However TPP Act does not provide any definition of domestic goods. Domestic goods are defined under section 6.2 of the PP Communication. The PP Communication states that any tenderer who would like to benefit from the preferential procurement for domestic goods has to obtain a domestic goods certification from the relevant local chamber of trade.[44]

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[42] Chapter(7):Section(7.6).
[43] For the definition of the domestic tenderer see, Chapter(7):Section(7.6).
[44] For a detailed examination of certification requirements see, Mehmet Bedii Kaya, 'The Legitimacy of Preferential Procurement and International Competition under the Turkish Public Procurement Law' (2012) 5 *Law & Justice Review* 121, p. 136-137.

Before 2011 the pre-condition of benefiting from the provision on domestic goods was being qualified as a domestic tenderer. In other words, the foreign economic operators were not entitled to benefit from the preferential procurement even though they were offering goods that were qualified as domestic goods. This provision significantly impeded the competition between foreign and domestic economic operators and it was a significant constraint for foreign economic operators while accessing the Turkish public procurement market. However, this provision was revised on 13 February 2011 through the Act numbered 6111 and the reference to domestic tenderers was abolished. In other words, the foreign economic operators henceforth could also benefit from the preferential procurement system once they offer products that are qualified as domestic goods.

The application of Article 63 is discretionary in general unless any retaliatory measures are adopted. However, according to the statistics published by TPP Authority, this discretion is frequently exercised and the contracting authorities bound to TPP Act have substantially favoured domestic goods through granting extra preferences for domestic goods up to 15 per-cent during the award stage.[45] The Turkish Government has also set a political target to increase efficiency of this preferential procurement for protecting and promoting the national industry.[46]

As underlined by Kortunay and Sezer, the effectiveness and the benefits of the preferential procurement system established by TPP Act need to be questioned.[47] The European Commission maintains that protectionism raises prices for consumers and businesses and limits choice.[48] Schooner and Yukins also argue that protectionism restricts markets and limits competition and increases transaction costs and, most importantly, that procurement

[45] For detailed statistics see, ibid, p. 139-141.
[46] See, ibid, p. 142.
[47] Ayhan Kortunay and Yasin Sezer, 'Kamu Ihale Hukukunun 63. Maddesinin AB Hukuku Perspektifinden Değerlendirilmesi' (2007) 56 *AUHFD* 137, p. 168.
[48] European Commission, Global Europe: Competing in the World COM(2006)567, p. 4.

preferences routinely fail to achieve the intended outcomes.[49] In the same context, Bovis contends that even though preferential procurement is used for specific purposes, e.g. the development of infant industries, the intended outcomes need to be evaluated through examining whether the infant industry, when it gets specialised or internationalised would be able to counterbalance any losses that emerge during its protected period.[50]

The Turkish economy is maintaining its growth rate despite the global economic crisis. The preferential procurement, favouring national suppliers and domestic goods and reserving the public contract opportunities for national suppliers, is being used as an instrument to maintain the national economy. However, Turkey needs to evaluate the possible implications of preferential procurement in the long-term in terms of efficiency and, most importantly, in terms of its implications for the promotion of sustainability.

The success of sustainable procurement is closely related to the structure of internal markets. As explained in Chapter 3, the European Union targets an increasing global market share in the field of environmental technologies and eco-innovations and has set the target to be the world leader in terms of green economy. The European market is already providing solutions for sustainable products and services. However, as discussed in Chapter 2, the national capacity of sustainable production in Turkey is not competitive yet.[51] Although achievement of sustainable procurement is a novel target, the supply side could be a key barrier to implementation since the domestic industries need to undergo significant upgrading before any sustainable procurement policy could be put in place.[52]

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[49] Steven L. Schooner and Christopher R. Yukins, 'Public procurement: focus on people, value for money and systemic integrity, not protectionism' in Baldwin Richard and Simon Evenett (eds), *The collapse of global trade, murky protectionism, and the crisis: Recommendations for the G20* (London: Centre for Economic Policy Research, 2011), p. 88.

[50] Christopher Bovis, *EU public procurement law* (Cheltenham: Edward Elgar Pub., 2007), p. 459.

[51] See in particular OECD, *OECD Environmental Performance Reviews - Turkey* (Paris: OECD Publishing, 2008), p. 109 et seq. See also Chapter(2):Section(2.4.4).

[52] This problem is argued to be a common obstacle of developing countries. For the discussions on that matter, see, Dacian Dragos and Bogdana Neamtu, 'Sustainable Public Procurement: Life-Cycle Costing in the New EU Directive Proposal' (2013) 1 *European Procurement & Public Private Partnership Law Review* 19, p. 28.

As explained in Chapter 3, public procurement can be used for stimulating innovation.[53] To recap, public procurement can, for example, play a role in the development of green technologies or less-polluting manufacturing technologies, i.e. it can trigger a new form of competition in the industry. In the same context, public procurement can enhance the diversity of the markets. Supply constraints can emerge as a key barrier for implementing the sustainability policies since certain industries might need to undergo substantial upgrading before a sustainable procurement policy can be put in place. As pointed out by Arrowsmith, the public authorities can even stimulate the emergence of new markets by setting certain standards for their procurement.[54] For instance, the private sector can consider investment in certain products not to be profitable and certain products cannot be subject to mass production in the market. Accordingly, the contracting authorities can promote the development and manufacture of affordable goods, subject to mass production for the private sector. This kind of strategic use of public procurement is summarised as "*by creating a demand, the market will react*".[55]

Public procurement can provide significant outcomes when it is used strategically. In that regard, instead of adopting a general preferential procurement policy, sector-specific, targeted and dynamic preferential procurement policies need to be developed in Turkey. Considering the supply constraints in terms of sustainable products and services in Turkey, the current general preferential procurement and the wide-spread practice of closing tender proceedings to international competition creates an additional barrier to implementing sustainable procurement policies in Turkey. Indeed, preferential procurement could be used

[53] Chapter(3):Section(3.4.1).
[54] Sue Arrowsmith, 'A taxonomy of horizontal policies in public procurement' in Arrowsmith Sue and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009), p. 135.
[55] Catherine Weller and Janet Meissner Pritchard, 'Evolving CJEU Jurisprudence: Balancing Sustainability Considerations with the Requirements of the Internal Market' (2013) 1 *European Procurement & Public Private Partnership Law Review* 55, p. 58.

as an efficient instrument to boost the competiveness of the national industry and to promote innovation in the long term once it targets the development of specific industries (primarily the infant or emerging industries) or protection of disadvantaged economic operators. Such an objective is already set under the Medium Term Programme (2012-2014) for the information and communication technologies sector. According to this policy framework, public procurement will be used as a policy tool to support development of the sector.[56]

In that regard, considering the insufficient national capacity of sustainable production in Turkey and supply constraints, a specific preference system needs to be established targeting and favouring only sustainable solutions. Furthermore, the implemented policies need to be monitored consistently and revised regularly according to the changing circumstances of the market.

As explained in Chapter 2, according to the 10th Development Plan (covering 2014-2018) Turkey's long-term vision is benefiting from public procurement as an instrument for fostering innovation and increasing green production capacities of the national economic operators.[57] In order to achieve this target, the general and non-monitored preferential procurement system, which is not used strategically, needs to be revised.

It is noteworthy that this proposal needs to be considered in the context of membership negotiations with the European Union and most importantly in the light of Turkey's policy on neoliberalism. To clarify, preferential procurement is proposed for a limited context (i.e. creation and promotion of green markets) and only for a limited, transition period. In that regard, the general preferential procurement system needs to be revised in a way that targets the creation of a green economy during the transition period until full accession to the European Union occurs.

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[56] See, Medium Term Programme (2012 - 2014) available at <www.mod.gov.tr/en/mtp/Medium%20Term%20Programme%202012-2014.pdf>, p. 34.
[57] Chapter(2):Section(2.4.3.1).

8.8 Other possible means of promoting sustainability

8.8.1 Alternative bidding

As explained in Chapter 3, The European Commission also recommends the use of variants as complementary instruments to assess the cost impact of alternative solutions for meeting the need.[58] In particular, if the contracting authorities have difficulties in terms of determining the prospective cost of pursuing a certain social or environmental policy, allowing the tenderers to submit variants provides specific data that can help to appraise the actual cost of pursing social or environmental policies. In that respect, the contracting authorities can compare ordinary bids with social or green variants and the contracting authorities can better decide upon using public procurement as a policy tool within their individual institutional frameworks and most importantly, according to their allocated budgets.

Article 30 of TPP Act only permits alternative bidding for the procurement of goods. It is noteworthy that alternative bidding is not conditional bidding. When alternative bidding is permitted, the tenderers are required to prepare two separate bids that fulfil all procedural criteria set forth under TPP Act. The contracting authorities are entitled to accept alternative bids while procuring goods on the condition that acceptance of alternative bids and method of evaluation of alternative bids are explicitly specified under the tender documents and notices.

Indeed, the Procurement Directive does not limit the variants for goods and provides a wide context for the variants.[59] In this context, the contracting authorities are entitled to use variants for any procurement where the criterion for award is that of the most economically advantageous tender. Considering the context set out under Chapter 3, social and green

[58] European Commission, *Buying green! A handbook on green public procurement: 2nd Edition* (Luxembourg: Publications Office of the European Union, 2011), p. 29.
[59] Public-Sector Directive, Article(24); Utilities Directive, Article(36).

procurement is not only limited to the procurement of goods. Using variants is a method with no significant cost and using social or green variants provides room for discussing innovative solutions. The contracting authorities, who lack experience or data for incorporating social or environmental considerations, could benefit from the experience of the private sector through letting them furnish alternative and most importantly sustainable ways of conducting a work or service. In that regard, it is the author's view that the approach of TPP Act which limits variants in the procurement of goods is not a proper approach for the promotion of sustainable development objectives through public procurement.

8.8.2 Partial bidding

As explained in Chapter 5, TPP Act prohibits the division of contracts into lots with the intention of avoiding threshold values.[60] As discussed, the approach of TPP Act is strict, and this prevents the contracts from being tendered as different parts. Intentional partitioning of the contracts for avoiding either threshold values or to circumvent procurement procedures can give rise to administrative and criminal liability of the contracting officers.

It could be questioned whether this prohibition should be applied rigidly. In other words, could the contracting authorities divide contracts into partitions in cases where the estimated costs of the contract are below threshold values? In other words, in cases where the partitioning neither has the risk of circumventing the procurement procedures nor affects the procurement procedure or advertisement requirements, should the prohibition on partitioning be applied rigidly? Gök suggests that in such cases the prohibition should not be applied rigidly and that small contracts could be used as tools to facilitate participation of the small scale economic operators.[61] As discussed in Chapter 3, the facilitation of access of

[60] Chapter(5):Section(5.4.2.2).
[61] Yaşar Gök, 'Kamu İhale Hukukuna Hakim Olan İlkeler' (2010) 2 *Sayder Dış Denetim Dergisi* 12, p. 21; A similar approach was put forward by Erol during the implementation of the State Tender Act. See, Kemal Erol, *Kamu ihaleleri ve küçük ve orta boy işletmeler* (Ankara: Türkiye Esnaf-Sanatkar ve Küçük Sanayi Araştırma Enstitüsü, 1996), p. 47.

the SMEs to the public procurement market is a key aspect of social procurement at the European Union level.[62] To recap, the report on SMEs' access to public procurement in the EU highlighted that the large size of the contracts stands as the biggest challenge preventing access of SMEs to the public contracts, and the report underlined the importance of dividing contracts into reasonable lots which could be undertaken by SMEs.[63] Although Gök's approach contributes to the empowerment of SMEs through public procurement, which is a significant aspect of socially responsible procurement, the current wording of prohibitions of TPP Act laid down under Article 5 and reiterated under Article 60 do not provide any room for such an interpretation.

Even though TPP Act does not permit dividing contracts into lots due to the concern that such a permission could give rise to circumvention of the threshold values, TPP Act permits partial bidding. TPP Act grants the contracting authorities discretion on accepting tenders for the whole or a portion of the subject matter of the procurement. Similar to alternative bidding, Article 27 of TPP Act requires the contracting authorities to explicitly specify whether partial bidding is permitted under the tender documents and notices. Nevertheless, partial bidding could be used as a method for facilitating access of SMEs in case they are discouraged from participation in the procurement procedures due to the large size of the contracts. In that regard, once the contracting authority permits partial bidding, the SMEs could offer a tender for a bearable part of the contract that could meet the production capacities of SMEs. Conferring a broad discretion to the contracting authorities for accepting partial bidding under TPP Act is therefore a proper approach for the promotion of social and industrial development objectives through public procurement. This method does not make the prohibition on partitioning redundant since the contracting authority will conduct the

[62] Chapter(3):Section(3.5.5.2).
[63] European Commission, Evaluation of SMES' Access to Public Procurement Markets in the EU (Final Report) September 2010 available at <http://ec.europa.eu/enterprise/policies/sme/business-environment/files/smes_access_to_public_procurement_final_report_2010_en.pdf >, p. 114.

procurement procedures and determine thresholds according to the whole contract. The only risk within this method is that it bears increasing complexity for the contracting authorities, which could be avoided through specifying the subject-matter of contract objectively in a way that makes it possible to determine the portions that could be undertaken by different suppliers.

8.8.3 Pre-commercial procurement

Besides the preferential procurement, Turkey also needs to consider other procurement mechanisms that could be used for market creation purposes. For instance, pre-commercial procurement could be used in order to foster innovation in Turkey for disseminating environmentally friendly technologies in areas where no commercially stable solution exists on the market or existing solutions have certain shortcomings that require new research development.

As explained in Chapter 2, the Europe 2020 Strategy provides a new insight and has created new momentum with regard to dissemination of policies and action plans on eco-innovation.[64] Indeed, The European Commission adopted a comprehensive strategy in 2006 that called for the public authorities to stimulate competitive demand in public procurement to foster market uptake of innovative products and services.[65] In this context, in December 2007 The European Commission adopted a communication to address the underlying barriers for the underutilization of pre-commercial procurement in Europe, which is considered an important tool to achieve the objective of fostering innovation.[66]

Pre-commercial procurement is a particular method of procurement that combines research and development and commercialisation aspects. It is not merely research and development

[64] See particularly, European Commission, Innovation for a sustainable Future - The Eco-innovation Action Plan (Eco-AP) COM(2011)899; See also, Chapter 2, Section(2.3.2).
[65] European Commission, Putting knowledge into practice: A broad-based innovation strategy for the EU COM(2006)502, p. 12.
[66] European Commission, Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe COM(2007)799.

procurement on the grounds that this procedure involves commercial development activities such as production, supply to establish commercial viability or to recover research and development costs, integration, customisation, incremental adaptations and improvements to existing products or processes, which exceed the scope of ordinary research and development procurements.[67] In other words, this procedure covers product-driven research and pre-commercial development together with uptake and commercialisation stages. In that regard, commercial procurement enables the contracting authorities to share the risks and benefits of designing, prototyping and testing new products and services with the suppliers and create optimum conditions for wide commercialization and take-up of research and development results through standardization and/or publication. Furthermore, in pre-commercial procurement, the contracting authorities do not reserve the results of this procedure for their own use and the risks and benefits are shared between the public bodies and the industry.[68]

Apostol argues that the Procurement Directives do not adequately cover all stages of pre-commercial procurement and consider the current rules to be restrictive (in particular, in cases where there is a necessity to conduct direct negotiations with one specific economic operator).[69] As highlighted by Apostol, a dynamic market dialogue is also essential for the success of pre-commercial procurement.[70] Indeed, the proposals for new Procurement Directives introduce a new provision entitled 'Innovation Partnership', which is indeed a new procurement procedure enabling the contracting authorities to establish partnership with one economic operator for the purpose of conducting research and development activities

[67] Ibid, p. 3.
[68] Ibid, p. 6.
[69] It would be beyond the scope of this study to examine all legal constraints of pre-commercial procurement under the EU Law. For a comprehensive review of this issue see, Anca Ramona Apostol, 'Pre-commercial procurement in support of innovation: regulatory effectiveness?' (2012) 6 *Public Procurement Law Review* 213, p. 219-220.
[70] Anca Ramona Apostol, 'Public procurement of innovation - a structural approach' (2012) 4 *Public Procurement Law Review* NA179, p. NA185.

and subsequently procuring the new, innovative product, service or work, provided that it can be delivered to agreed performance levels and costs.[71] However, this provision is argued by Apostol as failing to provide the necessary legal certainty or to strike an adequate balance between the innovation and competition interests.[72]

As explained previously, supply constraints can emerge as a key barrier for implementing the sustainability policies since certain industries might need to undergo substantial upgrading before a sustainable procurement policy can be put in place. The preferential procurement system, which does not target specific objectives and does not require a regular review of the success of the implemented policies, is not adequate for driving the industry towards sustainability. In that regard, pre-commercial procurement could be used an alternative method for achieving this purpose. Indeed, Article 3(f) of TPP Act excludes the procurements related to research and development from its scope. In that regard, the contracting authorities have a broad margin of discretion subject to their individual institutional frameworks to conduct procurements in this context. Furthermore, the negotiated procurement procedure, which is elaborated in Chapter 5, also entitles the contracting authorities to initiate procurements once it is established that 'the procurement is of a character requiring a research and development process and not subject to mass production'.[73] Both provisions could establish the legal foundations for conducting a pre-commercial procurement to drive the national industry towards sustainability in Turkey.

