

# SHAPING SUSTAINABLE PUBLIC PROCUREMENT LAWS IN THE EUROPEAN UNION

- An analysis of the legislative development  
from 'how to buy' to 'what to buy' in current  
and future EU legislative initiatives

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# TABLE OF CONTENTS

<b>EXECUTIVE SUMMARY</b>	<b>5</b>
<b>I. INTRODUCTION</b>	<b>7</b>
1. Methodology	8
2. The 2014 Reform of Public Procurement Directives	9
3. Beyond How to Buy	13
4. The need for a stronger social dimension of SPP	14
<b>II. EU INITIATIVES RELEVANT FOR SPP</b>	<b>17</b>
<b>GREEN DEAL INITIATIVES</b>	<b>18</b>
1. Renovation wave and works procurement	19
1.1. Voluntary GPP criteria for the construction sector	20
1.2. Overview of the present legislative framework building procurement	20
1.3. The relevance of buildings for the Green Transition	22
1.4. The works procurement component of the new initiatives	23
1.4.1. Reform of the EPBD	23
1.4.2. Reform of the EED	26
1.4.3. The reform of the RED	27
1.4.4. The reform of the CPR	28
2. Sustainable and Smart Mobility	31
2.1. Voluntary GPP criteria for road transport	31
2.2. The Clean Vehicles Directive - mandatory targets	33
2.3. Proposal for Batteries Regulation - mandatory requirements	35
3. Farm to Fork	37
3.1. Voluntary GPP criteria for food	38
3.2. An overview of the present legislative initiatives	40
4. Sustainable Products Policy and Ecodesign	41
4.1. Voluntary GPP criteria for sustainable products	42
4.2. The Proposal for a Ecodesign Regulation for Sustainable Products	44
4.3.1. Social criteria and due diligence	46

<b>SPP RELEVANT INITIATIVES OUTSIDE THE GREEN DEAL</b>	<b>47</b>
1. Proposal for a Corporate Sustainability Due Diligence	47
2. Proposal for a Corporate Sustainability Reporting Directive	48
3. Proposal for Minimum Wages Directive	49
2.1. Equal Pay	52
2.1.1. Enforcing minimum and equal pay in SPP	52
<b>III. CHANGES TO THE EU PROCUREMENT SPECIFIC LEGAL FRAMEWORK</b>	<b>55</b>
1. Strengthening the sustainability principle	55
2. The need to revise and streamline requirements along the procurement cycle	58
3. Removal of the link to the subject matter	58
4. Changing the rules on reserved contracts	60
5. Amending the Remedies Directives	61
<b>IV. REFLECTIONS AND CONCLUSIONS</b>	<b>63</b>
1. General	63
2. Legislative Initiatives - amendment proposals	65
2.1. Directive on the Energy Performance of Buildings (EPBD)	65
2.2. Energy Efficiency Directive (EED)	67
2.3. Renewable Energy Directive (RED)	67
2.4. Proposal for a Construction Product Regulation (CPR)	67
2.5. Clean Vehicles Directive (CVD)	68
2.6. Proposal for a Batteries Regulation (BR)	69
2.7. Future initiatives on food procurement	69
2.8. Proposal for a Regulation on Ecodesign of Sustainable Products (EDSP)	70
2.9. Proposal for Corporate Sustainability Due Diligence Directive (CSDD)	71
2.10. Proposal for Corporate Sustainability Reporting Directive (CSRD)	71
2.11. Proposal for Directive for Minimum Wages (MW)	71
3. Revising EU Public Procurement Directives	72
<b>ANNEX 1: ABOUT THE AUTHORS</b>	<b>73</b>





# EXECUTIVE SUMMARY

The current EU public procurement (and concessions) framework laid down in the 2014 directives enables Sustainable Public Procurement (SPP) to a relevant extent, but it also sets some unnecessary hindrances and falls well short of mandating SPP. The EU Green Deal has set ambitious targets for the EU that may be achieved only if all available tools - including procurement - are harnessed to this end. This means asserting the initiatives flowing from the EU Green Deal with provisions on mandatory SPP, including going beyond Green Public Procurement (GPP). While the goals set in the EU Green Deal are vital, the social aspect of procurement should also be reinforced. This Analysis focuses first of all on the legislative initiatives table by the European Commission. Most mandatory SPP initiatives cannot but take place at a sectoral level, but consistency in future legislation

needs to be achieved. At the end of the day, a new approach to public buying will have to be devised, ultimately leading as well to changes in the 2014 Public Procurement Directives. The 2014 Directives fall short of ensuring that economic operators engaged in environmental and social dumping are barred from procurement markets, thus imperilling the competitive playing field. More generally, the current provisions relevant for SPP are not fully coordinated. This Study is conducted in light of the Greens/EFA Group's long-standing demand to make sustainability criteria mandatory in public procurement by formulating concrete proposals for how the EU public procurement framework could be adapted or complemented in order to drive such sustainability considerations in public purchasing throughout the entire EU.



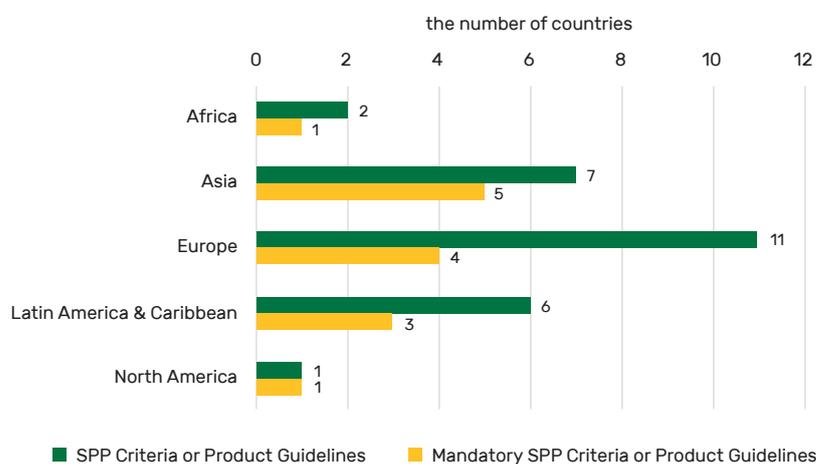
## PART I

# INTRODUCTION

In September 2015, the 2030 Agenda for Sustainable Development was adopted at the UN Sustainable Development Summit in New York. The Agenda indicates 17 Sustainable Development Goals (SDGs). Harnessing Sustainable Public Procurement (SPP) to achieve the SDGs can significantly impact achieving these goals.<sup>1</sup> So much so that Target 12.7 of the SDGs expressly refers to the need to “Promote public procurement practices that are sustainable, in accordance with national policies and priorities”. SPP is potentially also relevant to the achievement of many, if not most, of the SDGs. Similarly, the EU Green Deal of 2019 places public procurement in the spotlight to achieve its objectives.<sup>2</sup> It is seen as a major opportunity for EU public authorities to initiate sustainable change in many markets

by becoming trendsetters that pursue sustainable outcomes.<sup>3</sup> At present, however, the question before us is how to drive SPP further in Europe, particularly because the uptake of SPP in the Member States is often lagging behind.

The 2014 EU Public Procurement Directives revision clarified that SPP is permissible but steered clear from introducing mandatory rules.<sup>4</sup> According to the 2022 Global Review of SPP, the EU has developed the greatest number of SPP criteria and product guidelines. However, only about 35% of these have a mandatory character (see Figure 1). This is in contrast to other regions, such as Asia, where more than 70% of the existing SPP criteria and product guidelines are already mandatory.<sup>5</sup>



**Figure 1** Enforcement of SPP criteria or product procurement guidelines of participating national governments per region, 2021. Source 2022 SPP Global Review National Government Questionnaire.

- 1 R. Caranta, Public Procurement for the SDGs – Rethinking the Basics (October 1, 2021). Available at SSRN: <https://ssrn.com/abstract=4038840> or <http://dx.doi.org/10.2139/ssrn.4038840>
- 2 European Green Deal: Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee and the Committee of the Regions: The European Green Deal COM/2019/640 final (2019).
- 3 T.Tátrai, O.Diófási-Kovács. “European Green Deal – the way to Circular PublicProcurement” August 2021 ERA Forum 22(1)available at DOI: 10.1007/s12027-021-00678-2
- 4 M. Andhov (Andrecka) & K. Peterkova Mitkidis, “Sustainability requirements in EU public and private procurement – a right or an obligation?” 2017/1 Nordic Journal of Commercial Law (NJCL) pp. 56-87.
- 5 UNEP, 2022 Global Review of SPP - forthcoming.