8.9 Conclusion

The discussions within this chapter can be briefly summarised as follows:

TPP Act has significantly improved the procedures for awarding contracts. As explained, TPP Act provided more standardised and coherent practice by regulating the formalities and

[71] See, DRAFT Public-Sector Directive, Article(29); DRAFT Utilities Directive, Article(43).
[72] Apostol, note[69], p. 223.
[73] Chapter(5):Section(5.7.3).

information that the tender document must pose in a very detailed way. Furthermore, TPP Act regulated in detail the formulation and announcement of award criteria in the tender documents. In particular, the requirement of laying down detailed explanations accompanied by calculation methods that are used within the award criteria enhances the precision and objectivity of the formulation manner of the award criteria.

TPP Act also introduced further mechanisms such as the control of abnormally low tenders in order to safeguard the tendering proceedings against any unrealistic or unfeasible bids. Furthermore, TPP Act enhanced the institutional framework by centralising the decision-making body, i.e. the tender commission, by requiring the tender commission to be competent in all aspects of the procurement and by permitting the contracting authorities to invite experts from other public authorities if needed.

As explained in this chapter, the most important contribution of TPP Act is that it introduced a new methodology for awarding contracts: the MEAT. Most importantly, TPP Act non-exhaustively outlined the factors that could be incorporated into the award criteria and left the discretion of deciding what to incorporate to the contracting authorities. The secondary regulations implementing TPP Act also laid down rules in order to ensure objectivity and transparency of such determination. The introduction of the MEAT, in that regard, created the possibilities for the pursuit of sustainability concerns within the award criteria.

The examination in this chapter revealed that although TPP Act created the possibilities for the pursuit of sustainability concerns within the award criteria, certain constraints stand before the practical use of such a pursuit. However, it is argued that the contracting authorities bound to TPP Act maintain their old practices: they refrain from taking any risks for establishing award criteria based on non-price factors and they frequently rely on the lowest price as the award criteria and award the contract to the lowest bid. As explained, the Turkish literature does not provide sufficient work on that matter. Furthermore, the

methodology adopted in this study could not completely reveal the factors affecting the tendencies of the contracting authorities while formulating the award criteria. Such an answer could only be revealed through an empirical analysis. Nevertheless, it is the author's view that that institutional or organisational factors, low awareness of the pursuit of horizontal policies within the award criteria, uncertainty about legal possibilities to use non-price factors and severe criminal liability could be the factors preventing the contracting authorities from exercising their powers of discretion and causing them to mainly rely on the lowest price as the award criterion. Therefore, there is a need to conduct a comprehensive reform in order to highlight the pursuit of sustainability concerns within the award criteria.

This chapter also evaluated the impact of the preferential procurement system on the promotion of sustainability through public procurement. Considering the supply constraints in terms of sustainable products and services in Turkey, the current general preferential procurement and the widespread practice of closing tender proceedings to international competition creates an additional barrier before implementing sustainable procurement policies in Turkey.

CHAPTER 9

The pursuit of sustainability concerns within contract performance clauses

9.1 Introduction

Contract performance clauses lay down the technical details of how the contract has to be performed. The procurement procedures, from the initial stages of determination of the need to the award of contract, are subject to the Public Procurement Act (hereafter 'TPP Act') and the law governing these proceedings is administrative law. The performance of contract, though, is not regulated under TPP Act and is governed by the Public Procurement Contracts Act (hereafter 'the PP Contracts Act'), and the law governing the performance is private law.

This chapter examines the rules governing the performance of contracts awarded according to TPP Act, which are regulated under the PP Contracts Act. The chapter particularly examines whether any aspect of sustainability is considered throughout the performance of contracts and questions to what extent the contracting authorities have discretion to pursue any sustainability criteria under the contract performance clauses.

9.2 The general principles of the contract performance clauses

The PP Contracts Act lays down three major principles that govern the performance of the contracts. Firstly, Article 4(1) of the PP Contracts Act sets the wide context of the contract performance clauses and prohibits incorporation of any clause contrary to the tender documents. This rule establishes a hierarchy between the tender documents and the contract, and establishes that the latter need to comply with the former.

Secondly, Article 4(2) of the PP Contracts Act lays down that it is prohibited to either amend or arrange supplementary contracts other than in the cases specified under the act. This rule, indeed, serves to support the principle of competition, which is amongst the main principles pursued by TPP Act. Competition between the tenderers need to be conducted solely according to the award criteria set out under the tender conditions, and this rule of the PP

Contracts Act prevents the post-modification of the contract conditions in favour of the winning tenderer.

The PP Contracts Act explicitly specifies two cases where it is legitimate to make amendments. These cases are (1) amendment in cases where price differences emerge after the award of a contract as regulated under Article 8; (2) contract details such as location of performance of work or place of delivery and duration of work and conditions of payment in accordance with such duration, provided that it is completed or delivered before its time and provided that mutual agreement is reached between the contracting authority and the contractor. Indeed, amendments in cases of price difference need to be implemented narrowly. As discussed in Chapter 4, the State Tender Act provided wide margins in cases where there were variations in the material or unit prices of the works, which had been a significant shortcoming of the system, and this increased opportunities for corruption.[1] Article 8 of the PP Contracts Act, though, significantly limited the scope of the price adjustment system and set forth that the Council of Ministers, upon the recommendation of TPP Authority, has the authority to establish the principles and procedures governing payment of price differences for different contract categories. The Interim Article 2, which was added to the PP Contracts Act on 30 July 2008, though, granted a wider margin to the Council of Ministers to permit price differences for a specified time period, even for contracts that do not contain a price preference clause. Although payment of additional price differences in cases of force majeure could be justified, the contracting authorities need to permit payments of price differences in cases of additional works. Serdar points out that the price difference clauses in such cases not only violate the principle of competition but also

[1] Chapter(4):Section(4.3).

force the contracting authorities to conduct the procurement process rigorously, which has the risk of creating significant public losses.[2]

The third and last principle that the PP Contracts Act lays down is the principle of equal rights. According to Article 4(3) of the PP Contracts Act, the parties to the public procurement contracts have equal rights and obligations in implementing the contractual provisions. As stated, the law governing the performance of a contract is private law, not administrative law whereby the public bodies benefit from a privileged position. Under the Turkish law, the private law contracts are regulated under the Code of Obligations, which is established on the principle of freedom of contract. It is noteworthy that Article 36 of the PP Contracts Act provides that in cases where the Act does not contain relevant provisions, the provisions of the Code of Obligations apply.

The PP Contracts Act not only recognises the principle of equality in terms of rights and obligations but also lays down further restrictions. In this context, Article 4 of the PP Contracts Act prohibits incorporation of provisions under the tender documents or the contract clauses undermining this principle. Furthermore, Article 4 requires the interpretation and implementation of the PP Contracts Act in light of this principle of equality.

Beside the general principles, the PP Contracts Act lays down rules with regard to the tender securities, amendment, transfer and termination of the contract, and prohibited acts and conduct. In order to provide harmony and consistency, Article 5 of the PP Contracts Act refers to standard form contracts which are published in the Turkish Official Journal with regard to procurement of goods, services and works. The PP Contracts Act mandates that any contracts to be made by the contracting authorities should be drawn up in accordance

[2] Ali Serdar, 'Kamu İhale Mevzuatı Hakkında Genel Değerlendirme' (2010) 2 *Sayder Dış Denetim Dergisi* 34, p. 37.

with the provisions of those standard form contracts. The contracting authorities are only entitled to drawn up special contracts while procuring goods and services and upon the approval of TPP Authority.

Furthermore, in parallel with Article 66 of TPP Act, Article 38 of the PP Contracts Act requires amendments to the provisions of the PP Contracts Act to be arranged only through annexing provisions or making changes. In such a way, the PP Contracts Act aims to provide a unified legal framework with regard to the performance of contracts so that, the procurement practitioners can better track any changes to the legal framework.

9.3 The pursuit of sustainability concerns within the contract performance clauses

9.3.1 Examination of the EU law

As explained in Chapter 3, Public-Sector Directive permits the contracting authorities to lay down special conditions relating to the performance of a contract provided that such conditions are compatible with EU Community law and are pre-announced in the tender notice or in the specifications.[3] Public-Sector Directive points out that the conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

The European Commission points out that once formulated wisely, the contracting authorities can contribute to the protection of the environment without making any significant structural changes.[4] For instance, packaging and timing of orders also have environmental impacts. Asking items to be delivered in the appropriate quantity, usage of reusable containers to transport the products and specifying the most convenient method of transportation can have an impact on the environment and can decrease the amount of

[3] Public-Sector Directive, Article(26); Utilities Directive, Article(38); See, Chapter(3):Section(3.4.8) and Section(3.5.5).
[4] European Commission, *Buying green! A handbook on green public procurement: 2nd Edition* (Luxembourg: Publications Office of the European Union, 2011), p. 47.

emissions generated through the procurement. In the same context, in cases of works or services procurement, the contracting authorities have the option to require implementation of a certain environmental management system and stipulate this requirement in the contract performance clauses.

The public contracts, like the private contracts, must comply with all applicable rules, including social, labour and health regulations applicable in the territory where the contract is performed. As highlighted by the European Commission, the contract performance clauses could be used as means to achieve additional social objectives, which stand for objectives that go beyond those set out by the applicable mandatory legislation and do not relate to the technical specifications, the qualification or the award criteria.[5] It is noteworthy that Recital 33 to Public-Sector Directive highlights that the contract performance clauses could favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. Furthermore, this Recital to Public-Sector Directive exemplifies the concerns that could be addressed under the contract performance clauses such as (1) to recruit long-term job-seekers or to implement training measures for unemployed or young persons, (2) to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and (3) to recruit more handicapped persons than are required under national legislation.

As discussed in Chapter 3, the legitimacy of pursuing sustainability concerns within the contract performance clauses was touched upon within North-Holland case.[6] The Province of North-Holland, in the procurement disputed before the CJEU, requested the tenderers to hold the MAX HAVELAAR label for coffee and tea products, which aims at promoting fair

[5] European Commission, *Buying social: a guide to taking account of social considerations in public procurement* (Luxembourg: Official Publications of the European Communities, 2010), p. 43.
[6] Chapter(3):Section(3.5.5).

trade products through certifying that the labelled products are purchased at a fair price and under fair conditions from organisations made up of small-scale producers in developing countries. The CJEU, however, did not enter into discussions of the legitimacy of fair trade conditions as contract performance clauses since The European Commission failed to address such a complaint.

As discussed in Chapter 3, the CJEU enhanced the coverage of what constitutes a link to the subject matter of a contract. Following the same methodology, it could be argued that the fair trade requirements can legitimately be addressed within the contract performance clauses provided that they specifically target the subject matter of the contract, not the contractor's policy in general.

9.3.2 Examination of the Turkish law

As explained in Section 9.2, the contract performance clauses are subject to private law and the PP Contracts Act underlines that the parties to the public contracts have equal rights and obligations in implementing the contractual provisions. The PP Contracts Act prohibits the incorporation of provisions under the tender documents or the contract clauses undermining this principle and it requires the interpretation and implementation of the Act in the light of this principle of equality.

9.3.2.1 Environmental concerns

As explained previously, the contracting authorities could promote environmental protection within the contract performance simply through specifying how the goods are delivered. As exemplified by the European Commission, having the product delivered in the appropriate quantity, requiring the delivery outside peak traffic times, requiring the supplier to use recyclable packing material, and collecting information with regard to the greenhouse gas emission caused in delivering the product could generate environmental benefits without any

considerable cost.[7] Indeed, these conditions could legitimately be stipulated under the contract performance clauses within the context of the PP Contracts Act. Furthermore, the contracting authorities subject to TPP Act could also formulate the contract performance clauses in a way that minimises the use of resources on site within the current context of the PP Contracts Act.

As also explained in Chapter 3, imposing conditions on how the services or works are performed, training of the contractor staff, transport of products and tools to the site and disposal of used or packaging are other possible ways of ensuring protection of the environment during the performance of contracts. In particular, the contracting authorities could require the implementation of environmental management systems to address a wide range of environmental issues. As explained in Chapter 3, two environmental management schemes are deemed valid throughout the EU, which are the Eco-Management and Audit Scheme (hereafter 'EMAS')[8] and the international standard on environmental management systems, EN/ISO 14001[9].[10] As discussed in Chapter 7, the possibility to use environmental management schemes was provided by the reform of the Turkish public procurement legal framework in 2006.[11] However, as discussed, the secondary regulations implementing TPP Act applies certain limitations with regard to the possibilities of requiring application of environmental management schemes. Nevertheless, the introduction of environmental management systems to the Turkish public procurement law is a breakthrough in terms of the transition to sustainability in public procurement.

As explained in Chapter 2, the Environment Act explicitly imposes an active role on public bodies for protecting the environment and preventing pollution and they are obliged to

[7] European Commission, note[4], p. 47.
[8] See, Regulation (EC) No. 761/2001 allowing voluntary participation by organisations in a Community eco-management and audit scheme, OJ 2001 L 761/2001.
[9] See, European/International Standard EN/ISO 14001:1996 on environmental management systems.
[10] Chapter(3):Section(3.4.6).
[11] Chapter(7):Section(7.5.2.1).

adhere to the measures taken and principles established on the subject.[12] Furthermore, the Environment Act requires that it is essential to utilize environmentally compliant technologies that reduce the waste at the source and make possible for the recovery of waste. The legal and policy framework of sustainable development in Turkey provides the required mandate for the pursuit of environmental concerns during the performance of a contract, provided that the requirement is announced in the tender documents and it does not undermine the principle of equality, which is the main principle pursued by the PP Contracts Act.

9.3.2.2 Social concerns

As explained previously, public contracts, like private contracts, must comply with all applicable rules, including social, labour and health regulations applicable in the territory where the contract is performed. In that regard, the contract performance clauses could be used as means to achieve additional social objectives that go beyond those set out by the applicable mandatory legislation.

It is noteworthy that the Labour Act numbered 4857 lays down mandatory requirements with regard to minimum wages that can be paid to the workers. Article 39 of this act, with the primary objective of regulating the economic and social conditions of all employees working under an employment contract either covered or not covered by the Labour Act, entitles the Ministry of Labour and Social Security to determine minimum limits of wages every two years. As explained in Chapter 7, non-payment of social security contributions is a ground for being disqualified from the procurement proceedings, which also enables the contracting authorities to control whether the requirement of payment of minimum wages is fulfilled by the tenderers.[13]

[12] Chapter(2):Section(2.4.2).
[13] Chapter(7):Section(7.2.1.2).

As explained previously, Public-Sector Directive permits the contracting authorities to use contract performance clauses for ensuring compliance in substance with the provisions of the basic International Labour Organisation (ILO) Conventions in cases where such provisions have not been implemented in national law. Amongst the ILO Conventions, the ILO Convention concerning Labour Clauses in Public Contracts (No. 94), which entered into force on 20 Sep 1952 and which requires the signatory states to include clauses on wages, working hours and labour conditions in all public contracts awarded to third parties, is particularly important. This convention addresses socially responsible public procurement by requiring the economic operators participating in the public tendering procedures to align themselves with the locally established prevailing pay and other working conditions as determined by law or collective bargaining.[14] It is noteworthy that this convention is ratified by 62 different countries, including Turkey, which ratified the convention on 29 March 1961.[15] The Turkish Council of Ministers issued a council decision numbered 88/13168 in 1988, which laid down the implementation details of the Convention No. 49.[16]

Another important aspect of labour is health and safety issues. It is noteworthy that a separate piece of legislation, the Act on Occupational Health and Safety numbered 6331, was adopted and entered into force in 2012 in order to regulate health and safety standards to be adopted by employers in Turkey. This Act regulates the duties, powers, responsibilities, rights and obligations of employers and employees in order to ensure occupational health and safety in workplaces and to improve existing health and safety conditions. Most importantly, this Act covers all types of employment, work and workplaces that belong to the public and private sectors, owners and/or employers of subject workplaces and representatives/agents of such

[14] For a detailed examination see, International Labour Organisation, *Labour Clauses (Public Contracts) Convention, 1949 (No.94) and Recommendation (No.84) - A practical guide* (Geneva: International Labour Office, 2008).
[15] The parties to this convention available at <www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312239>
[16] OJ 01.11.1988/19976.

employers, and all employees including apprentices, interns and trainees, regardless of the fields of activity in which they are involved. Besides unifying the legal framework by replacing the relevant provisions of the Labour Act, this Act also establishes a coherent institutional framework titled the National Occupational Health and Safety Council in order to ensure harmonised implementation.

As outlined in this section, there exist a wide range of mandatory requirements that the contracting authorities and the tenderer who awarded the contract need to comply with. The contracting authorities can increase the level of compliance with these requirements or can impose new requirements depending on their individual needs through incorporating provisions into the contract performance clauses. According to the PP Contracts Act, the legitimacy of such concerns, as explained, is subject to their prior publication in the tender documents and their compliance with the principle of equality. The PP Contracts Act does not elaborate or exemplify the conditions that will be considered legitimate; therefore, the legitimacy needs to be examined in accordance with the merits of each case. Nevertheless, the conditions imposed by the contracting authority need to be determined objectively and precisely. Furthermore, the conditions should not confer an unrestricted freedom on the contracting authority with regard to arbitrarily determining the substance of a condition and arbitrarily changing the conditions in favour of the contracting authority.

The determination of which additional contract performance clauses will be imposed is also subject to the individual institutional framework of each contracting authority. As explained in Chapter 8, Article 123 of the Turkish Constitution requires the structure and functions of any administrative bodies by a legislative act, which is also known as the legality principle.[17] In that regard, administrative bodies are only entitled to perform duties within the scope of their individual legal framework. This rule also implies that administrative bodies are by

[17] Chapter(8):Section(8.5.2).

default considered not authorities to perform an action unless a specific act explicitly entitles them to do so. In other words, the contracting authorities, which are also administrations within the meaning of Article 123, can only pursue objectives that fall under their institutional framework. As explained in the previous section, the Environment Act confers a broad mandate on contracting for conducting actions to protect the environment. However, such a broad mandate does not exist for the social development pillar of sustainable development. Therefore, there is not a straightforward answer regarding which societal objectives could be accomplished through contract performance clauses.

On the other hand, as discussed in Chapter 3, the incorporation of requirements to meet additional social objectives requires certain costs, as with all other horizontal policies. The cost that will be undertaken by the economic operator will eventually be reflected in the tender that is submitted. As pointed out by Arrowsmith, "*a better balance between costs and benefits can generally be achieved by using award criteria rather than contract conditions as a mechanism for implementing secondary policies*".[18] In that regard, a better cost-benefit analysis can be made by the contracting authority and a better decision can be rendered with regard to subsidiarity of using contract performance clauses to achieve certain societal goals.

9.4 The legal status of subcontractors

The legal status of subcontractors and their qualification in public tenders according to TPP Act is worth examining. The PPA conditionally permits the tenderers to use sub-contractors while performing the contract and grants a broad margin of discretion to the contracting authorities on that matter. According to Article 15 of the PPA, when the contracting authority considers it necessary due to the characteristics of the subject matter of the procurement, the tenderers can be asked to specify the portions of the contract that they plan to assign to subcontractors at the tender stage, and to submit the list of the subcontractors for the approval

[18] Sue Arrowsmith, *The Law of Public and Utilities Procurement* (London: Sweet & Maxwell, 2005), p. 1289.

of the contracting authority prior to the signing of the contract, which is in line with Articles 25 and 48(2)(i) of Public-Sector Directive. In such a case, the liabilities of the sub-contractors with regard to the portion of the contract assigned to them do not release the contractor from its own liabilities. Moreover, as laid down under Article 11 of TPP Act, the criteria laid down for exclusion and debarment also applies to the subcontractors. The technical capacity requirements for the sub-contractor need to be evaluated according to the portion of work to be performed by the sub-contractor and the contracting authorities have the discretion to disqualify a subcontractor that is found inadequate in terms of capacity.

TPP Act permits the contracting authorities to restrict sub-contracting. Inan argues that this provision should not be implemented rigidly as the main contractor maintains liability for the whole contract.[19] Indeed, subcontracting facilitates access of small and medium-sized undertakings (hereafter 'SMEs') to the public contracts. Public-Sector Directive in Recital 23 provides that in order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market, it is advisable to include provisions on subcontracting. Equal opportunities in the public procurement market can be promoted by making subcontracting opportunities more visible. As explained in Chapter 3, the facilitation of access of SMEs to the public procurement market has social and industrial development aspects.[20] Therefore, the provision of TPP Act granting the discretion on restricting subcontracting to the contracting authorities needs to be interpreted narrowly, and the contracting authorities need to justify their decision of restriction, and are expected to prove that the merits of the procurement in question necessitate restriction of subcontracting.

On the other hand, the contractors in any case are not permitted to sub-contract the whole of a contract. Assigning or taking over a contract is prohibited according to Article 25(g) of the

[19] Atilla İnan, *İhale Hukuku Ders Notları* (Ankara: Yazarın Kendi Yayını, 2011), p. 111.
[20] Chapter(3):Section(3.5.5.2).

PP Contracts Act. Any contracts assigned without due permission, as well as contracts assigned or taken over, give rise to termination of the contract by the contracting authority and debarment from the public tenders.

It is noteworthy that the Turkish Prime Ministry issued a decree in 2011 requiring the public bodies to ensure cooperation with the Turkish Small and Medium Enterprises Development Agency, while preparing the Turkish strategy for the SMEs in line with the Small Business Act for Europe.[21] The Small Business Act for Europe aims to lay down the policy framework for facilitating SMEs' participation in public procurement. The SME Strategy and Action Plan (2011-2013), which was prepared in this context, aims to enhance the production level, amount of investment, value added and growth of SMEs and puts emphasis on the facilitating SMEs' participation in public procurement.[22] It is planned that a convenient, transparent and competitive environment will be established that will diminish the burdens of the public procurement process and would thereby facilitate the participation of SMEs. A public procurement reform is envisaged within this action plan for achieving these targets.

9.5 Conclusion

The PP Contracts Act explicitly deals with the performance of contracts awarded according to TPP Act. The most important contribution of this Act is the principle that the parties of the public procurement contracts have equal rights and obligations, and this restricts the contracting authorities from incorporating provisions under the tender documents or the contract clauses undermining this principle. Furthermore, the PP Contracts Act requires the interpretation and implementation of the Act in the light of this principle of equality.

[21] The Turkish OJ 05.06.2011/27955; See also European Commission, "Think Small First" - A "Small Business Act" for Europe COM(2008)394.
[22] Turkey Small and Medium Enterprises Development Organization, *The SME Strategy and Action Plan (2011-2013)* (Ankara: KOSGEB, 2011).

On the other hand, it is the author's view that the principle of equality within the context of the PP Contracts Act, indeed, needs be interpreted as meaning that the contract performance clauses should not grant an unlimited discretion to the contracting authorities on determining the conditions arbitrarily and in open-ended way. As stated, the contract performance clauses need to be in line with the tender documents and be publicised under the tender notices. In that regard, the contracting authorities opting out of promoting social concerns with regard to labour and employment need to formulate the extent of concerns under the tender documents objectively, allowing the tenderers to make economical judgments of the prospective costs of social protection so that the tenderers can form their tenders accordingly.

When the Turkish public procurement law is examined in terms of possibilities of pursuing environmental concerns, it is seen that the contract performance clauses on the supply of goods and the provision of works or services could both be used to promote sustainability within the context of the PP Contracts Act. As discussed, environmental conditions could legitimately be stipulated under the contract performance clauses within the context of the PP Contracts Act. The contracting authorities could also formulate the contract performance clauses in a way that minimises the use of resources on site within the current context of the PP Contracts Act. It is noteworthy that the explicit mandate under the Environment Act provides the legal basis for the pursuit of environmental concerns within the contract performance clauses.

The examination within this chapter has also demonstrated that the contract performance clauses could be used as means to achieve additional social objectives that go beyond those set out by the applicable mandatory legislation. As outlined in this chapter, there exist a wide range of mandatory requirements that the contracting authorities and the tenderer who is awarded the contract need to comply with. The contracting authorities can increase the level of compliance to these requirements or can impose new requirements depending on their

individual needs through incorporating provisions into the contract performance clauses. According to the PP Contracts Act, the legitimacy of such concerns, as explained, is subject to their prior publication in the tender documents and their compliance with the principle of equality. The PP Contracts Act does not elaborate or exemplify the conditions that will be considered legitimate; therefore the legitimacy needs to be examined in accordance with the merits of each case. Nevertheless, the conditions imposed by the contracting authority need to be determined objectively and precisely. Furthermore, the conditions should not confer an unrestricted freedom on the contracting authority with regard to arbitrarily determining the substance of conditions and arbitrarily changing the conditions in favour of the contracting authority. The determination of which additional contract performance clauses will be imposed is also subject to the individual institutional framework of each contracting authority. As discussed, there is a need to prescribe an explicit mandate for social and environmental concerns in order to establish the legal basis for the pursuit of social and environmental concerns within the contract performance clauses.

It is noteworthy that monitoring contract compliance is an essential aspect that needs to be considered while pursuing any sustainability concern. As the European Commission points out, green and social procurement can only be successful if compliance is properly monitored, and the Commission recommends the Member States to avoid adding requirements that cannot (or will not) be monitored effectively.[23] Indeed, effective compliance not only improves the quality of procurement but also contributes to the principle of competition, which is amongst the main principles pursued by TPP Act, through eliminating the circumvention of procurement rules during the performance of a contract.

[23] European Commission, note[4], Buying Green, p. 48; See also, European Commission, note[5], Buying Social, p. 46.

CHAPTER 10

Reform Proposals for Regulating Sustainable Public Procurement in Turkey

10.1 Introduction

As explained in Chapter 3, sustainable public procurement (hereafter 'SPP') is procurement whereby contracting authorities take account of all three pillars of sustainable development (economic, social and environmental) when procuring goods, services or works. The examination in Chapter 3 revealed that SPP is quite advanced in the EU with extensive legal rules, jurisprudence and soft law guidance.

As examined in Chapters 4 and 5, public procurement is a dynamic area of regulation in Turkey. The system has been subject to two substantial reforms and a new public procurement reform is on the agenda of the government. It is noteworthy that Turkey is currently seeking models to draw a roadmap for the public procurement reforms to stimulate sustainable development.[1] The EU's sustainable public procurement laws and practice provides a useful benchmark for regulating SPP in Turkey, which can be tailored in accordance with the local context of Turkey.

When the SPP model put forward by the EU is examined it is seen that the existence of a clear mandate and political backing, a coherent institutional framework and a consistent and clear legal framework, and an effective enforcement/remedy system are major pillars of SPP. The first pillar requires definition of the objectives of SPP clearly at the legislative level, which must be politically backed by putting forward a clear vision of objectives under the policy instruments. The EU example shows that the strong normative and political value conferred to sustainable development and effective enforcement results in greater consideration of sustainable development criteria in public procurement.

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[1] See, Chapter(2):Section(2.4.3).

The second pillar is the existence of a coherent institutional framework. In order to promote SPP, the design of both the legal framework and the institutional framework need to be revised, since SPP imposes roles and responsibilities for different stakeholders functioning in a broad range of economic, social and environmental areas. In that regard, SPP needs to be supported by a coherent institutional framework to ensure consistent and clear rules, unified implementation and effective enforcement in light of the EU experience.

SPP also requires careful design of mechanisms integrated into the PP legal framework to minimise the cost to value for money and achievement of desired outcomes. In that regard, a delicate balance needs to be established that would avoid discrimination, implement transparency and remove any possible barriers to access to public contracts, and minimise the cost of pursuing sustainable development through public procurement. The legal constraints and the mechanisms that need to be integrated differ for each stage of procurement.

Soft law guidance plays an important role in the promotion of SPP and it could be argued that it is an integral part of the legal framework. The policy instruments such as the EU Sustainable Development Strategy, the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan, and the Europe 2020 Strategy set a clear vision of the social, economic and environmental objectives of the EU, while Buying Green and Buying Social Handbooks provided a useful and practical guidance about how to integrate these objectives into public procurement proceedings. The soft law guidance, which was accompanied by the institutional guidance of the European Commission, provided useful outcomes. The European Commission not only elaborated the possibilities provided by the legal framework for the pursuit of sustainability criteria through public procurement, but also laid down amplified methodologies for how to conduct this pursuit. Instruments such as handbooks, databases and toolkits guide the contracting authorities guide the contracting

authorities in how they can go beyond the minimum legal requirements without violating the EU procurement rules.

The example of the EU also highlighted the complementary role of jurisprudence in the development of SPP. As explained in Chapter 3, the rules governing the use of public procurement for the promotion of social and environmental objectives mostly emanated from the case-law of the CJEU. The interpretation of the CJEU clarified the possibilities existing in the legal framework consisting of the EU Treaties and the EU Public Procurement Directives. In that regard, case-laws of the CJEU created a dynamic context for discussion of regulation of SPP in the EU.

This chapter is dedicated to how the findings on SPP in light of the EU experience can be transposed into Turkish public procurement law, taking into account the local context. In that regard, this chapter draws a roadmap for the public procurement reforms to stimulate SPP in Turkey in accordance with the findings of the previous chapters. This chapter lays down the general proposals with regard to the design of the procurement system, including the legal and institutional framework, as well as specific proposals with regard to different stages of public procurement.

10.2 Clear mandate and political backing for SPP

Sustainable development substantially influences the regulation of public procurement and orients the direction of public procurement reforms. The strong normative value conferred to sustainable development results in more consideration of sustainable development objectives in public procurement. The example of the EU, which put sustainable development at its epicentre with the explicit aim of strengthening the sustainability dimension of public procurement by allowing it to be integrated at each stage of the procurement process, supports this correlation.

Compared to the EU, the normative value of sustainable development is not strong in Turkey. Sustainable development is at the early stages of evolution in Turkey. Sustainable development is currently mentioned under the Environment Act and the Municipality Act. However, sustainable development is not mentioned under the TPP Act.

Sustainable development has a conceptual breadth and magnitude that goes far beyond the protection of the environment. However the current articulation of sustainable development only puts emphasis on the protection of the environment and gives rise to doubts about the implementation of sustainable development in practice. The legal and policy framework on the social pillar of sustainable development is quite fragmented and weak. Although the Turkish Constitutional Court approached sustainable development as a concept deriving from international law, the Court did not scrutinise the scope and substance of sustainable development in its decision in 2009 in accordance with its international dimension.[2]

The legal foundations of sustainable development and its three pillars can be traced within different provisions of the Constitution. The lack of any explicit reference to sustainable development could be justified since the Turkish Constitution was adopted and entered into force in 1982 when the concept of sustainable development had not yet emerged in the international realm. However, sustainable development has increasingly been recognised as an objective of the international community, most importantly by the EU, which Turkey officially wants to be a part of. Currently, there are ongoing negotiations for reforming the Turkish Constitution and sustainable development needs to be addressed explicitly at the constitutional level, following the precedence of the EU.