Several Member States have already developed various SPP mandatory criteria or product procurement guidelines for priority goods, services or works categories.<sup>6</sup> Mandatory SPP criteria and guidelines can vary in scope - both in the number of prioritised products and the number of procuring entities for which application is required. Criteria can be introduced for all prioritised products (e.g. Cyprus, Italy, Netherlands) or only for certain products (Belgium, Denmark, France). The criteria can also be mandatory for all procuring entities (France, Italy) or only for targeted entities (Cyprus, Denmark).

Whilst the above initiatives take place at the national level, the EU Green Deal and many of the initiatives associated with it, including the Circular Economy Action Plan, aim to go beyond what is currently possible at the EU level. They foresee the introduction of mandatory criteria in food

procurement, construction, renewable energies, batteries, electronics, textiles and furniture goods and services, and other sectors.

This sharp acceleration heeds the call for EU-wide mandatory criteria to increase the uptake of SPP, avoiding fragmentation of the internal market. Most importantly, the pertinent issues arise: how to shape such rules, in what sectors, and for what reasons.<sup>7</sup>

In this study, we analyse:

- A. the 2014 EU Public Procurement Directives, with a focus on Directive 2014/24/EU which contains the most developed regime;
- B. the existing EU mandatory SPP rules; and
- C. the various legislative initiatives now being undertaken by the EU institutions, both as part of the EU Green Deal and beyond, which are relevant for public procurement.

## 1. Methodology

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To ensure objective information, interpret and assess the current legislative framework, the doctrinal legal research analysis is carried out. As one of the focus points of this study is to consider a need for new mandatory legislation, the most suited methodology to apply hereto is the European Legal Method.<sup>8</sup> Through *hermeneutics*, European primary

and secondary law is analysed, as well as case law from the Court of Justice of the European Union (CJEU), the necessary legislative (preparatory) documents, the existing Green Public Procurement (GPP) criteria and the relevant legal literature.

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<sup>6</sup> For more information about the Dutch context, see W.A. Janssen, G. Bouwman, 'Legislating societal value into Dutch public procurement law: symbolism or substance?', *Public Procurement Law Review*, Issue 2, 2020, pp. 91-102; W.A. Janssen, E.E. Neele, 'De (in)effectiviteit van open en concrete aanbestedingsrechtelijke verplichtingen in de strijd tegen klimaatverandering' [The ineffectiveness of open and concrete public procurement law obligations in the fight against climate change], *Tijdschrift voor Bouwrecht*, 2, 2021, pp. 129-136. For the Danish context, see "Green Procurement for a Green Future - Green Public Procurement Strategy", which among other, predicts making it mandatory to choose an eco-labelled product when available. [https://fm.dk/media/18268/groenne-indkoeb-for-en-groen-fremtid-strategi-for-green-public-procurement\\_web.pdf](https://fm.dk/media/18268/groenne-indkoeb-for-en-groen-fremtid-strategi-for-green-public-procurement_web.pdf).

<sup>7</sup> For a full legal analysis with economic and public purchasing perspectives: W.A. Janssen, R. Caranta, *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Change*, London: Bloomsbury Hart (forthcoming 2023) or W.A. Janssen, 'Verplicht maatschappelijk verantwoord aanbesteden: een eerste verkenning van een paradigmaverandering' [Mandatory sustainable public procurement: a first exploration of a paradigm change], *Tijdschrift Aanbestedingsrecht & Staatssteunrecht*, 1, 2020, pp. 19-30.

<sup>8</sup> K. Riesenhuber, *European Legal Methodology* (Intersentia 2017); U. Neergaard & R. Nielsen, *European Legal Method: Towards a new European Legal Realism?* (Djøf Publishing 2013); R. van Gestel & HW Micklitz, "Why methods matter in European Legal Scholarship" (2014) 20 (3) *European Law Journal*, 292

We conduct evaluative research to assess to what extent new mandatory SPP provisions shall be introduced and which legislative framework shall be revised. We distinguish in our assessment between mandatory SPP measures couched as targets and measures rather consisting of requirements/criteria.

The legislative proposals we focus on are detailed in section II and IV of this Study.

There are several limitations to this study. Firstly, we do not research the effectiveness of the law or SPP criteria, effectively implemented and adequately.<sup>9</sup> We do not base our research on statistical data. We

assume that if the law is designed clearly and enforced, it should contribute to the uptake of SPP. Secondly, we analyse and draw conclusions on GPP criteria which have been developed by groups of experts. Unfortunately, social criteria are continuously gravely underdeveloped. Consequently, the report addresses mainly GPP criteria, and reflects on the consequences of the neglect of social criteria. Thirdly, while we do not conduct qualitative/quantitative analysis through case studies and interviews/questionnaires, feedback from representatives of stakeholders has been collected through the presentation of the drafts to the IMCO WG.

## 2. The 2014 Reform of Public Procurement Directives

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Before 2014, a limited room for SPP had been opened by the case law of the CJEU, which was also recalled in Recital 1 of Directive 2004/18/EC. At the time, Art. 53 Directive 2004/18/EC had, to a large extent, codified the *Concordia Bus* case law,<sup>10</sup> allowing reference to green award criteria, provided that they were linked to the subject matter of the contract and established in advance in an objective and non-discriminatory manner.

In early 2011, the Commission published the Green paper on “The modernisation of EU public procurement policy – Towards a more efficient European Procurement Market”.<sup>11</sup> The Green paper begins with a reference to the Europe 2020 strategy for smart, sustainable, and inclusive growth.<sup>12</sup> Public procurement is said to play a key role in this by

- A. improving framework conditions for businesses to innovate, making full use of demand-side policy;
- B. supporting the shift towards a resource-efficient and low-carbon economy, for instance, “by encouraging wider use of green public procurement”, and finally
- C. improving the business environment, especially for innovative SMEs.<sup>13</sup>

Immediately after that, the Green paper recalls that the Europe 2020 strategy also stresses that public procurement policy “*must ensure the most efficient use of public funds and that procurement markets must be kept open EU wide*”.

The actual proposals for the reform of the 2004 Directives tabled by the Commission were, however,

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9 For an analysis on the effectiveness of GPP through application of a law and economics methodology see: KM Halonen “Is public procurement fit for reaching sustainability goals? A law and economics approach to green public procurement” June 2021 Maastricht journal of European and comparative law 28(4):1023263X2110167 DOI: 10.1177/1023263X211016756

10 Case C-513/99, *Concordia Bus*, [2002] ECR I-7213.

11 COM (2011) 15 final.

12 COM (2010) 2020.

13 See M. Trybus, M. Andhov (Andrecka), “Favouring Small and Medium-Sized Enterprises with Directive 2014/24/EU?” in 3/2017 EPPPL, 224 ff.

not too innovative. Once again, the case law, and specifically the judgement in the *Dutch Coffee* case,<sup>14</sup> pushed the EU legislator to firmly root SPP in the 2014 Directives. Following the strong opinion of Advocate General Kokott, the CJEU concluded that contracting authorities are “*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*”.<sup>15</sup> Dutch Coffee closed the inter-institutional debate on award criteria. The proposal was changed, and today Art. 67(3) Directive 2014/24/EU clearly states that award criteria shall be considered to be linked to the subject matter where they relate to any stage of the life cycle of the goods or services purchased, including the specific process of production, provision or trading, even where such factors do not form part of their material substance.

The 2014 Directives may be seen as empowering contracting authorities to engage in SPP, more specifically in GPP, and to a certain extent lowering the regulatory risks attached to this approach under the 2004 directives. As it has been remarked, the “*sustainability paradigm is almost taking over the realm of public procurement, and it is marketed as a major ‘selling point’ of the new legislation*”.<sup>16</sup> SPP is currently regulated in a number of provisions in Directive 2014/24/EU:

- Art. 18(2) enacts a duty on the Member States to ensure compliance with applicable obligations in the fields of environmental, social and labour law;
- Art. 20 allows Member States to reserve contracts for sheltered workshops economic and operators whose main aim is the social and professional integration of disabled or disadvantaged persons.