Laying down a clear mandate for sustainable public procurement in law is also necessary in order to comply with the basic principles of administrative law, in particular the restriction

[2] The Turkish Constitutional Court, Case No. 2006/99, Decision No. 2009/9. For the details of this ruling see Chapter(2):Section(2.4.2).

on legal competence. As explained by Comba, "*[u]nder domestic administrative law the procuring entity cannot pursue an objective which is not provided for by law and therefore it would be illegal for a procuring entity to insert in a public procurement contract a secondary consideration related to an objective other than those given to that procuring entity by national law*".[3] Therefore, the competence issues such as competence absence of an explicit mandate needs to be evaluated in its own national and institutional context of the contracting authority.

The limitation put forward by Comba, indeed, applies to Turkey and a specific rule regulating legal competence already exists under the Turkish administrative law. For instance, Article 123 of the Turkish Constitution requires the structure and functions of any administrative bodies by a legislative act, so-called the legality principle. In that regard, administrative bodies are only entitled to perform duties within the scope of their individual legal mandate. This rule also implies that administrative bodies are by default considered not entitled to perform an action unless a specific act explicitly entitles them to do so.

As explained in Chapter 3, sustainable public procurement has a conceptual breadth and magnitude that goes far beyond the protection of the environment and covers a broad range of social and economic issues such as stimulating innovation, supporting efficient and clean technologies, enhancing employment opportunities, decent work, compliance with social and labour rights, social inclusion, equal opportunities, accessibility, designing for all, ethical trade issues.[4] In some cases, such as fair trade concerns the issue has a trans-boundary aspect since it has protection of farmers in developing countries. Considering the broadness of the objectives that can fall under the umbrella of sustainable public procurement and

[3] Mario E. Comba, 'Green and Social Considerations in Public Procurement Contracts: A Comparative Approach' in Caranta Roberto and Martin Trybus (eds), *The Law of Green and Social Procurement* (Copenhagen: DJØF Publishing, 2010), p. 310.

[4] See, Chapter(3):Section(3.4) and Section(3.5).

considering the explicit limitation of Article 123 of the Turkish Constitution in terms of legal competence, there is a need to lay down a clear mandate under TPP Act, mentioning that sustainability considerations are legitimate concerns that could be pursued by the contracting authorities bound by TPP Act. Indeed, lack of a clear mandate for sustainability concerns under TPP Act also undermines the possible complementary role of jurisprudence for promotion of SPP in Turkey.

The policy framework of sustainable development is also quite fragmented. Turkey has not prepared a standalone and comprehensive strategy on sustainable development encapsulating all pillars. Although the 10th Development Plan, the Turkish Energy Efficiency Strategy and Plan, the Turkish National Climate Change Action Plan, the SME Strategy and Action Plan determines the political agenda, there is not a clear vision. The policy framework, besides being fragmented, is vaguely articulated and there is lack of coordination between the instruments. In that regard, there is a need to prepare a standalone strategy that puts forward a clear vision of sustainable development in Turkey. The strong political value conferred to sustainable development will also result in more consideration of sustainable development objectives in public procurement.

Besides being fragmented, the policy instruments are not legally binding, including the 10th Development Plan. The main principles governing the development plans are regulated by the Act numbered 3067 entitled the Implementation and Protection of Integrity of Development Plans, which was promulgated in 1984. Article 3 of this Act brought about a general principle for the adoption of legislative acts and requires the Turkish Grand National Assembly to commission a review of the compatibility of all draft laws, proposals and amendments to the development plans. If the draft laws are not found compatible with the development plans, they may be rejected on this basis. However, this legislation does not grant binding legal status to the development plans: the legislative power is entitled to

promulgate legislation that may contradict the development plans. In that regard, the development plans could not be regarded as legal mandate for SPP.

In fact, the reform dynamics for laying down clear mandate and political backing for sustainable public procurement can be gained by the influence of the EU. As explained in Chapter 4, Turkey is a candidate country negotiating membership with the European Union. However, although the European Union opened membership negotiations with Turkey, there are considerable political problems that prevent Turkey from joining the European Union.[5] The process is quite vague and there is not a definite roadmap for membership. As Alyanak points out, the negotiations have lost their momentum.[6] The vagueness of this process is argued to complicate full compliance with the EU law.[7] By 2013, the official negotiations between Turkey and the European Union are still frozen.

The stagnation of negotiations in that regard is a significant challenge for Turkey. Nevertheless, Turkey needs to continue the reform processes to achieve sustainable public procurement in line with the approach put forward by the EU despite the stagnation of the negotiations, considering the economic, social and environmental gains that could be achieved. In that regard, Turkey needs to benefit from the EU's and the Member States' experience on that matter. As discussed within the relevant chapters of this thesis, the use of

[5] It would be beyond the scope of this study to attempt any extensive analysis of the political problems preventing Turkey to join the European Union. In short, due to the Turkish failure to apply to Cyprus the Additional Protocol to the Ankara Agreement, the EU Council decided on December 2006 that chapters will not be opened for negotiation and no chapter will be provisionally closed until Turkey has fulfilled its commitment with regard to Cyprus. For the political obstacles of Turkey's membership see, Esra LaGro and Knud Erik Jørgensen, *Turkey and the European Union: prospects for a difficult encounter* (Basingstoke: Palgrave Macmillan, 2007); A. Schrijvers and Eline D. Ridder, 'European Union accession policy' in Wunderlich Jens-Uwe and David J. Bailey (eds), *The European Union and Global Governance: A Handbook* (London: Routledge, 2011).

[6] Servet Alyanak, 'The Public Procurement System of Turkey in Comparison to European Community Procurement Legislation' (2007) 36 *Public Contract Law Journal* 203, p. 205.

[7] Rana İzci, 'Europeanisation of Turkish Environmental Policy with Special Reference to Sustainability Discourse' in Nas Çiğdem and Yonca Özer (eds), *Turkey and the European Union - Processes of Europeanisation* (Farnham: Ashgate, 2012), p. 198; Nesrin Algan and Ayşegül Mengi, 'Turkey's Sustainable Development Policies in the EU Accession Process' (2005) 14 *European Environmental Law Review* 95, p. 108.

public procurement as a policy tool to achieve sustainable development is quite advanced in the EU with extensive legal rules and jurisprudence. Furthermore, there is extensive soft law guidance that forms a valuable benchmark for Turkey, including indication of the way forward and the mistakes to avoid. Turkey, as a candidate country for EU membership, could learn from the EU's experience and establish its own sustainable public procurement system with minimal cost. In that regard, the EU's sustainable public procurement laws and practice provides a useful benchmark for Turkey, which could be tailored in accordance with the local context of Turkey.

In this context, the promotion of sustainable public procurement and the reform of public procurement in terms of transparency and competition matters need to be evaluated in a separate context than the political debates surrounding the membership negotiations with the EU. As stated previously, Turkey is currently seeking models to draw a roadmap for the public procurement reforms to stimulate sustainable development. For instance, there are an ongoing projects such as Green Procurement Project, which seeks the possibilities for ensuring procurement of more efficient equipment, vehicle and buildings in public institutions; project for increasing energy efficiency in the public sector, and a project for facilitating SMEs' participation in public procurement.[8] It is noteworthy that Turkey, through benefiting from the experience of the EU and through learning about the individual practices of the Member States, could establish a sustainable public procurement system with no significant cost.

In brief, the legal and political status of sustainable development needs to be strengthened, and the promotion of sustainable public procurement and meeting the EU law needs to be

[8] For the details and institutions in charge of these projects, see Section(10.3.2).

evaluated in a context that is separate from the political debates surrounding the membership negotiations with the EU.

10.3 Coherent institutional framework supporting SPP

The clear mandate and political backing for SPP needs to be reinforced with a coherent institutional framework, covering all stakeholders including national government, review and judiciary bodies, procuring officials and relevant ministries. Considering the local context of Turkey and findings on SPP, the roles and responsibilities of each stakeholder needs to be clarified and institutional framework in Turkey needs to be restructured. The proposals for institutional reform are as follows for each relevant stakeholder:

10.3.1 Leadership of national government

The success of SPP, as all public policies, depends on the political will and support of top management, i.e. leadership.[9] Leadership determines the vision of SPP and the broad border of sustainability level that is aimed to be achieved, which will be reinforced at different levels of public management. The Republic of Turkey is a unitary state and the national government can be a powerful driver to increase awareness and enhance the degree of sustainability consideration at public procurement policies that can go beyond minimum legal requirements. A case-study on public lighting area conducted in 2009 demonstrates a very good example of how the Turkish Government has changed the consumption behaviour of public sector towards sustainability through strong leadership.

As discussed in Chapter 2, Turkey has endorsed a comprehensive strategy in order to promote energy efficiency in various sectors.[10] The Energy Efficiency Act numbered 5627, which was enacted in 2007, laid down the main framework in that regard and stipulated energy efficiency requirements for a wide range of goods. In accordance with the established

[9] See, British Standards Institution, *Principles and framework for procuring sustainability (BS8903:2010) - Guide* (London: British Standards Institution, 2010), p. 39.
[10] Chapter(2):Section (2.4.3.3).

legal framework, a major transformation to efficiency has been in the public lighting area, and the Turkish Prime Ministry issued the Circular No 2008/19in August 2008 to change consumption behaviour in this sphere.[11] The project was monitored consistently and, according to the Ministry of Energy, the targets of leading society toward efficiency and at the same time securing savings in the budget have been successfully accomplished in a very short period.[12] It was affirmed that public lighting performed better by 23%, electricity consumption capacity was reduced by 102 MW, purchase cost was recovered in 101 days and yearly budget improvement was 41 million Turkish Liras.[13]

The lessons that can be learnt from this example is that if political determination comes from the top level (the Prime Minister), if specific targets are set and most importantly, if the outcomes are measured and monitored consistently, sustainability that go beyond the minimum legal requirements could be achieved in Turkey.

As explained previously, the policy framework of sustainable development is quite fragmented in Turkey In that regard, there is a need to prepare a standalone strategy that puts forward a clear vision of sustainable development in Turkey covering all aspects of sustainable development. The strong political value conferred to sustainable development will also result in more consideration of sustainable development criteria in public procurement. Considering this correlation, the importance given to sustainable development by the Turkish Government must be highlighted and supported with the capacity building programmes. In particular, special task forces, negotiation teams, who have expertise on the SPP, needs to be established at the national government level, in order to support all public bodies at central level for capacity building for SPP.

[11] OJ 13.08.2008/26966.
[12] The Ministry of Energy, Transition To Efficient Public Lighting (January 2009) available at <www.enerji.gov.tr/yayinlar_raporlar_EN/KVAG_Raporu_EN.pdf>
[13] Id., p. 4-5.

10.3.2 Enhanced coordination at ministerial level

Another important pillar of coherent institutional framework for SPP is increasing coordination at Ministerial level. SPP encapsulates various social, environmental and economic issues that falls under competence of different Ministers. Therefore, there is a need to enhance coordination between ministries with regard to implementation of the SPP.

As explained in Chapter 2, different policy frameworks of sustainable development targets to use public procurement to achieve their prescribed objectives. For instance, according to the 10th Development Plan, public procurement is considered as an efficient tool to foster innovation and increase green production capacities of the national economic operators.[14] The determination of objectives within the development plans are carried out by the Ministry of Development.

In the same context, the Turkish Energy Efficiency Strategy and Plan lays down more specific action plans in order to realise the prescribed targets. Public procurement is also considered as an area that particularly needs to be reformed in order to achieve the target of using energy effectively and efficiently in the public sector.[15] The Ministry responsible to achieve these targets is the Ministry of Energy and Natural Resources.

The Turkish National Climate Change Action Plan lays down the objective to decrease annual energy consumption in the buildings and the premises of public institutions by 10% by 2015 and by 20% by 2023. The Plan prescribes as an action the carrying out of preparatory works for implementation of the Green Procurement Programme to ensure purchase of more

[14] Ministry of Development, *10th Development Plan (2014-2018)* (Ankara: Ministry of Development, 2013).
[15] The strategy available at <www.eie.gov.tr/eie-web/duyurular/EV/EV-Strateji_Belgesi/Energy_Efficiency_Strategy_Paper_2012.pdf>

efficient equipment, vehicle and buildings in public institutions.[16] The Minister responsible for the implementation of this Action Plan is the Ministry of Environment and Forestry. This Ministry is also responsible for the implementation of the Environmental Impact Assessment procedure.

The SME Strategy and Action Plan (2011-2013) also aims to enhance the production level, amount of investment, value added and growth of SMEs and puts emphasis on the facilitating SMEs' participation in public procurement.[17] It is discussed under this policy document that a convenient, transparent and competitive environment will be established that will diminish the burdens of the public procurement process and would thereby facilitate the participation of SMEs. The Ministry responsible for the implementation of this Action Plan is the Ministry of Science, Industry and Technology.

As explained in Chapter 2, the social pillar of sustainable development is weak in Turkey. This weakness also gives rise to low awareness on the use of public procurement to achieve societal objectives. However, social procurement is a core aspect of SPP at the EU level. In parallel with full acknowledgment of social procurement in Turkey in accordance with the EU law and practice, the ministers responsible for social welfare and labour will also have duties for the regulation of public procurement. For instance, the Ministry of Family and Social Policies who is in charge of overseeing the disability issues, the Ministry of Labour and Social Security who is in charge of overseeing the labour issues will have significant tasks in order to promote social procurement.

In that regard, while a clear legal mandate is defined for SPP, the ministerial coordination need also be regulated, determining the roles and responsibilities of different ministries for

[16] Ministry of Environment and Urbanization, *Republic of Turkey National Climate Change Action Plan (2011-2023)* (Ankara: Ministry of Environment and Urbanization, 2011). For the details of project see, Chapter(2):Section(2.5).
[17] Turkey Small and Medium Enterprises Development Organization, *The SME Strategy and Action Plan (2011-2013)* (Ankara: KOSGEB, 2011).

different pillars of SPP. The lead of this cross-ministerial taskforce must be taken by the Prime Ministry. So that, a consistent and coherent determination of SPP priorities and objectives by different ministers could be ensured.

10.3.3 Enhanced institutional guidance of TPP Authority

There is a need to increase awareness of the possible benefits of sustainable public procurement and to better highlight this possibility under the policy frameworks. The possible benefits of sustainable public procurement also need to be appraised by the contracting authorities throughout Turkey. The European Commission has taken such an active role in increasing the awareness of benefits of sustainable procurement, has issued handbooks for eliminating uncertainty about legal possibilities for including sustainability criteria in tender documents, and has established portals for coordinating the exchange of best practice information.

As explained in Chapter 3, it is significant for both economic operators and the contracting authorities to have measureable/verifiable criteria for complying with the sustainability requirements. In order to overcome the problems emanating from data availability, The European Commission has developed a database which contains basic environmental information for about 100 different product and service groups.[18] The European Commission has also determined ten priority sectors for the implementation of green procurement.[19] The Commission has also published a report for calculation of life-cycle costs in the field of construction in order to support the contracting authorities while they formulate their award criteria, and initiated the Clean Vehicle project for life-cycle costing for vehicle procurement.[20] Furthermore, The European Commission published a handbook entitled

[18] The database is available at <http://europea.eu.int/comm/environment/green_purchasing>
[19] European Commission, Public procurement for a better environment COM(2008)400, p. 7.
[20] The European Commission, 'Clean Vehicle' available at <www.cleanvehicle.eu>

'Buying Green'[21] in 2004 which was revised in 2011 and a handbook entitled 'Buying Social'[22] in 2010 in order to guide the Member States on the legal possibilities provided by the EU Public Procurement Directives for the pursuit of sustainability concerns.