- Art. 42(1) allows contracting authorities to refer to the production process in the technical specifications and Art. 42(3)(a) to draft technical specifications in terms of performance or functional requirements, including environmental characteristics;
- Art. 43 allows contracting authorities to directly refer to environmental or social labels;
- Art. 56(1) last phrase provides that contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with the applicable obligations referred to in Art. 18(2);
- Art. 57(1)(f) enacts a duty on contracting authorities to exclude economic operators that have been the subject of a conviction by final judgment for child labour and other forms of trafficking in human beings; and Art. 57 (4)(a) allows contracting authorities – or Member States to direct them – to exclude economic operators found in breach of the obligations under Art. 18(2);
- Art. 62 empowers contracting authorities to require compliance with quality assurance standards;
- Art. 67 allows contracting authorities to refer to social, environmental and innovative characteristics in the award criteria;
- Art. 68 allows contracting authorities to make use of life-cycle cost methodologies;<sup>17</sup>
- Art. 69(2)(d) enacts a duty to reject an abnormally low tender where contracting authorities have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Art. 18(2);
- Art. 70 allows contracting authorities to lay down special conditions relating to the performance of a contract referring to environmental, social or employment-related considerations;
- Art. 71 requires subcontractors’ compliance with

<sup>14</sup> Case C-368/10 *Commission v Netherlands* [2012] ECLI:EU:C:2012:284.

<sup>15</sup> *Ibid* para 85.

<sup>16</sup> D. Dragos, B. Neamtu, “Sustainable public procurement in the EU: experiences and prospects” in F. Lichère, R. Caranta, S. Treumer (eds), *Modernising Public Procurement: The New Directive* (Djof 2014), at 304.

<sup>17</sup> M. Andhov, R. Caranta, A. Wiesbrock (eds), *Cost and EU Public Procurement Law: Life-Cycle Costing for Sustainability* (Routledge Publishing 2020).

applicable obligations under Art. 18(2). Observance of these obligations is to be ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit. Where the national law of a Member State provides for a mechanism of joint liability between subcontractors and the main contractor, the Member State concerned shall ensure that the relevant rules are applied in compliance with the conditions set out in Art. 18(2).

Based on the above, it is widely accepted that the current rules on public procurement contain many possibilities to include sustainability. Nevertheless, as it is customarily in legal instruments aimed at opening procurement markets to foreign competition – it is the same with the WTO-GPA<sup>18</sup> but also with the UNCITRAL Model Law<sup>19</sup> – the EU Public Procurement Directives focus on procedures rather than substance. ‘**How to buy**’ is what they are about. The exclusion criteria further give contracting authorities a closed list of whom not to buy from. The default position is that every economic operator established in a Member State is otherwise eligible to tender. The EU Public Procurement Directives are not about ‘**what to buy**’; that choice is left to contracting authorities’ discretion, generally guided by the Member States.<sup>20</sup> The leading principles of non-discrimination and equal treatment, as well as the need to ensure open competition, constrain that choice in terms of sustainability.

The same is true of the SPP provisions in the 2014 EU Public Procurement Directives listed above. They focus on **How** to buy and, to a limited extent, on **Whom not to buy from**. Moreover, the ‘link to the subject-matter’ (L2SM) set in the *Concordia Bus* case has metastasised throughout the directives.<sup>21</sup> Besides Art. 67(3) Directive 2014/24/EU on award criteria, the reference to the L2SM pops up, for instance, in Articles: 42(1) on technical specifications; 43(1)(a) and (2) on labels; 45 on variants, and in 70 on contract performance conditions.<sup>22</sup> However, as the Art. 67(3) clearly states, the ‘L2SM has to be understood with reference to the life cycle as defined with reference to award criteria.

Arguably, today the L2SM bites deeper with reference to the **Whom not to buy from**. The condition of a ‘link with the subject matter’ of the contract excludes criteria and conditions relating to general corporate policy. Such conditions cannot be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or services. Contracting authorities should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place.<sup>23</sup>

While undeniable progress in relation to the law as it was before has been achieved, the provisions in the 2014 Directives still offer room for significant improvements (see section III).

18 The World Trade Organization’s plurilateral Agreement on Government Procurement (GPA) available at: [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm)

19 UNCITRAL Model Law on Public Procurement (2011) available at: [https://uncitral.un.org/en/texts/procurement/modellaw/public\\_procurement#:~:text=The%20Model%20Law%20on%20Public,and%20integrity%20towards%20these%20goals](https://uncitral.un.org/en/texts/procurement/modellaw/public_procurement#:~:text=The%20Model%20Law%20on%20Public,and%20integrity%20towards%20these%20goals).

20 P. Trepte “The Contracting Authority as Purchaser and Regulator: Should the Procurement Rules Regulate what we Buy?” in G.Skovgaard Ølykke, C. Risvig Hansen, Ch. D. Tvarnø, *EU Public Procurement: Modernisation, Growth and Innovation : Discussions on the 2011 Proposals for Procurement Directives*, DJØF Publishing, 2012 at 85 ff..

21 Or, as Semple states, it has ‘snowballed’. See A.Sample *A Practical Guide to Public Procurement* (Cambridge, 2015) para 4.42..

22 Art. 58(1) on selection criteria has a somewhat different formulation, requiring them to be ‘related and proportionate to the subject-matter’.

23 Rec. 97 Dir. 2014/24/EU; See further: M. Andhov (Andrecka), “Corporate Social Responsibility and Sustainability in Danish Public Procurement” in 3/2017 EPPPL, pp. 333-345; O. Martin-Ortega, O. Outhwaite and W. Rook, “Buying power and working conditions in the electronics supply chain: legal options for socially responsible public procurement”, *International Journal of Human Rights*, 2015, vol. 19 (3), pp. 341-368.

Moreover, the full potential of Art. 18(2) Directive 2014/24/EU has still to be gauged.<sup>24</sup> In the *TIM* case, the CJEU has highlighted the nature of Art. 18 as a general principle of procurement according to the Directive.<sup>25</sup> Therefore, the requirements that economic operators must comply, in the performance of the contract, with obligations relating to environmental, social and labour law (in its paragraph 2) constitute a **cardinal value** of the Directive, at the same level as the principles contained in its paragraph 1, i.e. equal treatment, non-discrimination, transparency, proportionality and prohibiting the exclusion of a contract from the scope of Directive 2014/24/EU and artificially narrowing competition.<sup>26</sup>

One question which was raised in the above mentioned 2011 Green Paper was if and if so, to what extent EU law should not just *empower* but *direct* contracting authorities to purchase environmentally sound goods and services (or at least provide incentives to do so).<sup>27</sup> This is already the case with specific legislation, such as for instance with:

- Regulation (EC) No 106/2008 (so-called EU Energy Star Regulation), which introduced obligations on contracting authorities to require in their public contracts a certain level of energy efficiency;
- Directive 2012/27/EU on energy efficiency which calls on the public sector to play an exemplary role in the field of energy efficiency;
- Directive 2019/11/61 on clean vehicles that

contains targets for the number of clean vehicles that are bought by contracting authorities;

- Directive 2009/28/EC on the promotion of the use of energy from renewable sources and
- Directive 2010/31/EU on the energy performance of buildings, which promote resource-efficient public buildings for instance because of low or zero primary energy consumption.
- Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services.

When adopting the 2014 EU Public Procurement Directives, EU institutions decided not to pursue mandatory SPP further through wide sweeping provisions because it would impinge too much on the discretion of the Member States and their contracting authorities to procure tailor-made solutions on the market.<sup>28</sup> Accordingly, it was thought better to leave it to sector-specific legislation to set mandatory criteria and targets while at the same time promoting the development and use of European approaches to life cycle costing.<sup>29</sup> The Commission has, however, developed voluntary guidance to help the contracting authorities willing to engage in SPP to do so without regulatory risk. More specifically, the 3rd edition of the *Buying Green!* guide was published to coincide with the entry into force of the 2014 Directives.<sup>30</sup> The 2nd edition of the *Buying Social* guide was published in 2021,<sup>31</sup> together with a collection of best practices under the title of *Buying for Social Impact*.<sup>32</sup>

24 M. Andhov, "Commentary to Article 18(2)" in R. Caranta, A. Sanchez-Graells (eds.) *European Public Procurement. Commentary on Directive 2014/24/EU* (Edward Elgar 2021).