As explained in Chapter 5, TPP Authority has a key role in the regulation and implementation of public procurement in Turkey.[23] All contracting authorities covered by TPP Act are required to execute the decisions of TPP Authority promptly without any further execution procedure, and the contracting authorities are not permitted to question the subsidiarity of TPP Authority's decisions. TPP Authority is also entitled to prepare, develop and guide the implementation of all regulations concerning TPP Act and the PP Contracts Act and the standard tender documents and contracts.

TPP Authority has contributed to a uniform implementation of TPP Act throughout Turkey. Indeed, TPP Authority could take an active role in assisting the contracting authorities with regard to the incorporation of Turkey's sustainable development objectives into public procurement procedures. TPP Authority, by using its power to issue secondary regulations and by preparing the standard forms, can regulate the essentials of sustainable public procurement for different stages of public procurement process. Furthermore, TPP Act can provide assistance for the implementation stage.

There is a need for TPP Authority to set clear targets, which must be amplified by specific methodologies for incorporating such targets into the public procurement process. In other words, setting targets would not lead to practical outcomes unless a clear strategy is adopted guiding the contracting authorities on how to implement the policies in practice. The

[21] See, European Commission, *Buying green!: A handbook on environmental public procurement* (Luxembourg: Office for Official Publications of the European Communities, 2004); European Commission, *Buying green! A handbook on green public procurement: 2nd Edition* (Luxembourg: Publications Office of the European Union, 2011).
[22] See, European Commission, *Buying social: a guide to taking account of social considerations in public procurement* (Luxembourg: Official Publications of the European Communities, 2010).
[23] Chapter(5):Section(5.2.1).

strategies must be sound, not holistic, and must take into account the local context and the market conditions in Turkey. Furthermore, a step-by-step approach needs to be adopted, considering the possible differentiation of implementation capacity of contracting authorities, which could be influenced by technical and human factors.

The assistance of TPP Authority could take different forms such as soft law guidance through the Public Procurement Communication, general training and capacity building exercises, setting examples and benchmarks for the sustainable procurement policies, preparing handbooks, giving consultancy services on-demand, and employing sustainable development and procurement experts who could be invited by the contracting authorities to the tender commissions when needed.

The pursuit of SA-8000 certification was a significant example that TPP Authority must learn lessons from.[24] The main problem in that case was that TPP Authority only laid down restrictions, but failed to show guidance to the contracting authorities on how to address social concerns encapsulated under SA-8000 certification. TPP Authority needs to change its approach and must take a proactive role in that regard for guiding the contracting authorities and providing a uniform implementation of sustainable public procurement throughout Turkey. In that regard, the implementation of SPP needs to be supported, monitored and overseen by the institutional guidance of TPP Authority.

On the other hand, the Act numbered 5917 of 2009 assigned the Ministry of Finance the duty to determine the key policies on public procurement in the context of general economic policies and strategies, and to ensure coordination among the related parties in the preparation of the draft laws in this area. When this provision entered into force it was argued that the provision limited TPP Authority's powers in favour of the Ministry of Finance and

[24] Chapter(7):Section(7.5.2.2).

it was claimed that TPP Authority lost its autonomy.[25] However, it was clarified by the Ministry of Finance that this provision was promulgated in order to carry out the negotiations with the European Union with regard to public procurement reforms as the existence of such a central body is laid down by the EU as an opening benchmark of negotiations.[26] It was also clarified that the aim was to provide policy harmony in procurement related areas such as concessions and public-private-partnerships which are not covered by TPP Act and hence not within the scope of TPP Authority.

Within the Turkish administrative system, TPP Authority is the main body in charge of implementation of TPP Act. There is not a likely institutional conflict between TPP Authority and the Ministry of Finance or other ministries with regard to implementation of public procurement. However, a possible conflict is possible while determining SPP priorities and objectives, which exceeds administrative capacity of TPP Authority due to the legality principle. As explained in previous section, there is a need to ensure ministerial coordination for determining the roles and responsibilities of different ministries for different pillars of SPP. It was suggested that the lead of a cross-ministerial taskforce must be taken by the Prime Ministry. In accordance with the recommendations of this cross-ministerial taskforce, SPP priorities and objectives should be determined. However, the task of implementing these objectives in public procurement should be left to TPP Authority. If a clear mandate is specified under TPP Act with regard to SPP as specified in Section 10.2, administratively and financially autonomous status of TPP Authority and its unique competence in preparing the secondary regulations implementing TPP Act, can provide significant outcomes for promotion of SPP in Turkey.

[25] Hasan Gül, 'Türk Kamu Alımları Sisteminde Kamu İhale Kurumu'nun Yeri ve Artan Önemi' (2010) 2 *Sayder Dış Denetim Dergisi* 5, p. 7.
[26] See, the Ministry of Finance, 'Current Situation in Negotiations on Chapter 5: Public Procurement' available at <www.abmaliye.gov.tr/en/node/306>

10.3.4 Capacity building for procuring officials

As explained in Chapter 8, the principal decision-making body throughout the public procurement process is the tender commission.[27] TPP Act centralised the decision-making body and prohibited establishment of any additional commissions. In that regard, TPP Act requires the tender commission to be competent in all aspects of the procurement. Therefore, TPP Act stipulates that at least two members of the tender commission must be experts on the subject-matter of the procurement. Furthermore, TPP Act permits the contracting authorities to invite experts from other contracting authorities that are subject to TPP Act in cases of absence of personnel in adequate numbers or qualifications.

The approach of TPP Act with regard to the tender commission (i.e. the centralisation of the decision-making process, the requirement of having experts in the tender commission and the possibility of inviting experts from other public bodies) has positive implications in that regard.

On the other hand, procurement officials are not qualified as a separate profession in Turkey. In general, the procuring officials who establish the tender commission are civil servants. These officials are appointed by the contracting officers who are entitled administratively to utilise funds in accordance with the institutional framework of the public authority. Although TPP Act is silent according to this issue, the sole discretion about determining the degree of expertise needed for being a member of a tender commission belongs to the contracting officers.

The incorporation of sustainable development objectives into the public procurement procedures necessitates commercial and analytical skills, competencies and tools to in order to ensure that the costs and benefits are weighed adequately. Furthermore, the familiarity of institutions with sustainable procurement policies is a significant factor that contributes to

[27] Chapter(8):Section(8.3).

the success of promoting sustainability through public procurement.[28] Organisational factors such as institutional norms, routines, cultures, in that regard, have impact on the success. As pointed out by Fisher, these factors not only applies to SPP and they find their root in the context of orientation of public sector modernisation over the last three decades.[29]

The provision of TPP Act, which grants a broad discretion to the contracting officers for composition of the tender commissions is a significant provision that needs to be maintained. However, in order to ensure the procurement officials easily handle the task of addressing sustainability concerns within their procurements, different mechanisms needs to be established. The institutional guidance of TPP Authority is very significant in that respect.

TPP Authority, following the practice of the European Commission, needs to establish easy accessible online toolkits, platforms for experience sharing and handbooks that contain best practices and tangible methodologies for addressing different sustainability concerns through public procurement proceedings.

Furthermore, the procurement officials, needs to have access to education and training opportunities. As procurement officials are not organised as a distinct profession, the procurement officials who needs to enhance their experience on procurement and also who wants to avoid any administrative and criminal liability that could derive from misapplication of the procurement rules, should be granted the option to get training from TPP Authority. In fact, such a special training is necessary not only for promotion of the SPP but for general implementation of TPP Act due to the lack of a consistent and clear legal framework and the excessive derogations to TPP Act, which complicates the legal framework. As it will be explained in the following section, this complication is burdensome

[28] Stephen Brammer and Helen Walker, 'Sustainable procurement in the public sector: an international comparative study' (2011) 31 *International Journal of Operations & Production Management* 452, p. 456.
[29] Eleanor Fisher, 'The Power of Purchase: Addressing Sustainability through Public Procurement' (2013) 1 *European Procurement & Public Private Partnership Law Review* 2, p. 4.

on the contracting authorities as much as the economic operators since the complication diminished transparency over the procedures and rules to be applied, and the contracting authorities that lack adequate human capital generate poor or unethical decisions.

10.4 Consistent and clear legal framework

Another important pillar of SPP, in addition to clear mandate and political backing and coherent institutional framework, is having a consistent and clear legal framework. The regulation of SPP can give rise to additional costs that have to be weighed by the contracting authority against the prospective benefits of SPP. Besides the costs different legal constraints come forward for each stage of public procurement. SPP requires careful design of mechanism integrated into the PP legal framework to minimise the cost to value for money and achievement of desired outcomes. In that regard, a delicate balance needs to be established that would avoid discrimination, implement transparency and remove any possible barriers to access to public contracts and minimise the cost of pursuing sustainable development through public procurement.

This section outlines the proposals for reforming TPP Act in order to make it consistent and clear for promotion of SPP.

10.4.1 Coverage

(1) The legal framework on public procurement needs to be unified and simplified

TPP Act, when it was first adopted in 2002, succeeded in unifying and simplifying the legal framework on public procurement in Turkey. However, in the course of time unjustified exemptions and exclusions were introduced to TPP Act, which undermined the promulgation purpose of TPP Act which was to be the main legislation governing public procurement.[30] Furthermore, the secondary regulations laid down for the exempted authorities and excluded contracts redefine the procurement process from scratch and even introduce exemptions for

[30] See, Chapter(5):Section(5.3.3) and Section(5.3.4).

specific projects or specific types of procurement. The derogations from TPP Act are not justified objectively and are not determined in a uniform way.

The diversity of procurement rules and excessive secondary regulations creates complexity and results in a considerable amount of different institutional practices, which are believed to obstruct the proper implementation of the objectives of transparency, competition and equal treatment in the Turkish public procurement market. The most concrete consequence of the lack of uniformity is the differentiation of the procurement procedures for the same contracting authorities, which increases the transaction costs of conducting procurement. Most importantly, the complication of the legal framework has significant adverse effects on the access of SMEs to public contracts.

There could be a better way of regulating exemptions from TPP Act. For instance, if it is unavoidable to grant an exemption from TPP Act due to the special circumstances of an entity, instead of exempting the entity from TPP Act and dedicating a separate piece of regulation for that purpose and redefining the procurement process from scratch, the areas for which that individual entity requires different practice need to be laid down under TPP Act as a separate provision. This approach would help economic operators to easily track any changes in the legal framework on public procurement and would also make the practice of the exempted entities more uniform and predictable.

On the other hand, TPP Act specifies a broad range of monetary values for advertisement, procurement procedures and types of procurement (i.e. goods, services or works) and due to the update of the values each year, these become fractioned and complicated.[31] There is no reasonable justification for having so many different values and thresholds. Besides unification, there is a particular need to simplify the monetary values and fix them at reasonable amounts.

[31] For threshold value see, Chapter(5):Section(5.5); for monetary values see, Chapter(5):Section(5.6.5).

Such complexity has implications for the pursuit of sustainable development objectives throughout public procurement since it makes it challenging to lay down a uniform vision and consistent implementation of any horizontal policies. In that regard, complexity of the public procurement rules emerges as a significant barrier to using public procurement as a policy tool to promote sustainable development in Turkey. Therefore, the legal framework on public procurement needs to be unified and simplified. In that regard, the exclusions outlined in Article 3 from sub-heading (a) to (t) need to be revised.

(2) The procurement of utilities needs to be regulated under a separate piece of legislation

TPP Act provides that the enterprises, establishments and corporations who carry out activities in the energy, water, transportation and telecommunication sectors are excluded from the scope of TPP Act. The procurements of utilities have been exempted from the scope of TPP Act in order to provide harmony with the EU's approach, dedicating a separate directive with regard to utilities. The preparation of a new legislation in order to regulate the procurements of utilities was planned. In order to prevent any uncertainty during the transition period, the procurement of the enterprises, institutions and corporations operating in the energy, water, transportation and telecommunication sectors have been subject to sub-paragraph (g) of 3rd Article of TPP Act until their special act enters into force. Also, their procurements of goods, services and works which are not within the scope of the said sub-paragraph have been subject to other provisions of TPP Act. The sub-paragraph (g) provides conditional exemption for the procurements below certain thresholds. TPP Authority is currently working on a draft law for utilities procurement; however there is not a definite timeline for the enactment. The draft law for utilities is still, as of 2013, waiting promulgation since 2002. Lack of separate rules on the procurements of utilities is a significant shortcoming of TPP Act.

(3) SPP should be pursued, regardless of stage, in a transparent and non-discriminatory manner

As discussed in Chapters 4, elimination of corruption in public spending has been the main impetus of public procurement reforms in Turkey.[32] Due to this prevailing attitude, the strategic use of public procurement is not a notion that has been sufficiently implemented within the legal framework and the reforms have not been fully motivated by sustainable development concerns. The benefits of sustainable procurement policies can only be gained by exercising broad discretion. However, having broad discretionary powers could promote sustainable procurement and best value for money as much as it could lead to corruption. Indeed, once the procurement system is designed wisely, corruption can be minimised whilst sustainability is promoted.

As rightly pointed out by Weller and Pritchard, "*transparency and non-discrimination are the backbone of public procurement, and remain the backbone of sustainable public procurement*".[33] The principle of transparency is considered to embody four pillars: publicity for contract opportunities, publicity for the rules governing the procurement procedure, having rule-based decision making and providing opportunities for verification and enforcement of the decisions.[34] In that regard, SPP should be pursued, regardless of stage, in a transparent and non-discriminatory manner.

TPP Act has introduced different measures to prevent corruption such as increasing transparency, eliminating conflicts of interest, imposing procurement sanctions on bidders and criminal and disciplinary sanctions. The Council of Ministers also adopted a comprehensive strategy in 2010 entitled Enhancing Transparency and Strengthening the

[32] Chapter(4):Section(4.4).
[33] Catherine Weller and Janet Meissner Pritchard, 'Evolving CJEU Jurisprudence: Balancing Sustainability Considerations with the Requirements of the Internal Market' (2013) 1 *European Procurement & Public Private Partnership Law Review* 55, p. 59.
[34] Chapter(5):Section(5.4.1.1).

Fight against Corruption. Furthermore, Turkey has also been party to the various international agreements related to corruption.[35] TPP Act has laid down a wide range of safeguards in order to eliminate any corrupt practices. In that regard, the peripheral conditions for sustainable public procurement, in general, do exist.

(4) The unjustified grounds for using exceptional procurement procedures need to be abolished

The restricted and negotiated procedures are exceptional procurement procedures that must be used only in the existence of objective reasons. Articles 20 and 21 of TPP Act, however, grant discretion to the contracting authorities to conduct procurement using these procedures if the estimated cost of the procurement is below threshold values without requiring the existence of any exceptional circumstances. According to statistics, these procedures consisted of about 20% of the overall procurements conducted in 2012.[36] Due to their impact on competition in the Turkish public procurement market, the provisions were challenged before the Turkish Constitutional Court.[37] However, the Court did not adequately evaluate the possible implications of the excessive use of these procedures.

As explained in Chapter 5, the current regulation of restricted and negotiated procedures goes far beyond the requirements of Public-Sector Directive.[38] Besides the issue of compliance with the EU law, there is a particular need to evaluate the impact of excessive use of restricted and negotiated procedures in terms of their impact on limiting access of entities like SMEs to public contract opportunities, which contribute to local economy and job creation and have the potential to better develop innovative solutions.

[35] Chapter(5):Section(5.4.1.7).
[36] For the statistics see Chapter(5):Section(5.7).
[37] See, the Turkish Constitutional Court, Case No. 2009/9, Decision No. 2011/103.
[38] See, Chapter(5):Section(5.7.1) and Section(5.7.2.)

On the other hand, these procurement procedures whereby the contracting authorities have a wide margin of discretion to negotiate the technical aspects could be used as tools for the pursuit of sustainable development objectives, despite the lack of an explicit mandate. As discussed in Chapter 3, there are a diverse range of constraints challenging the contracting authorities while identifying sustainable solutions, in particular when the environmental and social standards are not comprehensively elaborated.[39] There could be cases where data availability and uncertainty challenge the contracting authorities since cost data is often confidential or difficult to collect. In that regard, the contracting authorities could benefit from the experience of the private sector and could use the negotiation procedure for tailoring a sustainable solution in accordance with the specific context of the contracting authority. The principle of confidentiality, which is amongst the general principles pursued by TPP Act, can provide protection during negotiations in cases where the private sector hesitates to propose innovative solutions for the sake of protecting trade secrets.

(5) The competitive dialogue procedure needs to be introduced to TPP Act

As explained in Chapter 5, TPP Act provides three procurement procedures: open, restricted and negotiated procedures.[40] TPP Act, however, does not regulate the competitive dialogue procedure, which is already regulated under Article 29 of Public-Sector Directive. Competitive dialogue is a procurement procedure whereby the contracting authority conducts negotiations with the candidates selected on the basis of objective and non-discriminatory criteria with the aim of identifying one or more of the most suitable solutions capable of meeting the contracting authority's needs in terms of the properties of use and functional requirements. This procedure particularly provides flexibility to the contracting

[39] Chapter(3):Section(3.4.2).
[40] Chapter(5):Section(5.7).

authorities in complex projects, whereby the contracting authorities cannot properly identify the technical and financial aspects of a project.

According to Walker and Brammer the level of communication between buyers and suppliers has a substantial impact on the facilitation of SPP.[41] They argue that greater communication enhances information exchange and collaboration, hence augments the ability of the buyers to implement sustainable procurement policies in their supply relationships. Conducting negotiations is also considered to have two major outcomes in terms of SPP: (1) the negotiation provides an opportunity to proactively influence the supplier's future sustainability agenda and also (2) provides an opportunity to secure supplier agreement to take actions to mitigate any supply chain risks and/or reduce those impacts identified in the risk and impact analysis during the earlier stages of procurement.[42]

The competitive dialogue method provides the possibility to the contracting authorities for conducting negotiation in a flexible way, while safeguarding competition and ensuring equal treatment of economic operators through laying down detailed rules and formalities with regard to the way of negotiation. In that regard, the competitive dialogue method needs to be incorporated into TPP Act in terms of its outcomes with regard to SPP. Article 29 of Public-Sector Directive could be a model while drafting a rule for that purpose.

(6) The requirements of Environmental Impact Assessment needs to be revised in a way ensuring the widest possible coverage

One of the implementation principles pursued by TPP Act is the requirement of Environmental Impact Assessment (hereafter 'EIA').[43] TPP Act provides that where the related legislation requires an EIA report for a works project, a positive report must be

[41] See, Helen Walker and Stephen Brammer, 'The relationship between sustainable procurement and e-procurement in the public sector' (2012) 140 *International Journal of Production Economics* 256, p. 265.
[42] British Standards Institution, note[9], p. 34.
[43] Chapter(5):Section(5.4.2.4).

obtained before the initiation of procurement proceedings. The only explicit reference to the environment pillar of sustainable development within TPP Act is the EIA requirement. The shortcomings of the Turkish system on that matter derive from the EIA Regulation, not TPP Act. The coverage of the EIA requirement under its regulation has been limited and a significant number of projects have been removed from the scope in the course of time with no satisfactory justification.

The main coverage of the EIA procedure is regulated under a secondary, administrative regulation which can easily be modified. This method of regulation has facilitated the modification of requirements, which in certain cases were tailored according to the needs of a specific project. Furthermore, the EIA process requires involvement of individuals, groups or any stakeholders who are considered to be positively or negatively affected by a proposed project. However, it is argued that the public participation aspect of the EIA, which adds a social aspect to the EIA procedure, is not adequately implemented in Turkey; the public participation is either conducted in a limited context or the public decision is not valued and is not integrated into the final decision.[44]

The requirement of EIA is a significant provision on the way to promoting sustainable development since this requirement provides evaluation of the environmental problems before they occur and permits adoption of required actions in order to minimise the possible impact. In order to ensure environmental sustainability, the limited coverage of the EIA Regulation needs to be expanded, which in turn will also influence the procurement of works through TPP Act.

[44] Nükhet Turgut Yılmaz, *Çevre Politikası ve Hukuku* (Ankara: İmaj Yayınevi, 2009), p. 238; For the local implementation examples of EIA procedure see, Ömer Aykul, *Ekolojik Hukuk (Eko-Hukuk)* (Ankara: Seçkin, 2010), p. 216-260. See also, Dilek Unalan and Richard Cowell, 'Adoption of the EU SEA Directive in Turkey' (2009) 29 *Environmental Impact Assessment Review* 243.

Beside the narrow scope of EIA regulation, another important issue with regard to EIA is proper implementation. In Turkey, the Ministry of Environment and Urbanisation is the public body in charge of overseeing the implementation of EIA. This Ministry is entitled to impose sanctions and fines in case of improper implementation of EIA requirement. According to the most recent report published by this Ministry total 194 fines were imposed with a total amount of 4,292,737 Turkish Liras due to violations of Environment Act in 2011.[45] It is noteworthy that 164 of these fines with the amount of 3,131,718 were imposed due to violations of EIA requirement. In other words, the fines imposed due to violation of EIA requirement consisted of 72.95% of the all fines imposed by the Ministry of Environment and Urbanisation in 2011. Considering these statistics, besides expanding the scope of EIA regulation, the implementation should also be overseen and monitored consistently.

(7) Pre-commercial procurement needs to be regulated under TPP Act

Turkey needs to establish its sustainable procurement system in a dynamic context whereby all alternative methods of achieving sustainability are explored and exploited. One of the methods of public procurement that needs special attention is pre-commercial procurement. Pre-commercial procurement could be used in order to foster innovation in Turkey for disseminating environmentally friendly technologies in areas where no commercially stable solution exists on the market or where existing solutions have certain shortcomings that require new research development. Therefore, Turkey needs to benefit from the possibilities provided by pre-commercial procurement for market creation purposes, in particular for disseminating environmentally friendly products and services.

[45] Ministry of Environment and Urbanisation, *Environmental Inspection Report of Turkiye in 2011* (Ankara: Ministry of Environment and Urbanisation, 2012), p. 38.

As explained in Chapter 8, pre-commercial procurement is a particular method of procurement that combines research and development and commercialisation aspects.[46] Supply constraints in environmentally friendly products/services can emerge as a key barrier for implementing sustainability policies since certain industries might need to undergo substantial upgrading before a sustainable procurement policy can be put in place. Article 63 of TPP Act regulating the preferential procurement system, which does not target specific objectives and does not require a regular review of the success of the implemented policies, is not adequate for driving the industry towards sustainability in Turkey.

Different provisions of TPP Act, such as Article 3(f) excluding procurements related to research and development from its scope and Article 21(d) entitling the contracting authorities to use the negotiated procedure once it is established that the procurement is of a character requiring a research and development process and not subject to mass production, could be used for conducting pre-commercial procurement. However, considering the complexity of pre-commercial procurement, in particular the combination of product-driven research and commercial development together with the uptake and commercialisation stages, pre-commercial procurement needs to be comprehensively regulated under TPP Act as a separate method of procurement. Furthermore, due to the lack of an explicit mandate on this issue that would prevent administrative and institutional constraints, the public authorities could hesitate to use the current procurement rules for pre-commercial procurement.

Indeed, the 'Innovation Partnership' provision of Draft Public Procurement Directives could be used as a guide while drafting a new provision for TPP Act. The Draft Public Procurement Directives introduce a new provision entitled 'Innovation Partnership', which is indeed a new procurement procedure enabling the contracting authorities to establish a partnership

[46] Chapter(8):Section(8.8.3).

with one economic operator for the purpose of conducting research and development activities and subsequently procuring the new, innovative product, service or work, provided that it can be delivered to agreed performance levels and costs.[47]

10.4.2 Technical specification

(1) The limitations before the use of international standards need to be eliminated and the use of the phrase 'or equivalent' must be made mandatory

As explained in Chapter 6, Article 12 of TPP Act permits the use of national 'and/or' international standards within the technical specifications, without providing any further explanation about the hierarchy between the national and international standards.[48] As explained in Chapter 7, the Goods Procurement Implementation Regulation underlines that international standards can only be referred to in cases where national standards do not exist. The technical specifications need to be drafted according to performance requirements and the contracting authorities must accept any equivalent solutions and any means of proof that meet the targeted performance. The approach put forward by TPP Act, which does not recognise international standards as having equal status as national standards and does not require the use of 'or equivalent' as a general principle, needs to be reformed. Article 12 of TPP Act needs to abolish the hierarchy between the national and international standards and must make the phrase 'or equivalent' mandatory for the standards. This reform would particularly contribute to the use of international environmental standards in Turkey, which can easily be deployed and used for addressing a broad range of environmental considerations.

[47] DRAFT Public-Sector Directive, Article(29); DRAFT Utilities Directive, Article(43).
[48] Chapter(6):Section(6.3.3).

(2) The draft eco-label regulation needs to be put in force

As discussed in Chapter 6, eco-labels, which are voluntary schemes that aim to increase recognisability of environmentally friendly products and services, are the most convenient method for addressing a wide range of environmental consideration through public procurement.[49] However, North-Holland case ruled in 2012 has substantially changed the rules governing eco-labels.[50] The current approach of CJEU, prevents practical use of eco-labels in the European Union and creates a significant barrier before the promotion of SPP.

To recap, the CJEU adopted a rigid approach against eco-labels on the grounds that the eco-labels could be subject to variations. In that regard, the CJEU ruled that the contracting authorities must prepare a detailed specifications and to use eco-labels only as a means of proof.[51] The CJEU held that the only permitted cross reference is a cross reference to requirements set out in other legislations, provided that such a cross reference is unavoidable. The most prominent outcome of the judgment of the CJEU is that made it less convenient for the contracting authorities to rely on eco-labels. It is important to note that the judgment of the Court equally applies to the utilities on the grounds that the rules on eco-labels under Public-Sector Directive are identical to the ones under Utilities Directive.

As explained in Chapter 6, Turkey does not have its own eco-label scheme equivalent to either the international Type I environmental labelling programme or the European eco-label scheme.[52] The by-law on Eco-Labels that was projected to be prepared by 2011 is still in a draft stage. As explained in Chapter 6, TPP Act does not leave room for favouring the direct use of eco-labels under the technical specifications, except for those labels covered by the Labelling Regulation (i.e. energy performance labels). Indeed, international or European

[49] Chapter(6):Section(6.4.1).
[50] C-368/10, Commission v Netherlands, judgment of 10 May 2012.
[51] Ibid, para. 64-68.
[52] Chapter(6):Section(6.4.6).

eco-labels could be used as reference by the contracting authorities until the special regulation enters into force. Accordingly, the contracting authorities need to examine the criteria underlying a specific eco-label and they need to directly incorporate these criteria into the technical specifications, without referring to a specific eco-label or requiring registration under a specific eco-label.

Eco-labels are the most practical method of addressing environmental issues within the technical specifications. Considering their practicality, the draft eco-label regulation, which is prepared in accordance with the requirements of the EU law, needs to be put in force promptly. However, the Turkish regulation needs to avoid adopting a strict approach with regard to eco-labels as adopted by the CJEU in North-Holland case. In that regard, it should be made clear that cross-referencing to eco-labels is permissible provided that the requirement of eco-label is adequately publicised under the tender documents and any equivalent means of proof are accepted for meeting the environmental requirement underlying the eco-label. Furthermore, an explicit provision needs to be incorporated into TPP Act with regard to the possibility to use eco-labels for addressing environmental concerns, which should also be supported with soft law guidance.

(3) The consideration of disability and design for all requirements needs to be mandatory under the technical specifications

Although the protection of people with disabilities and easing their access to communities is a primary social policy in Turkey, this policy is not reflected enough under TPP Act. TPP Act does not contain any provision encouraging consideration of disability issues and design for all requirements within the technical specifications, unlike Public-Sector Directive, which requires consideration of such requirements 'whenever possible'.[53] Despite the silence of TPP Act on that matter, Article 2 of the Disability Act lays down a strict schedule

[53] Chapter(3):Section(3.5.2).

for the transformation of all existing official buildings of the public institutions and organisations, all existing roads, pavements, pedestrian crossings, open and green areas, sporting areas and similar social and cultural infrastructure areas and all kinds of structures built by the natural and legal persons serving the public to be brought to a suitable condition for the accessibility of disabled people by 2015. Despite the explicit requirement of the Disability Act, TPP Act does not lay down a provision to support this transformation. In order to enhance social aspects of public procurement, the consideration of disability and design for all requirements needs to be mandatory under the technical specifications. Such a revision is unavoidable due to the strict requirements of the Disability Act. So that, Article 12 of TPP Act, which regulates the general principles of technical specifications under TPP Act, should be amended and requiring the technical specifications to take into account accessibility criteria for people with disabilities or design for all users 'whenever possible' should be recognised as a general principle, as it is under Article 23 of Public-Sector Directive.

(4) The procurement of electricity needs to be regulated under TPP Act and an explicit provision favouring green electricity needs to be incorporated into TPP Act

Parallel to the liberalisation of the electricity market in Turkey and recognition of the right for eligible consumers to choose an electricity supplier through the Electricity Market Act, the contracting authorities within TPP Act asked TPP Authority to clarify the legal status of the procurement of electricity, which is not directly regulated under TPP Act. In that regard, TPP Authority adopted a general board decision in 2011 to clarify this issue.[54] According to TPP Authority's decision numbered 2011/DK.D-105, the procurement of electricity should follow the rules laid down for the procurement of goods. However, when the electricity market gets fully liberalised (particularly the transmission networks) and the consumers,

[54] TPP Authority, Decision No. 2011/DK.D-105, 17.06.2011.

regardless of their transmission network, are qualified as eligible consumers who have the right to choose their electricity provider, the significance of procurement of electricity will increase. Therefore, the procurement of electricity by the contracting authorities bound by TPP Act needs to be regulated at the legislation level rather than by a board decision of TPP Authority.

On the other hand, as discussed in Chapter 8, the main pitfall of green electricity is the so-called '*invisibility*', which means that the electricity produced from renewable energy sources is no different from the electricity produced from traditional sources.[55] TPP Authority's decision does not provide any guidance with regard to the possibility of favouring green electricity. In that regard, TPP Act needs to explicitly recognise the legitimacy of favouring green electricity (electricity produced from renewable energy sources), despite the fact that green electricity neither affects the consumption characteristics for the consumer nor provides extra efficiency for consumers.

10.4.3 Qualification criteria

(1) An explicit mandate for disqualifying economic operators who are in violation of social and environmental legislation needs to be incorporated into TPP Act

TPP Act does not explicitly mention the possibility of considerations related to social or environmental issues as grounds for exclusion from procurement proceedings. As discussed in Chapter 7, although Article 10 of TPP Act could to a certain extent be interpreted as permitting the exclusion of an economic operator from the procurement proceedings in cases of professional misconduct, it is not a sufficient provision for sustainable public procurement. Article 55(3) of the Draft Public-Sector Directive, entitled 'exclusion grounds', lays down a clear provision on that matter and entitles contracting authorities to

[55] Peter Kunzlik, 'The procurement of 'green' energy' in Arrowsmith Sue and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009), p. 394.

exclude from participation in a public contract any economic operator where they are aware of any violation of obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions. A similar provision would enhance both social and green public procurement in Turkey. In that regard, an explicit mandate for disqualifying economic operators who are in violation of social and environmental legislation needs to be incorporated into Article 10 of TPP Act. Such an explicit provision would also increase awareness provided by public procurement to enhance social and environmental standards.

(2) The environmental management systems need to be addressed by TPP Act, not under secondary regulations, and the threshold values must be diminished

Environmental management systems are practical tools for querying the capacity of the tenderers to cope with environmental problems related to the subject matter of the contract. The environmental management systems were introduced into Turkish law through the amendment of the implementation regulations of TPP Act in 2006. Although this introduction was a breakthrough in terms of addressing environmental concerns in public procurement, considering the overall design, these concerns need to be incorporated into TPP Act, not under secondary regulations. Furthermore, the threshold value for the use of environmental management systems in cases of works procurement, which is about 6.3 Million EUR, needs to be diminished to a reasonable amount.[56] Another possibility that could be considered is the removal of all threshold requirements and giving the ultimate discretion regarding whether to require environmental management systems to the contracting authorities, which would then be used in accordance with the requirements of the procurement in question.