25 M. Andhov, W. Janssen, # 8 Art 18(2) and the Tim case: a sustainability principle?, in Bestek – the Public Procurement Podcast, [www.bestekpodcast.com](http://www.bestekpodcast.com), 6 January 2021.

26 Case C-395/18, Tim SpA, ECLI:EU:C:2020:58, paragraph 38.

27 COM (2011) 15 final, p. 41 ff; see the discussion by P. Trepte, 'The Contracting Authority as Purchaser and Regulator: Should the Procurement Rules Regulate what we Buy?' in G. Ølykke, C. Risvig, Ch. Tvarnø (eds), *EU Public Procurement, Modernisation, Growth and Innovation* (Djof 2012), at 85.

28 EU Commission, Synthesis of replies, *Green Paper on modernisation of EU public procurement policy*, p. 15.

29 Rec. 95 of Dir. 2014/24/EU and Rec. 100 of Dir. 2014/25/EU.

30 [https://ec.europa.eu/environment/gpp/buying\\_handbook\\_en.htm](https://ec.europa.eu/environment/gpp/buying_handbook_en.htm)

31 <https://ec.europa.eu/docsroom/documents/45767>

32 <https://op.europa.eu/en/publication-detail/-/publication/3498035f-5137-11ea-aece-01aa75ed71a1>

Finally, the EU Commission has been on the forefront of developing GPP criteria. These criteria cover a range of specific procurements, including electricity, road transport, cleaning products and lighting. These criteria are divided in so-called ‘**core criteria**’, which are deemed to be for easy application

and ‘**comprehensive criteria**’ that are designed to reach a higher environmental performance. There is currently no information present that would indicate the usage of these criteria by contracting authorities on the Member State level, which would be useful to consider their effectiveness in the future.

### 3. Beyond How to Buy

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In full continuity with the Europe 2020 Strategy, the Commission’s *Reflection Paper Towards a Sustainable Europe by 2030* highlighted the need to “make the circular economy the backbone of EU industrial strategy, enabling circularity in new areas and sectors, empowering consumers to make informed choices and enhancing efforts by the public sector through sustainable public procurement”.<sup>33</sup> Furthermore, the EU Green Deal and many of the initiatives associated with it go beyond what is currently legally possible.<sup>34</sup> In fact, we might be witnessing a paradigm shift ahead where the EU moves more towards creating a framework for ‘**what**’ is bought. The EU Green Deal indicated that “[p]ublic authorities, including the EU institutions, should lead by example and ensure that their procurement is green”.<sup>35</sup> The Commission committed to proposing further legislation and guidance on green public purchasing.<sup>36</sup> Accordingly, the planned mandatory nature of legislation can be read in ‘ensure’ and ‘shall’ in combination with the announcement to propose further legislation in this field. This was made clearer in the Circular Economy Action Plan, indicating that “[p]ublic authorities’ purchasing power represents 14% of EU GDP and can serve as a powerful driver of the demand

for sustainable products. To tap into this potential, the Commission will propose minimum mandatory green public procurement (GPP) criteria and targets in sectoral legislation and phase in compulsory reporting to monitor the uptake of Green Public Procurement (GPP) without creating an unjustified administrative burden for the public buyers”.<sup>37</sup> Furthermore, the EU Green Deal Investment Plan stated: “The Commission will propose minimum mandatory green criteria or targets for public procurements in sectoral initiatives, EU funding or product-specific legislation. Such minimum criteria will ‘de facto’ set a common definition of what a ‘green purchase’ is, allowing the collection of comparable data from public buyers and setting the basis for assessing the impact of green public procurements. Public authorities across Europe will be encouraged to integrate green criteria and use labels in their procurements.”<sup>38</sup> As the Circular Economy Action Plan avows, the shift towards mandatory criteria is born out of the realisation that instruments such as the EU GPP criteria “have reduced impact due to the limitations of voluntary approaches”.<sup>39</sup>

This sharp acceleration towards mandatory SPP heeds the call for EU-wide increase the uptake of

33 European Commission. *Reflection Paper: Towards a sustainable Europe by 2030*.

34 *Communication from the Commission, The European Green Deal*. COM(2019) 640 final.

35 COM(2019) 640 final, at p. 8.

36 W. Janssen, M. Andhov #3 The EU Green Deal in light of public procurement law, in Bestek – the Public Procurement Podcast, [www.bestekpodcast.com](http://www.bestekpodcast.com), 6 June 2020. See also: K. Pouikli, “Towards mandatory Green Public Procurement (GPP) requirements under the EU Green Deal: reconsidering the role of public procurement as an environmental policy tool” October 2020 ERA Forum 21(1) DOI: 10.1007/s12027-020-00635-5

37 [https://ec.europa.eu/environment/circular-economy/pdf/new\\_circular\\_economy\\_action\\_plan.pdf](https://ec.europa.eu/environment/circular-economy/pdf/new_circular_economy_action_plan.pdf), paragraph 2.2.

38 COM(2020) 21 final at p. 12.

39 [https://ec.europa.eu/environment/circular-economy/pdf/new\\_circular\\_economy\\_action\\_plan.pdf](https://ec.europa.eu/environment/circular-economy/pdf/new_circular_economy_action_plan.pdf)

SPP avoiding fragmentation of the internal market from a number of academics, including the authors of the present Study.<sup>40</sup> As was convincingly argued by Mélon, “mandatory GPP promotes the availability of information on the market, further standardisation, and more legally certain and efficient procurement processes for the authorities. Furthermore, a mandatory GPP approach is likely to increase market demand and innovation and lower the costs of environmentally-friendly products and services.”<sup>41</sup>

The EU is not alone. The OECD is now touting the benefits of SPP.<sup>42</sup> The World Bank, the leading

multilateral development bank, while not mandating SPP, is now arguing that “sustainable procurement is “smart” procurement, as it takes a three-dimensional life cycle approach versus the traditional one-dimensional, economics-focused approach. Three-dimensional thinking (economic, environmental and social) does not mean it takes three times longer, nor is the outcome necessarily more expensive. Sustainable procurement is strategic procurement practice at its optimum.”<sup>43</sup> At the same time, mandatory requirements might raise legal questions regarding technical responsiveness, past performance, and responsibility to international trade challenges regarding discriminatory standards.

## 4. The need for a stronger social dimension of SPP

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Public procurement has long been used as a tool for social policy, including social justice and States have not been shy in relying on what they buy to improve markets and advance the inclusion of disadvantaged groups.<sup>44</sup> Already in 1933, ‘with a view to increasing employment quickly’ Sec. 203(a) of the US National Industrial Recovery Act of 1933 gave President Roosevelt “to construct, finance, or aid in the construction or financing of any public works project included” in the New Deal program and “to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project”. Under Sec 204(2)(C), fair wages

too were mandated in procurements. Still, social considerations cannot lead to preferential treatment for domestic suppliers. The latter is prohibited under EU Public Procurement law. In 1988, in one of the seminal cases on SPP, the Court of Justice held in the *Beentjes* case that “the condition relating to the employment of long-term unemployed persons is compatible with the directive if it has no direct or indirect discriminatory effect on tenderers from other Member States”.<sup>45</sup> Article 20 of Directive 2014/24/EU on sheltered workshops goes some way towards allowing taking into consideration the special conditions of disadvantaged groups.<sup>46</sup>

40 Andhov M et al, *Sustainability Through Public Procurement: The Way Forward – Reform Proposals*, 2020. DOI: <http://dx.doi.org/10.2139/ssrn.3559393>, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3559393](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559393)

41 Mélon L. ‘More Than a Nudge? Arguments and Tools for Mandating Green Public Procurement in the EU’, *Sustainability* 12, 1003, 2020; see also Andhov et al, *above fn* , 60

42 OECD. Green Public Procurement available at <https://www.oecd.org/gov/public-procurement/green/>

43 World Bank, *Sustainable Procurement. An introduction for practitioners to sustainable procurement in World Bank IPF projects*. Published April 2019, <https://thedocs.worldbank.org/en/doc/788731479395390605-0290022019/original/GuidanceonSustainableProcurement.pdf> , p. 3.

44 C. McCrudden, *Buying Social Justice: Equality, Government Procurement, and Legal Change* (Oxford, OUP, 2007). O. Martin-Ortega, C. Methven O’Brien, ‘Advancing Respect for Labour Rights Globally through Public Procurement’, 5 *Politics and Governance*: 69-79.

45 Case 31/87, *Gebroeders Beentjes*, ECLI:EU:C:1988:422.

46 I Baciu, ‘Comment to Article 20’ in R. Caranta, A. Sanchez-Graells (eds.) *European Public Procurement. Commentary on Directive 2014/24/EU* (Edward Elgar 2021).

A more complex approach is that of relying on public procurement to influence working conditions in global supply chains, due to the element of extraterritoriality that such actions require and the lack of contractual relationships between contracting authorities and the suppliers of their contractors which are the ultimate employers of the workers whose rights may need protection.<sup>47</sup> The social aspect of SPP has two distinctive dimensions in the context of the EU Green Deal:

- The internal market where SPP can contribute to achieving Just Transition and inclusion in Europe;
- An external dimension where SPP should ensure compliance with human rights beyond the EU borders.<sup>48</sup>

This external dimension has been recognised both directly and indirectly already at the EU level. For example, the EU has publicly committed to implementing the UN Guiding Principles on Business and Human Rights, which call for states to exercise policy coherence and comply with the obligation to protect human rights when they develop economic activities, including in their procurement.<sup>49</sup> Another example is the mention of public procurement in the new Strategy on Combating Trafficking in

Human Beings, which specifically states that “[p]ublic institutions also have a role to play in ensuring that public procurement incentivises transparency and due diligence in supply chains.”<sup>50</sup>

However, the above-mentioned challenges have meant that this external dimension of SPP has hardly developed at the EU level. Environmental considerations in public procurement have gained more traction as the ones that are easier to argue objectivity - climate change does not recognise borders - and therefore commonly accepted. Particularly under the EU Green Deal, the greatest advances have happened in the area of GPP, where to some extent the interrelation between ‘green’ action and its social dimension has been neglected. This worrying development in shifting the focus from SPP to GPP should be criticised, particularly as the EU Green Deal, clearly states “no person and no place left behind”.<sup>51</sup> There is a necessity to strengthen the social dimension of public procurement and recognise the role the public sector must place in addressing human rights violations in supply chains, and social dumping as equally burning issues that the EU currently faces. The three-dimensional SPP with equally strong social, environmental and economic considerations should be reflected in the EU initiatives going forward.

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47 O. Outhwaite, O. Martin-Ortega, “Human Rights in Global Supply Chains: Corporate Social Responsibility and Public Procurement in the European Union”, *Human Rights & International Legal Discourse*, 2016, vol. 10(1), at. 41-71; O. Martin-Ortega, C. Methven O’Brien, “Advancing Respect for Labour Rights Globally through Public Procurement”, 5 *Politics and Governance*, 2017, at 69-79.

48 O. Martin-Ortega, “Sustainable public procurement: Strengthening the social and human rights dimensions of SPP in the framework of the European Green Deal” *BHRE Research Series. Policy Brief 1*. December 2021.

49 United Nations Office for Project Services (UNOPS), High Impact Procurement. Supporting Sustainable Development. Supplement to the 2016 Annual Statistical Report on United Nations Procurement. (O. Martin-Ortega and C. Methven O’Brien, “The SDGs, human rights and procurement: An urgent need for policy coherence”, at 10-13), 2017; C. Methven O’Brien and O. Martin-Ortega, “The Role of the State as Buyer under Guiding Principle 6”. Submission to UN Working Group on Business and Human Rights consultation on “The State as an economic actor: the role of economic diplomacy tools to promote business respect of human rights”. *BHRE Research Series, Policy Paper no.4*, September 2017.

50 EU Commission, Communication on the EU Strategy on Combating Trafficking in Human Beings 2021-2025, COM(2021) 171 final, 14.4.2021, p. 7.

51 Idid





## PART II

# EU INITIATIVES RELEVANT FOR SPP

The EU Green Deal is currently the main hub for EU initiatives targeted at promoting sustainability initiatives. We focus on those initiatives for which public procurement is – at least potentially – a relevant tool. At the same time, the initiatives taken under the EU Green Deal are not the only ones relevant for SPP, and these are explored too.

Other initiatives and pieces of legislation are part of the more general environment in which public procurement takes place, but will only be mentioned here and not analysed further. One instance concerns **the taxonomy of sustainable investments**. Recitals 43 and 44 of Regulation (EU) 2020/852 indicate that the Commission will have to take into account its 2018 communication on ‘Public Procurement for a Better Environment’ and the 2014 EU Public Procurement Directives when adopting, establishing and updating the technical screening criteria.<sup>52</sup>

Another instance is provided by Regulation (EU) 2021/241 which illustrates **the methodology for climate tracking**, including with reference to energy efficiency, in Annex VI.<sup>53</sup>

The last instance is provided by the Commission Communication on the use of the **Environmental Footprint methods** to measure and communicate the life cycle environmental performance of products and organisations,<sup>54</sup> whose Annex 1 gives an indication as to the life cycle steps, including with reference to the environmental integrity of electricity mixes.<sup>55</sup>

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52 Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/208

53 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

54 C(2021) 9332 final.

55 § 4 and exp. § 4.4.2.

# GREEN DEAL INITIATIVES

The EU Green Deal provided for the adoption of an EU industrial strategy to address the twin challenges of green and digital transformation and of a new Circular Economy Action Plan. The latter stated that the Commission would propose minimum mandatory GPP criteria and targets in sectoral legislation as well as introduce compulsory reporting to monitor the uptake of GPP. The Action Plan specifically focused on seven key product value chains, i.e. electronics and ICT, batteries and vehicles, packaging, plastics, textiles, construction and buildings and food, water and nutrients.

A number of reforms that are potentially relevant for SPP flow directly from the EU Green Deal and are *inter alia* linked to the

- A. EU Climate Act and the “Fit for 55” initiatives;
- B. Renovation Wave;
- C. Sustainable and smart mobility;
- D. Farm to Fork initiative; and
- E. Sustainable Product Policy and Ecodesign.

The first implementing act for the EU Green Deal was the **EU Climate Act** which wrote into the law the goal for Europe’s economy and society to become climate-neutral by 2050.<sup>56</sup> The law also sets the intermediate target of reducing net greenhouse gas emissions by at least 55% by 2030, compared to 1990 levels.

The ‘Fit for 55’ Commission’s Communication is the cornerstone of the initiatives specifically targeting climate change.<sup>57</sup> It is a very complex package of proposals for both new and amended legislation. The new legislative proposals refer to

- Carbon Border Adjustment Mechanism (CBAM);
- ReFuelEU Aviation;
- FuelEU Maritime;
- Social Climate Fund;
- EU forest strategy.

The above proposals are of very limited relevance to SPP and will not be addressed here. Of course, contracting authorities will have to take notice of them in their procurement documents for aviation and maritime fuel and for wood products. The CBAM will have to be factored in by bidders wanting to provide goods from outside the EU.

More relevant for SPP are several updates of existing legislation, whose full list includes:

- Amendment to the renewable energy directive (RED);
- Amendment to the energy efficiency directive (EED);
- Recast of the Energy Performance of Building Directive (EPDB)
- Revision of the Construction Products Regulation (CPR);
- Revision of the regulation on land use, land-use change, and forest (LULUCF)
- Revision of the EU emission trading scheme (EU ETS);
- Revision of the Clean Vehicles Directive (CVD)
- Revision of the Batteries Regulation (BR);
- Revision of the effort sharing regulation (ESR);
- Revision of the alternative fuels infrastructure directive (AFID);
- Amendment of the regulation setting CO2 emissions standards for cars and vans;

<sup>56</sup> Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing a framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999.

<sup>57</sup> *Fit for 55: delivering the EU’s 2030 Climate Target on the way to climate neutrality* COM(2021) 550 final.

- Revision of the energy taxation directive (ETD)
- Revision of Regulation on the provision of food information to consumers (PFIC)
- Revision to the Ecodesign Directive (ED).

Among the proposals listed above of specific interest are the RED, the EED, the EPBD, the CPR, CVD, BR will be specifically analysed here to gauge their potential for SPP.