[56] For the values see Chapter(7):Section(7.5.2.1).

(3) The limitations before using international social standards such as 'Social Accountability: 8000' must be abolished

As examined in Chapter 7, there has been an increasing awareness of the possibility to use social standards such as 'Social Accountability: 8000', which is an international standard setting out the voluntary requirements to be met by employers in the workplace, dealing with such issues as child labour, forced and compulsory labour, health and safety, freedom of association and the right to collective bargaining, discrimination, disciplinary practices, working hours and remuneration.[57] However, the use of this standard was restricted by TPP Authority on the grounds that it is not a recognised standard in Turkey, transposed by the Turkish Standards Institute as a Turkish standard. The approach of TPP Authority could be justified if the contracting authorities had stipulated only SA-8000 without accepting any equivalent means of proof that encapsulate the areas covered by SA-8000. However, TPP Authority did not comprehensively evaluate the legitimacy of SA-8000. Indeed, such social standards are the most practical instruments since they provide uniform implementation of social policies. The strict approach of TPP Act, which favours national standards over international standards, must be reconsidered in order to establish a sustainable public procurement system that meets international standards. For that purpose, Article 12 of TPP Act dealing with standards and Section 74.4 of the PP Communication restricting SA-8000 need to be revised.

(4) The setting-aside of contracts for workshops for workers with disabilities should be recognised

TPP Act does not lay down a general principle for sheltered workshops for disabled people, which constitutes a significant aspect of social procurement in the EU. As discussed in Chapter 7, the majority of sheltered workshops operated by disabled people consider the

[57] Chapter(7):Section(7.5.2.2).

barriers to participating in public procurement procedures as a major marketing problem.[58] In order to enhance socially responsible procurement policies, TPP Act needs to set aside public contract opportunities for sheltered workshops operated by disabled people, since such workshops would not be able to obtain public contracts in a competitive market.

10.4.4 Award criteria

(1) There is a need to lay down explicit mandates for the pursuit of environmental and social concerns within the award criteria

The introduction of the MEAT by TPP Act is a breakthrough development in the way of modernising public procurement in Turkey on the grounds that it confers a broader discretion on the contracting authorities to consider a range of factors while awarding the contracts. The extent of this discretion, however, is controversial. It could be argued that the Environment Act could be used as a basis even though such criteria do not provide an immediate economic benefit for the contracting authority, even though the criteria do not affect the intrinsic characteristics of the product itself, and even though the criteria neither affect the consumption characteristics for the contracting authority nor provide extra efficiency. This is a wide interpretation of Article 40 of TPP Act in light of the sustainability context, in particular the Environment Act. On the other hand, such an interpretation cannot be applied for social concerns due to the weak normative background. The only exception to this could be disability issues due to the strict and imperative wording of the Disability Act.

In order to establish a sustainable public procurement system, the award criteria play a key role and Article 40 of TPP Act needs be reformed in that regard, in a way recognising that the pursuit of social and environmental concerns as non-price factors are legitimate, as it is stated in Article 53 of Public-Sector Directive. Furthermore, the provisions that will permit

[58] Chapter(7):Section(7.5.2.2).

the incorporation of social and environmental considerations need to be supported by practical soft law guidance.

(2) The general preferential procurement system needs to be revised in a way that targets the creation of a green economy during the transition period until full accession to the European Union occurs

Article 63 of TPP Act grants discretion to the contracting authorities to: (a) grant preferences to 'domestic tenderers' up to 15% in the procurement of services and works; and (b) grant preferences to any tenderers offering domestic goods up to 15% during the award stage. According to the statistics published by TPP Authority, this discretion is frequently exercised and the contracting authorities bound to TPP Act have substantially favoured domestic goods through granting extra preferences for domestic goods up to 15% during the award stage.[59]

Preferential procurement favouring national suppliers and domestic goods and reserving the public contract opportunities for national suppliers is being used as an instrument to maintain the national economy. However, Turkey needs to evaluate the possible implications of preferential procurement in the long-term in terms of efficiency and, most importantly, in terms of its implications for the promotion of sustainability.

Public procurement can provide significant outcomes when it is used strategically. In that regard, instead of adopting a general preferential procurement policy, sector-specific, targeted and dynamic preferential procurement policies need to be developed in Turkey. Considering the supply constraints in terms of sustainable products and services in Turkey, the current general preferential procurement and the widespread practice of closing tender proceedings to international competition creates an additional barrier to implementing sustainable procurement policies in Turkey. Indeed, preferential procurement could be used as an efficient instrument to boost the competiveness of the national industry and to promote

[59] Chapter(8):Section(8.7).

innovation in the long term once it targets the development of specific industries (primarily the infant or emerging industries) or protection of disadvantaged economic operators. Such an objective is already set under the Medium Term Programme (2012-2014) for the information and communication technologies sector. According to this policy framework, public procurement will be used as a policy tool to support development of the sector.[60]

In that regard, considering the insufficient national capacity of sustainable production in Turkey and supply constraints, a specific preference system needs to be established targeting and favouring only sustainable solutions. Furthermore, the implemented policies need to be monitored consistently and revised regularly according to the changing circumstances of the market.

It is noteworthy that this proposal needs to be considered in the context of membership negotiations with the European Union and most importantly in the light of Turkey's policy on neoliberalism. To clarify, preferential procurement is proposed for a limited context (i.e. creation and promotion of green markets) and only for a limited, transition period. In that regard, the general preferential procurement system needs to be revised in a way that targets the creation of a green economy during the transition period until full accession to the European Union occurs.

(3) Alternative bidding needs to be accepted for all types of procurement

As discussed in Chapter 8, the award stage is the most convenient stage to assess the real cost of horizontal policies and the use of variants or so-called alternative bidding is an efficient method to make a specific evaluation of the costs.[61] In particular, if the contracting authorities have difficulties in terms of determining the prospective cost of pursuing a certain social or environmental policy, allowing the tenderers to submit alternative bids provides

[60] See, Medium Term Programme (2012 - 2014) available at <www.mod.gov.tr/en/mtp/Medium%20Term%20Programme%202012-2014.pdf>, p. 34.
[61] Chapter(8):Section(8.8.1).

specific data that can help to appraise the actual cost of pursing social or environmental policies.

Article 30 of TPP Act, however, only permits alternative bidding for the procurement of goods. In fact, alternative bidding is a method with no significant cost and using social or green variants provides room for discussing innovative solutions. Considering the practicality provided by the alternative bidding method, Article 30 of TPP Act needs to be reformed and alternative bidding needs to be accepted for all procurement types, i.e. for services and works procurements besides goods as it is under Article 25 of Public-Sector Directive.

10.4.5 Contract conditions

The PP Contract Act does not lay down a general principle with regard to the pursuit of social or environmental concerns within the contract performance clauses. It could be argued that the Environment Act could be used as a basis, as it is interpreted for the award criteria. On the other hand, such an interpretation cannot be done for social concerns due to the weak normative background. In order to establish a sustainable public procurement system, the PP Contracts Act needs be reformed in a way that recognises that the pursuit of social and environmental concerns within the contract performance clauses is legitimate. In that regard, an expression similar to the provision of Article 26 of Public-Sector Directive such as 'the conditions governing the performance of a contract may, in particular, concern social and environmental considerations' could be incorporated into Article 4 of the PP Contracts Act entitled 'principles'. Furthermore, the provisions that will permit the incorporation of social and environmental considerations need to be supported by practical soft law guidance.

10.4.6 Important role of soft law guidance

The example put forward by the EU demonstrated the importance of soft law with regard to the evolution of SPP. As explained in Chapter 3, the legal rules on SPP in the EU have

evolved in the course of time from soft law to hard law. Although certain aspects of sustainable development were treated as non-binding or as soft law, they laid down foundations for normative rules that could be directly enforced in the course of time. The novel goals of sustainable development have evolved from abstract commitments to tangible and implementable policies, which in turn were incorporated into the EU procurement rules. For instance, Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles imposes mandatory requirements on the procurement of energy-efficient vehicles.[62] Similarly, the European Energy Star Programme requires central government authorities and EU institutions to procure equipment not less efficient than the Energy Star.[63] It is noteworthy that these requirements evolved into mandatory requirements in the course of time, mostly under the influence of initiatives on sustainable development at the EU level.

As explained in Section 10.3, a significant pillar of SPP is the existence of a coherent institutional framework supporting SPP. As discussed, the active role played by the European Commission has been effective for the contracting authorities in the EU for establishing their strategies on SPP and implementing them.

As explained in Chapter 3, while implementing SPP not only legal constraints but also various other factors, including organisational and psychological barriers, enter into consideration.[64] The reform of award criteria under TPP Act in 2008 is a good example of that. As discussed in Chapter 8, Article 40 of TPP Act was revised in 2008 and it has been clarified that the contracting authorities are entitled to determine the most economically advantageous tender by either relying on price or price accompanied by non-price factors.[65]

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[62] Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles, OJ 2009 L 120/5.
[63] Regulation (EC) No. 106/2008 on a Community energy efficiency labelling programme for office equipment, OJ 2008 L 39.
[64] In particular see, L. Preuss and H. Walker, 'Psychological barriers in the road to sustainable development: Evidence from public sector procurement' (2011) 89 *Public Administration* 493.
[65] Chapter(8):Section(8.5).

As explained, the introduction of the most economically advantageous tender by TPP Act and the revision of Article 40 in 2008 are breakthrough developments in the way of modernising public procurement in Turkey on the grounds that it confers a broader discretion on the contracting authorities to consider a range of factors while awarding the contracts, in particular opening up possibilities for the promotion of sustainability concerns. However, the Act numbered 5812 made a minor wording change that some scholars have argued did not create a substantial change in terms of formulating award criteria. Furthermore, it is argued that the contracting authorities bound to TPP Act maintain their old practices; they refrain from taking any risks for establishing award criteria based on non-price factors and they frequently rely on the lowest price as the award criteria and award the contract to the lowest bid.

This example implies that laying down provisions are not sufficient alone, and granting discretion to the contracting authorities does not provide desirable outcomes unless awareness is raised for the possibilities provided by the legal framework and unless a clear methodology of how to use this discretion is made clear to the contracting authorities. In other words, the discretion for promoting SPP could only be exercised if the legal rules are supplemented with soft law guidance. As explained in Section 10.3.2, TPP Authority, the public body in charge of proper implementation of TPP Act throughout Turkey, needs to provide the requisite soft law guidance.

SPP requires changing behaviours in public management, which are shaped by different organisational and institutional norms and routines. The familiarity of institutions with sustainable procurement policies is a significant factor that contributes to the success of achieving sustainability through public procurement. In order to enhance the practical use of powers of discretion, there is a need to provide internal institutional practical guidance

making it clear that the use of non-price factors or preference of sustainable solutions falls within the sustainable public procurement policy of the individual institution.

Soft law guidance of TPP Authority, in that regard, needs to encapsulate: legal possibilities provided by the legal framework, minimum legal requirements, possible ways of enhancing social or environmental standards than the minimum legal standard, detailed and amplified methodologies for incorporating social and environmental considerations into different stages of public procurement, possible benefits and drawbacks of using different methods of addressing sustainability concerns, a step-by-step approach for implementation from basic to advanced levels, pilot projects and success stories of different contracting authorities overseen by TPP Authority, and platforms for collaboration with successful contracting authorities for experience sharing. Furthermore, instead of expecting each contracting authority to conduct cost and benefit analysis, TPP Authority needs to coordinate and lead research in that area and must make the data available to all contracting authorities.

The practical outcome of soft law guidance is that it creates a dynamic context for discussion, research and implementation. Instead of specifying definite and binding requirements, soft law guidance provides experience of different solutions in accordance with changing circumstances and contexts. In other words, it encourages the contracting authorities to learn by doing. As discussed in Section 10.3.1, if specific targets are set and, most importantly, if the outcomes are measured and monitored consistently, sustainability that goes beyond the minimum legal requirements could be achieved in Turkey. The outcomes of the implementation can lay down foundations for enhancing social and environmental standards in Turkey and this can lead to sustainability in procurement (SPP) becoming mandatory in the course of time.

10.5 Effective enforcement/remedy system

As explained in Chapter 3, the rules governing the use of public procurement for the promotion of social and environmental objectives mostly emanated from the case-law of the CJEU. The interpretation of the CJEU clarified the possibilities existing in the legal framework consisting of the EU Treaties and the EU Public Procurement Directives. The CJEU, while interpreting the rules of the EU Treaties and the Public Procurement Directives adopted teleological and functional approach.

The case-law of the CJEU is like a pyramid: each judgment is built upon the outcomes of the previous judgement. In other words, the interpretation process is conducted consistently through taking into account the previous rulings but without disregarding the changing circumstances. In that regard, the CJEU significantly enhanced the possibilities for addressing sustainability concerns through public procurement in the course of time. Concordia Bus, EVN/Wienstrom and most importantly North-Holland cases are significant outcomes of that approach.

As explained in Chapter 5, a significant contribution of TPP Act is the introduction of a review system by TPP Authority to provide effective remedies for any aggrieved economic operators.[66] The main purpose of requiring the administrative review by TPP Authority, which is a mandatory step of pre-contractual review, is explained under the Preamble of TPP Act as accelerating the dispute resolution proceedings. However, the current design of the review system under TPP Act has significant shortcomings in terms of effectiveness.

Firstly, the limited recognition of standing before the PP Board significantly curtails addressing procurement violations and raising disputes before TPP Authority. Furthermore, the legal standing issues are mostly regulated under the secondary administrative

[66] For a critique on the review procedures see, Chapter(5):Section(5.9.3).

regulations. In order to provide full respect to the rule of law, the essentials of the legal standing must be directly regulated under the PP act rather than through secondary regulations.

Secondly, the PP Board imposes high application fees for lodging any appeal. The strict regulation of right of standing and high application fees contradicts the general principles pursued by TPP Act, in particular the principles of transparency and public supervision.

Thirdly, Article 53(b) of TPP Act, which conferred TPP Authority the discretion to investigate ex-officio any violation of TPP Act, was abolished in 2008 through the Act numbered 5812. In other words, TPP Act is entitled to investigate a procurement dispute only if such a dispute is addressed by an economic operator.

TPP Authority could only provide uniform implementation of TPP Act by all covered contracting authorities throughout Turkey if it maintains its extensive powers. Therefore, the diminishment of the powers of TPP Authority and the abolishment of its power to conduct ex-officio investigations could not be justified objectively. Indeed, strengthening the review system is an essential peripheral condition for promotion of SPP. As explained in Section 10.4.1, enhancing transparency and avoiding discrimination are the backbone of SPP. The mechanism that would ensure the proper implementation is an effective review system.

The possible complementary role of TPP Authority while reviewing the procurement disputes needs also be examined in terms of promotion of SPP. TPP Authority is only entitled to evaluate and conclude any complaints claiming that the proceedings carried out by any contracting authority within the period from the commencement of the tender proceedings until the signing of the contract are in violation of TPP Act. As explained in Section 10.2, the main shortcoming of TPP Act is lack of an explicit mandate for the pursuit of sustainability concerns under TPP Act. Lack of a clear mandate for sustainability concerns under TPP Act undermines the possible complementary role of TPP Authority for promotion

of SPP in Turkey. The case of SA-8000 standard justifies this argument.[67] TPP Authority, due to lack of an explicit mandate under TPP Act, could not adopt a proactive role while interpreting the legitimacy of pursuit of social objectives encapsulated under SA-8000 standard.

The normative value of sustainable development, as explained in Chapter 2, is weak in Turkey.[68] It is the author's view that the weakness of normative value of sustainable development and lack of an explicit mandate under TPP Act on the legitimacy of sustainability concerns also prevents the Turkish administrative courts to adopt a teleological or functional approach to interpretation. In light of the important role of the judiciary in filling in the gap, such as the CJEU, the Turkish system needs to be reformed in a way explicitly recognising the legitimacy of sustainability concerns.

As explained in Chapter 9, monitoring contract compliance is also an essential aspect that needs to be considered while pursuing any sustainability concern through public procurement.[69] As the European Commission points out, green and social procurement can only be successful if compliance is properly monitored, and the Commission recommends the Member States to avoid adding requirements that cannot (or will not) be monitored effectively.[70] Indeed, effective compliance not only improves the quality of procurement but also contributes to the principles of transparency and competition, which are amongst the main principles pursued by TPP Act, through eliminating the circumvention of procurement rules during the performance of a contract.

[67] Chapter(7):Section(7.5.2.2).

[68] Chapter(2):Section(2.4.2).

[69] Chapter(9):Section(9.5).

[70] European Commission, Buying Green, note[21], p. 48; European Commission, Buying Social, note[22], p. 46.

CHAPTER 11

Conclusion

As stated in Chapter 1, the main objectives of this thesis were to elucidate the current legal framework for regulating public procurement under the Turkish law, to highlight any problems with this framework, and to identify possible options for improving the regulation. Furthermore, it was aimed to address whether Turkish public procurement law currently permits the pursuit of any social, environmental and economic objectives of sustainable development. In that regard, the thesis aimed to outline the main barriers to pursuing sustainable development objectives under Turkish public procurement law and examine the procurement rules that should be reformed in order to establish a sustainable public procurement system that meets the European Union law.

In response to these questions, the subsequent chapters of the thesis explained the current legal and institutional framework, identified a number of problems that exist, and set out certain specific options and proposals that might be considered for reforming the system. This chapter compiles all the main conclusions of the analysis of this thesis.

11.1 Increased awareness of sustainable development at international, regional and national levels

The examination of the concept of sustainable development, which establishes the foundations of sustainable public procurement, was a significant part of this thesis. Chapter 2 was dedicated to that purpose; it provided an overview of the concept of sustainable development and set the broad context for examination in the subsequent chapters. The examination demonstrated that there has been an increasing recognition of sustainable development as an objective of the international community in various international and regional instruments, which has led to an increased awareness at international, regional and national levels. The most important contribution of Chapter 2 was that it highlighted the fact

that the meaning and substance of sustainable development depend on the legal context in which it is applied, since each country is unique in its economy, society and environmental priorities and so all have different challenges and needs.

Chapter 2 looked at the status of sustainable development in both the European Union and Turkey. Accordingly, sustainable development is a normative principle comprising an integral part of the EU law. The concept of sustainable development bears a better understandable meaning within the context of the EU law and it has been disseminated to various sector-specific and even product-specific areas.

There has been an increased awareness of sustainable development in Turkey as well. When the dynamics of evolution of sustainable development in Turkey are examined, a strong European influence comes forward. In that regard, being party to the Customs Union in 1995, acceptance as a candidate state in 1999 and the initiation accession negotiations in 2004 are the main dynamics that shaped Turkey's approach to sustainable development. However, the normative value of sustainable development, compared to the EU, is not strong in Turkey. Sustainable development is at early stages of evolution in Turkey. For instance, the Environment Act provides an explicit mandate for all public bodies and units to protect the environment in accordance with the principle of sustainable development. The legal framework for the social pillar of sustainable development, on the other hand, is quite fragmented and weak.

11.2 The important role of public procurement in achieving sustainable development in the EU and Turkey

After scrutinising the concept of sustainable development at the European Union and Turkish levels, the focus of the research was given to the correlation between sustainable development and public procurement. It is noteworthy that various regulatory and policy frameworks on sustainable development at the EU level, such as the Sustainable

Development Strategy, the 6th Environmental Action Programme, the Energy Efficiency Plan, the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan and the Europe 2020 Strategy, have all made special reference to public procurement for the promotion of their prescribed objectives. There is also an increasing awareness of the opportunities provided by public procurement to promote sustainable development in Turkey. The 10th Development Plan, the Energy Efficiency Strategy, the SME Strategy and Action Plan and the National Climate Change Action Plan, which are the main policy frameworks of sustainable development, are significant due to their explicit recognition of public procurement as an instrument to achieve their prescribed targets.

11.3 The evolving nature of the Turkish public procurement law

Before examining the current legal framework governing public procurement in Turkey through the prism of sustainability, the historical development of the Turkish public procurement framework was analysed in order to find the driving factors that triggered the public procurement reforms and identify any weak points and inherent problems in the Turkish public procurement system. Chapter 4, in that regard, examined the evolving nature of the Turkish public procurement law.

According to the findings of Chapter 4, the Turkish public procurement law has undertaken two major reform stages and the main motivations for each reform have always been unification, simplification and modernisation of the legal and institutional framework. The reforms were conducted with the intention of preventing or at least minimising corruption while spending public money. However, each reform initiative failed to achieve their objectives since the system was not reformed comprehensively. In that regard, the diversity of legal rules as well as the institutional framework made the Turkish public procurement system more complex and vague for economic operators as the practice and requirements of each contracting authority differed considerably. The examination in this chapter also

revealed that public procurement has always been used to protect the national industry through closing the tendering opportunities to international competition and favouring the national economic operators as well as domestic goods. Due to the resistance of the national economic operators and the political instability, a comprehensive public procurement reform could not be initiated. As explained, the momentum required to initiate a comprehensive public procurement reform in Turkey was gained under the political pressure of certain external dynamics such as the IMF, the World Bank and the European Union.

After examining the historical development of the Turkish public procurement law, the focus was given to the current regulation of public procurement. Chapter 5, in that regard, provided an overview of the regulatory and institutional framework on public procurement in Turkey. As discussed in that chapter, TPP Act was mainly modelled after the EU Public-Sector Directive. However, TPP Act has distinctive features and contains remarkable differences from these models which make the new legislations sui generis, and they are mostly tailored to the specific context in Turkey. TPP Act, enacted in 2002, had succeeded in unifying the institutional framework; however, it failed to unify the legal framework due to excessive derogations which were introduced to TPP Act inconsistently.

Chapter 5 also aimed to answer the question of whether sustainable development has been taken into consideration in the current legal framework, and the question of what is the most significant barrier to pursuing sustainable development throughout the public procurement process under the current framework. The examination in that chapter revealed that the diversity of procurement rules emerges as the first significant obstacle to implement sustainable development policies in Turkey. The unjustified exclusions complicate the pursuit of any horizontal policies.

Chapter 5 conducted a detailed investigation on the principles pursued by TPP Act. Amongst the general principles, only the requirement of environmental impact assessment falls within

the scope of sustainability. However, this requirement only applies to the procurement of certain works. Lack of a direct provision mandating consideration of social and environmental objectives for procurements of goods, services and works is a significant shortcoming. On the other hand, it is argued that the procurement procedures whereby the contracting authorities have a wide margin of discretion to negotiate the technical aspects (i.e. restricted and negotiated procedures) could be used as tools for the pursuit of sustainable development objectives. Although different possibilities exist to address sustainable development objectives in that way, there is a need to identify an explicit mandate requiring the contracting authorities to address the social and environmental impact of their procurement activities.

Chapter 5 further provided an overview of the procurement review procedures in order to provide a full understanding of the Turkish public procurement system. Even though the introduction of a special review procedure for procurement disputes is a significant reform, the system could be criticised from different aspects. As discussed, the diminishment of the powers of TPP Authority and the abolishment of its power to conduct ex-officio investigations is a significant shortcoming since TPP Authority could only provide uniform implementation of TPP Act by all covered contracting authorities throughout Turkey if it maintains its extensive powers.

11.4 The valuable lessons offered by the EU sustainable public procurement law and practice

As stated in Chapter 1, the relevance of EU sustainable public procurement laws and practice to Turkey primarily derives from the membership negotiations of Turkey with the EU. Beside this primary reason, there are significant lessons for Turkey that could be learnt from the EU's experience. The examination in this thesis affirmed this assumption and revealed that there are valuable lessons offered by the EU sustainable public procurement law and

practice. The use of public procurement as a policy tool to achieve sustainable development is quite advanced in the EU, with extensive legal rules and jurisprudence. Furthermore, there is extensive soft law guidance that forms a valuable benchmark for Turkey.

Chapter 3 of this thesis examined the issue of using public procurement as a policy tool to promote sustainable development, which is crystallised under the concept of sustainable public procurement. This chapter took into consideration the legitimacy of this policy pursuit under the EU law. As explained, procurement whereby sustainable development objectives are addressed is conceptualised under the heading of 'sustainable public procurement'. Although the environmental aspect of sustainable public procurement (i.e. green procurement) is the most prominent, sustainable public procurement is not merely the protection of the environment through public procurement as it also encapsulates social and economic aspects.

The examination in Chapter 3 revealed that the promotion of sustainable public procurement is voluntary unless sector-specific or general regulations mandate the pursuit of certain sustainability concerns. The examination enshrined that the legitimacy of sustainability concerns and the discretion granted to the contracting authorities needs to be evaluated at the stage whereby the sustainability concern is pursued.

As discussed in Chapter 3, the legitimacy of pursuit of sustainability concerns was mainly resolved by the case-law of the CJEU and the outcomes of the case-law were then integrated into the Public Procurement Directives, which entered into force in 2004. It is important to note that the horizontal policies can be incorporated into different stages of procurement and different legal constraints come forward for each respective stage. However, due to the complex and dynamic nature of sustainability issues and, in the same vein, the complex and dynamic nature of public procurement procedures, the Procurement Directives could not completely disperse the ambiguity over the legitimacy of the pursuit of sustainability

concerns. In that regard, the case-law of the CJEU, ruled after the adoption of the Procurement Directives, also draws the boundaries of the legitimacy of horizontal policies, not only for environmental aspects but for all sustainability concerns. The case-law of the CJEU is like a pyramid: each judgment is built upon the outcomes of the previous judgement. Notwithstanding the stage whereby the sustainability concern is pursued, the principles of transparency, equal treatment and non-discrimination must be respected, which is reinforced by the case-law of the CJEU.

North-Holland case, which was settled in 2012, provided a new insight with regard to the possibilities for addressing sustainability concerns. This ruling reinforced the principle of transparency and the CJEU held that the transparency obligation requires all conditions and detailed rules of award procedures to be laid down in the tender notice or tender documents in a manner that is clear, precise and unequivocal. The ruling of North-Holland, on the other hand, is considered to sanction the idea that a sustainability criterion can have a significant influence on the award criteria.

The only adverse outcome of the judgment of North-Holland is that it made it less convenient for the contracting authorities to rely on eco-labels. The CJEU held that the only permitted cross reference is a cross reference to requirements set out in other legislations, provided that such a cross reference is unavoidable. As discussed in Chapter 3, the author disfavours the approach put forward by the CJEU. The CJEU could be less sceptical toward eco-labels which rely on scientific data, are prepared through a stakeholder participation process, are accessible, and which have been in the market for more than thirty years. Nevertheless, North-Holland case significantly enhanced the possibilities for addressing sustainability concerns throughout public procurement proceedings.

11.5 Reform Proposals for Regulating Sustainable Public Procurement in Turkey

In light of the precedence of the EU, Chapters 6 to 9 examined the possibilities of pursuing sustainability criteria at different stages of procurement, i.e. technical specifications, qualification criteria, award criteria and contract performance clauses. When the SPP model put forward by the EU is examined it is seen that the existence of a clear mandate and political backing, coherent institutional framework and consistent and clear legal framework and an effective enforcement/remedy system are major pillars of SPP. The findings of this examination and proposals with possible options for developing a sustainable development-oriented public procurement regulation in Turkey could be summarised as follows.

(1) Clear mandate and political backing for SPP

- The legal and political status of sustainable development needs to be strengthened in Turkey.
- The promotion of sustainable public procurement and meeting the EU law needs to be evaluated in a context that is separate from the political debates surrounding the membership negotiations with the EU.

(2) Coherent institutional framework supporting SPP

- Leadership of national government: The importance given to sustainable development by the Turkish Government must be highlighted and supported with the capacity building programmes.
- Enhanced coordination at ministerial level: While a clear legal mandate is defined for SPP, the ministerial coordination also needs be regulated, determining the roles and responsibilities of different ministries for different pillars of SPP.
- Enhanced institutional guidance of TPP Authority: The implementation of SPP needs to be supported, monitored and overseen by the institutional guidance of TPP Authority.

- Empowered review bodies: Strengthening the review system is an essential peripheral condition for the promotion of SPP by shifting the paradigm of regulating public procurement in Turkey from preventing corruption to strategic use. Furthermore, lack of a clear mandate for sustainability concerns under TPP Act undermines the possible complementary role of jurisprudence for the promotion of SPP in Turkey.
- Capacity building for procuring officials: In order to ensure that procurement officials can easily handle the task of addressing sustainability concerns within their procurements, they need to have access to education and training opportunities.

(3) Consistent and clear legal framework

Coverage

- The legal framework on public procurement, TPP Act, needs to be unified and simplified.
- The procurement of utilities needs to be regulated under a separate piece of legislation rather than TPP Act.
- SPP should be pursued, regardless of stage, in a transparent and non-discriminatory manner.
- The unjustified grounds for using exceptional procurement procedures under TPP Act need to be abolished.
- The competitive dialogue procedure needs to be introduced to TPP Act.
- The requirement of Environmental Impact Assessment needs to be revised in a way ensuring the widest possible coverage.
- Pre-commercial procurement needs to be comprehensively regulated under TPP Act.

Technical specifications

- The limitations preventing the use of international standards need to be eliminated and the use of the phrase ‘or equivalent’ must be made mandatory.

- The draft eco-label regulation needs to be put into force.
- The consideration of disability and design for all requirements needs to be mandatory under the technical specifications.
- The procurement of electricity needs to be regulated under TPP Act and an explicit provision favouring green electricity needs to be incorporated into TPP Act.

Qualification criteria

- An explicit mandate for disqualifying economic operators who are in violation of social and environmental legislation needs to be incorporated into TPP Act.
- The environmental management systems need to be addressed by TPP Act, not under secondary regulations, and the threshold values must be diminished.
- The limitations before using international social standards such as 'Social Accountability: 8000' must be abolished.
- The setting-aside of contracts for workshops for workers with disabilities should be recognised.

Award criteria

- There is a need to lay down explicit mandates for the pursuit of environmental and social concerns within the award criteria.
- The general preferential procurement system needs to be revised in a way that targets the creation of a green economy during the transition period until full accession to the European Union occurs.
- Alternative bidding needs to be accepted for all types of procurement.

Contract conditions

- The PP Contracts Act needs be reformed in a way recognising that the pursuit of social and environmental concerns within the contract performance clauses is legitimate.

Important role of soft law guidance

- The legal and institutional framework of public procurement needs to be supported with a comprehensive soft law guidance.

(4) Effective enforcement/remedy system

- In light of the important role of the judiciary in filling in the gap, such as the CJEU, the Turkish system needs to be reformed in a way explicitly recognising the legitimacy of sustainability concerns.

11.6 The way forward

The most challenging part of this thesis was the lack of sufficient academic literature on the Turkish public procurement law. There exists very limited literature analysing the Turkish public procurement regime, not only in English but also in the Turkish literature. Moreover, the Turkish public procurement law underwent significant revisions in 2008 and 2011, therefore certain aspects of the literature are already partially obsolete. Furthermore, very little attention has been paid to the interaction between public procurement and sustainable development within the Turkish literature. The sustainability aspect of public procurement has been a largely neglected area of study in Turkey when compared with the vastness of the literature on the EU sustainable public procurement law and practice. Nevertheless, this thesis attempted to establish foundations for future research on the Turkish sustainable public procurement law.

There are a number of ways in which the research within this thesis could be taken further. This thesis essentially used the methods of black letter and comparative legal research in order to achieve its objectives and it has examined how the law is regulated. In that regard, as a way forward, an empirical analysis of and research into the constraints preventing effective implementation of sustainable public procurement in Turkey would make a particularly useful contribution.

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