Some proposals' link with SPP is very remote, so they will not be specifically addressed here. While,

in principle, the EU ETS might be relevant as well, emissions trading will be applicable from 2026 for road transport and buildings under the proposal. However, this will be done *“in a separate system focused on upstream fuel suppliers, putting the responsibility on fuel producers to comply with the system, rather than requiring individual households or road transport users to take part directly. Emissions from road transport and building sectors will be capped, with the cap reduced over time so that total emissions fall”*.<sup>58</sup>

## 1. Renovation wave and works procurement

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In the EU Green Deal, the Commission indicated that *“[t]o address the twin challenge of energy efficiency and affordability, the EU and the Member States should engage in a **Renovation Wave**’ of public and private buildings.*<sup>59</sup> The strategy for the Renovation Wave was laid down in a 2020 Communication,<sup>60</sup> where the Commission indicates it will propose *inter alia*:

- revisions of the Renewable Energy Directive (RED) and of the Directive 2010/31/EU on the Energy Performance of Buildings (EPBD)<sup>61</sup>, and of the
- Construction Products Regulation (CPR)<sup>62</sup>,
- to introduce a stronger obligation to have Energy Performance Certificates alongside
- phased introduction of mandatory minimum energy performance standards for existing buildings,

e. to extend the requirements for building renovation to all public administration levels and

f. and promote the decarbonisation of heating and cooling through revisions of the RED, Energy Efficiency Directive (EED) and the EU Emission Trading Scheme (EU ETS) the application and further development of ecodesign and labelling measures, as well as support to energy district approaches.<sup>63</sup>

Administrative, educational and healthcare facilities, as well as social housing, are at the core of the Renovation Wave,<sup>64</sup> which translates directly into potential relevance for SPP.

Already the Circular Economy Action Plan foresaw the revision of the CPR, including the possible introduction of recycled content requirements for certain construction products, taking into account

<sup>58</sup> COM(2021) 550 final, point 2.2.1. at p. 7.

<sup>59</sup> COM(2019) 640 final, at p. 9.

<sup>60</sup> *A Renovation Wave for Europe- greening our buildings, creating jobs, improving lives* COM(2020) 662 final.

<sup>61</sup> The Commission tabled its proposal for a recast EPBD on 15th December 2021 see: COM(2021) 802 final.

<sup>62</sup> Proposal for the revision of the CPR was published on 22nd March 2022 see: COM(2022) 144 final.

<sup>63</sup> COM(2020) 662 final at p. 5 ss.

<sup>64</sup> COM(2020) 662 final at pp. 19 and 21 ff.

their safety and functionality, and the use of Level(s) to integrate life cycle assessment in public procurement, also exploring the appropriateness of setting of carbon reduction targets and the potential of carbon storage.<sup>65</sup>

Also, the reform of the RED, the EED and the LULUCF are all clearly relevant to and interlinked with the Renovation Wave.

## 1.1. Voluntary GPP criteria for the construction sector

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The sector-specific voluntary guidance follows from the EU GPP Criteria, including for Office Building Design, Construction and Management (currently under revision) and Road Design, Construction and Maintenance.

The 2016 EU GPP Criteria for Office Building Design, Construction and Management address the procurement process for office buildings, including their design, site preparation, construction, servicing and ongoing management. For the purposes of the criteria, the product group “Office buildings” shall comprise buildings where mainly administrative, bureaucratic and clerical activities are carried out. Major renovations of office buildings are also addressed within the scope of the criteria.

The revision of the GPP Criteria for Office Building Design, Construction and Management will expand the scope to other types of buildings purchased and/or maintained by public authorities, in particular schools and social housing. Criteria proposals will also try to be in line with recent policy developments

relating to the Renovation Wave, the Level(s) common framework and the EU Taxonomy. Criteria will aim to be clear and ambitious, based on a life-cycle approach and a scientific evidence base.

The EU GPP Criteria for Road Design, Construction and Maintenance - also from 2016 - contain recommendations that apply to both the construction of new roads and maintenance and rehabilitation of existing ones. The criteria address the main hot-spots along the whole life cycle of a road, from materials production (including raw materials extraction and transportation), to construction, use (fuel consumption during the road service life due to the pavement-vehicle interaction), maintenance (and operation) and EoL. The most significant environmental impacts are related to greenhouse gas emissions from fuel consumption during the use of the road and resource use to manufacture construction materials. Other environmental areas of interest, such as water, habitat preservation and noise emissions reductions are also addressed.

## 1.2. Overview of the present legislative framework building procurement

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### **Energy Performance of Buildings Directive (EPBD)**

EPBD as recast by Directive 2018/844/EU is currently laying down measures to enhance

energy savings in buildings and to reduce the large differences between Member States’ results in this sector.<sup>66</sup> Those measures should take into account climatic and local conditions as well as indoor climate environment and cost-effectiveness.<sup>67</sup>

<sup>65</sup> COM(2020) 98 final at p. 12; see also COM(2020) 662 final.

<sup>66</sup> Directive 2010/31/EU.

<sup>67</sup> Ibid. Recitals 7 and 8

The EPBD foresees the adoption of national plans, which “*should set more ambitious targets for the buildings occupied by public authorities*”.<sup>68</sup> Those same authorities should become ‘early adopters’ of energy efficiency improvements.<sup>69</sup> To set an example showing that environmental and energy considerations are being taken into account, those same buildings should be regularly subject to energy certification.<sup>70</sup> The plans should ensure that all new buildings are ‘nearly zero-energy’ buildings by 2020.<sup>71</sup>

### **Energy Efficiency Directive (EED)**

The first EED dates from 2010 and was enacted to introduce a set of binding measures to help the EU reach energy efficiency targets aiming at mitigating climate change. It has been modified several times,<sup>72</sup> including to incorporate the provisions on long-term renovation strategies laid down in Directive 2012/27/EU (the first EED) and to prod the Member States into action. More specifically, “*Member States should provide clear guidelines and outline measurable, targeted actions as well as promote equal access to financing, including for the worst performing segments of the national building stock, for energy-poor consumers, for social housing and for households subject to split-incentive dilemmas, while taking into consideration affordability*”(Recital 9) and increase the renovation rate of existing buildings having in mind energy efficiency (Recital 10).

Directive 2018/2002 further modified the EED to reflect more ambitious targets. Reference is made here to the most recent text.

Public authorities are given a specific role in the EED, including with reference to public procurement.

The first phrase in Recital 39 indicates that “[l]ocal and regional authorities should be given a leading role in the development and design, execution and assessment of the measures laid down in Directive 2012/27/EU”. This leading role was reflected in Art. 5 to 6, the latter focusing specifically on public procurement (referred to as purchasing).

### **Directive 2009/28/EC, the Renewable Energy (RED)**

RED was revised in 2018 and was recast by Directive 2018/2001. The Directive sets a common target – currently set at 32% – for the amount of renewable energy in the EU’s energy consumption by 2030. It establishes common principles and rules to remove barriers, stimulate investments and drive cost reductions in renewable energy technologies. The RED does not refer to public procurement explicitly but refers back to the EPBD. Under Art. 15(5), “*Member States shall ensure that new public buildings, and existing public buildings that are subject to major renovation, at the national, regional and local level, fulfil an exemplary role in the context of this Directive from 1 January 2012. Member States may, inter alia, allow that obligation to be fulfilled by complying with nearly zero-energy building provisions as required in Directive 2010/31/EU or by providing for the roofs of public or mixed private-public buildings to be used by third parties for installations that produce energy from renewable sources.*”

### **Regulation (EU) No 305/2011 - the Construction Products Regulation (CPR)**

CPR lays down harmonised conditions for the marketing of construction products. As it is now,

68 Ibid Recital 21.

69 Ibid Recital 23.

70 Ibid Recital 24.

71 2018 for buildings occupied and owned by public authorities - Art 9 Ibid.

72 By Directive (EU) 2018/844 amending Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency.

the CPR does not set product requirements, and the Member States are competent in the safety, environmental and energy requirements applicable to buildings and civil engineering works.

### **Regulation (EU) 2018/841 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework (LULUCF)**

LULUCF sets out the commitments of the Member States for the land use, land use change and forestry. It contributes to achieving the objectives of the Paris Agreement and meeting the greenhouse gas emission reduction target. It does not specifically address public procurement.

## **1.3. The relevance of buildings for the Green Transition**

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Buildings account for 40% of the EU's energy consumption and 36% of energy-related direct and indirect greenhouse gas emissions.<sup>73</sup> In the EU, heating, cooling and domestic hot water account for 80% of households' energy. Logically, buildings are at the core of EU policy and legislation proposals aiming at fighting climate change. It is a complex panorama, articulated around two main strands, which go beyond climate change to encompass different aspects of sustainability: EU Climate Law and the Renovation Wave.<sup>74</sup> With the Renovation Wave the Commission called the Member States to “at least double the annual energy renovation rate of residential and non-residential buildings by 2030 and to foster deep energy renovations (..) The increased rate and depth of renovation will have to be maintained also post 2030 in order to reach EU-wide climate neutrality by 2050”.<sup>75</sup> SPP has an important role to play in delivering the Renovation Wave. The Commission is tasked with

- issuing guidance on the Energy Efficiency First principle “to help public authorities properly take into account all costs and wider benefits of the investments in

*the built environment, which could be practically applied in public procurement”;*

- to propose the widening of the scope of the requirements to all public administration levels and to increase the annual renovation obligation as part of the revision of the EED;
- to propose the phased introduction of minimum energy performance standards in the context of the revision of the EPBD and to increase the rate and depth of building renovations;
- to “develop GPP criteria for public buildings such as office buildings and schools related to life-cycle and climate resilience and based on Level(s)”.<sup>76</sup>

Finally, since Building Information Modelling (BIM) improves transparency and reduces costs and resource use, the Commission is to “provide a recommendation to promote Building Information Modelling in public procurement for construction and provide a methodology to public clients to conduct cost-benefit analysis for the use of BIM in public tenders.”<sup>77</sup>

<sup>73</sup> data from COM(2020) 662 final.

<sup>74</sup> A Renovation Wave for Europe - greening our buildings, creating jobs, improving lives COM(2020) 662 final.

<sup>75</sup> At p. 3.

<sup>76</sup> At p. 23.

<sup>77</sup> At. p. 16. See also: R. Vornicu “Towards a Digital Transformation of Public Procurement. The Promises and Challenges of Electronic Procurement Tools such as Building Information Modelling (BIM)” conference paper 33rd IBIMA Conference; R. Vornicu, BIM and public procurement law. Friends or foes? available at: <https://www.linkedin.com/pulse/bim-public-procurement-law-friends-foes-roxana-vornicu/>

To implement the EU Climate Law, the Commission adopted the “Fit for 55” package, which is a set of proposals to make the EU’s climate, energy, land use, transport and taxation policies fit for reducing net greenhouse gas emissions by at least 55% by 2030.<sup>78</sup> Those proposals have been drafted based on a balanced policy mix. According to the analyses, *“an over-reliance on strengthened regulatory policies would lead to unnecessarily high economic burdens, while carbon pricing alone would not overcome persistent market failures and non-market barriers. The chosen policy mix is, therefore, a careful balance between pricing, targets, standards and support measures”*.<sup>79</sup>

A number of the Fit for 55 initiatives are closely connected to buildings and reinforce the policy indications flowing from the Renovation Wave. The proposed revision to the RED will set an increased target to produce 40% of the EU’s energy from renewable sources by 2030. The revision of the EED will require the public sector to renovate

3% of its buildings each year to drive the Renovation Wave, and this will, in turn, feed into the recast EPBD. Finally, the EU Climate Act recognises the need to enhance the EU’s carbon sink through more ambitious land use, land-use change, and forestry LULUCF regulation.

A third strand in EU policy and legislation proposals aiming at fighting climate change and, more generally, at achieving sustainability and innovation is linked to the Circular Economy Action Plan. The plan foresees an ambitious sustainable products policy and legal framework. This includes a reform of the CPR.

The proposals aiming at fighting climate change are strongly intertwined and mutually supportive, so much so that many of the proposals which have been tabled so far by the Commission refer to the different policy strands.

## 1.4. The works procurement component of the new initiatives<sup>80</sup>

### 1.4.1. Reform of the EPBD

The revised will be tasked to promote *“the improvement of the energy performance of buildings and the reduction of greenhouse gas emissions from buildings within the Union, with a view to achieving a zero-emission building stock by 2050 taking into account outdoor climatic and local conditions, as well as indoor climate requirements and cost-effectiveness”* (Article 1). Among the main innovations in the proposed revision is the introduction of minimum energy performance standards *“minimum energy performance standards are the essential regulatory tool to trigger renovation*

*of existing buildings on a large scale, as they tackle the key barriers to renovation such as split incentives and co-ownership structures, which cannot be overcome by economic incentives”*.<sup>81</sup>

Also relevant is the integration in the National Energy and Climate Plans (NECPs) of the National Building Renovation Plans that each Member State has to draft (esp. Art. 3(8)).<sup>82</sup> The latter aligns the EPBD with the Governance Regulations (Regulation (EU) 2018/1999) streamlining the reporting and monitoring of Member States’ progress.<sup>83</sup>

78 See also the Climate Target Plan: Stepping up Europe’s 2030 climate ambition Investing in a climate-neutral future for the benefit of our people, COM/2020/562 final.

79 Communication COM/2021/550: ‘Fit for 55’: delivering the EU’s 2030 Climate Target on the way to climate neutrality.

80 In this section of the Study the focus will be on the EPBD, the EED, the RED, and the CPR. The LULUCF will also be referred to.

81 See also the first sentence of Recital 22 in the proposal.

82 See also Recitals 29 ff.

83 See COM(2021) 802 final, at p. 11.

To add stringency, Art. 2 of the proposal introduces several new definitions, including ‘zero-emission building’,<sup>84</sup> ‘minimum energy performance standards’,<sup>85</sup> and ‘deep renovation’,<sup>86</sup> and it also recasts old ones, such as, ‘nearly zero-emission building’.<sup>87</sup>

The revised EPBD is expected to deliver benefits consistent with other EU law measures.<sup>88</sup> More specifically, by leading to reductions in energy consumption in the building sector, the EPBD will support the Member States in achieving national targets under the soon to be revised Effort Sharing Regulation (ESR),<sup>89</sup> and will contribute to “*the delivery of the overall energy efficiency targets set in the (EED)*”. The scale of renovations triggered by the EPBD “*will enable the indicative 2030 target for the share of renewables in buildings’ final energy consumption in line with the RED*”<sup>90</sup>. The ‘Renovate’ flagship components in national recovery and resilience plans will play to the same endgame, as under the EU Taxonomy Climate Delegated Act, building renovations need to achieve 30% energy saving as one way to be classed as a sustainable economic activity.<sup>91</sup>

Further synergies link the EPBD with the Ecodesign Directive, analysed below, which sets

energy performance and other environmental performance requirements on energy-related technical building systems (e.g. boilers, heat pumps or light sources) and equipment used in buildings (e.g. household appliances) and with Construction Products Regulation (CPR), mentioned above, which is to regulate the performance of construction products. Concerning specifically minimum energy performance standards, the proposal provides for coordinated action by the EU and the Member States.<sup>92</sup> A phased-in and time-bound tightening of EU-level minimum energy performance standards (MEPS) for the very worst-performing buildings is coupled with an option for Member States to introduce national MEPS for all other buildings.<sup>93</sup> “*Where Member States establish national MEPS, they should be designed with a view to the national roadmap and the national targets for 2030, 2040 and 2050 that Member States will establish as part of their National building renovation plans to reach the overall decarbonisation objective by 2050*”.<sup>94</sup> EU minimum performance standards are expected to be in line with the criteria for environmentally sustainable activities laid down in the EU Taxonomy Climate Delegated Act.<sup>95</sup> Those standards will be based on harmonised energy performance classes. The lowest energy performance class G is defined as “the worst-performing 15% of each Member

84 “*means a building with a very high energy performance, as determined in accordance with Annex I, where the very low amount of energy still required is fully covered by energy from renewable sources generated on-site, from a renewable energy community within the meaning of Directive (EU) 2018/2001 [amended RED] or from a district heating and cooling system, in accordance with the requirements set out in Annex III*”; see also Recital 19.

85 “*rules that require existing buildings to meet an energy performance requirement as part of a wide renovation plan for a building stock or at a trigger point on the market (sale or rent), in a period of time or by a specific date, thereby triggering renovation of existing buildings*”.

86 “*‘deep renovation’ means a renovation which transforms a building or building unit a) before 1 January 2030, into a nearly zero-energy building; b) as of 1 January 2030, into a zero-emission building*”; see also Recital 33; ‘staged deep renovation’ and ‘major renovation’ are defined as well.

87 “*a building with a very high energy performance, as determined in accordance with Annex I , which cannot be lower than the 2023 cost-optimal level reported by Member States in accordance with Article 6(2) and where the nearly zero or very low amount of energy required is covered to a very significant extent by energy from renewable sources, including energy from renewable sources produced on-site or nearby*”.

88 See Recitals 3 ff.

89 COM(2021) 555; the proposal is currently in the trialogue phase: [Revising the Effort-sharing Regulation for 2021-2030: ‘Fit for 55’ package \(europa.eu\)](#); see also COM(2021) 558 final, Recital 108.

90 COM(2021) 802 final, at p. 4.

91 COM(2021) 802 final, at p. 3; see also, for the impact of the RRF, COM(2021) 558 final, at p. 8.

92 See also Recitals 22 ff.

93 See also Recital 24.

94 COM(2021) 802 final, at p. 9.

95 See Recital 26.

State's national building stock" to even the efforts of the Member States, while the definition of the best energy performance class A "ensures the convergence of the harmonised energy performance class scale towards the common vision of zero-emission buildings".<sup>96</sup>

The proposed Art. 11(2) EPBD also deserves mention because of its general relevance. According to the Explanatory Memorandum, "Article 11 focuses on technical building systems only, and a clear legal basis for national bans of boilers based on fossil fuels is introduced, allowing Member States to set requirements for heat generators based on greenhouse gas emissions or the type of fuel used. Several Member States consider such measures as essential to achieve a decarbonised building stock and to improve air quality and health. This provision addresses the current legal uncertainty on whether such bans are permitted under Article 6(1) of the Ecodesign Directive and free market rules under the Treaties."<sup>97</sup> However, the proposed Art. 11(2) simply provides that "Member States may set requirements related to the greenhouse gas emissions of, or to the type of fuel used by heat generators provided that such requirements do not constitute an unjustifiable market barrier". Arguably this does not go very far in defining the area of permissible action for the Member States.

In this ambitious framework, SPP is called to play an important role. While in principle, all provisions in the proposed revised EPBD apply to buildings occupied or owned by public authorities (e.g. Art. 11(3) on measuring and control devices for the monitoring and regulation of indoor air quality or Art. 12 on infrastructures for sustainable mobility), specific provisions apply to 'public bodies', i.e. "contracting authorities" as defined in Article 2(1) of Directive 2014/24/EU".

Basically, buildings occupied or owned by public bodies must reach the objectives laid down in the EPBD sometime before the rest of the building stock. More specifically, under Art. 7(1), new buildings occupied or owned by public bodies must be 'zero-emission' as of 1 January 2027, while for other buildings, the date is 1 January 2030. Concerning existing buildings under Art. 9(1), the Member States shall ensure that (a) buildings and building units owned by public bodies achieve at the latest (i) after 1 January 2027, at least energy performance class F; and (ii) after 1 January 2030, at least energy performance class E. The target dates just mentioned - and those for non-residential buildings and building units - anticipate those for 'residential buildings and building units' by three years.

Under different provisions, public authorities are required to double down on specific efforts or to show their commitment to high-energy performance. Under the last sentence of the proposed Art. 12(2) EPBD, "In case of buildings owned or occupied by public authorities, Member States shall ensure pre-cabling for at least one in two parking spaces by 1 January 2033". Under Art. 18(1) EPBD, in the case of buildings occupied by public authorities and frequently visited by the public, "the energy performance certificate is displayed in a prominent place clearly visible to the public".<sup>98</sup>

## 1.4.2. Reform of the EED

The recast of the **EED** aims at contributing to the enhanced ambitions announced in the EU Green Deal and further spelt out in the Commission's Climate Target Plan (CTP).<sup>99</sup> The latter aligns with the Paris Agreement's objective to keep the global temperature increase below 2°C and pursue efforts to

<sup>96</sup> Recital 27.

<sup>97</sup> COM(2021) 802 final, at p. 15.

<sup>98</sup> See also Recital 51.

<sup>99</sup> See the Communication Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people, COM/2020/562 final.

keep it to 1,5°C.<sup>100</sup> Buildings, including heating and cooling, still represent a major potential for energy savings, which is also true of public buildings.<sup>101</sup> There is a strong relationship between the EED and the EPBD. Indeed, the EED “sets a framework for other energy efficiency policies by laying down the energy efficiency targets and setting the main cross-sectoral measures as well as more specific ones. It targets energy savings in the public sector, including via obligations to renovate public buildings annually and taking into account energy efficiency in procurement of goods, services, works and buildings. Its particular aim at public buildings is complementary to the EPBD, which sets the standards and specific technical obligations related to buildings”.<sup>102</sup> Also, the EED has important interlinkages with the RED, notably in relation to heating and cooling.<sup>103</sup>

Contrary to the EPBD and CPR, Art. 1(2) of the EED proposal states: “The requirements laid down in this Directive are minimum requirements and shall not prevent any Member State from maintaining or introducing more stringent measures. Such measures shall be compatible with Union law. Where national legislation provides for more stringent measures, the Member State shall notify such legislation to the Commission”. This minimum harmonisation approach is generally to be preferred when legislating SPP.

The proposal for the recast of the EED strongly reinforces the exemplary role of the public sector. The evaluation of the old EED had shown reluctance in the public sectors to systematically include energy efficiency requirements in procurement, and this is because of price considerations and

several limitations that prevent reaping energy savings potential in the public sector. In particular, allowing the Member States to assess if the measures were cost-effective and/or economically and/or technically feasible provided them with easy escape routes.<sup>104</sup> Art. 5 of the EED proposal introduces an obligation for the public sector to reduce its energy consumption, while Art. 6 broadens the scope of the renovation obligation, making it applicable not just at the State level as it is under the rules now in force, but all public bodies at all administration levels and in all sectors of public bodies’ activities, including healthcare, education and public housing, where the buildings are owned by public bodies. The EED proposal aligns the definition of the public bodies to the well-articulated notions defined under Directive 2014/24/EU,<sup>105</sup> thus benefiting from the clarifications flowing from the long-standing case law of the CJEU.<sup>106</sup> The renovation rate remains at least 3%. The proposal aims at renovations meeting the Near Zero Energy Buildings (NZEB) standard (Art. 6) in line with the Renovation Wave Strategy and the more recent recast of the EPBD proposal.<sup>107</sup>

Concerning public procurement, Art. 7 EED now refers explicitly to ‘public procurement’ rather than ‘purchasing by public bodies’ as it is in the Directive now in force. Aligning the terminology is expected to ensure coherence across different legislative measures all relevant for contracting authorities. The proposed Art. 7(1) too extends the obligation to take into account the energy efficiency requirements to all public administration levels by referring to “contracting authorities and contracting

100 COM(2021) 558 final, at p. 1.

101 *Ibid.* at p. 3; see also Recitals 9 and 26 of the proposal.

102 *Ibid.* at p. 5.

103 *Ibid.* at p. 7.

104 *Ibid.* at pp. 15 f; see also at p. 18: “Removing conditionalities of cost-effectiveness, technical or economic feasibility as regards energy efficiency requirements in public procurement will simplify the implementation of the energy efficiency requirements, as they will apply equally to all public authorities”.

105 Recital 28.

106 See the definitions in Article 2(10), (12) and (13).

107 COM(2021) 802 final.

entities". The proposed Art. 7(1) also does away with conditionalities, removing references to cost-effectiveness, technical and economic feasibility and providing that the Member States shall ensure that contracting authorities and contracting entities, when concluding public contracts and concessions with a value equal to or greater than the EU thresholds, (a) "purchase only products, services, buildings and works with high energy-efficiency performance in accordance with the requirements referred to in Annex IV to this Directive" and (b) "apply the energy efficiency first principle referred to in Article 3 of this Directive, including for those public contracts and concessions for which no specific requirements are provided in Annex IV".<sup>108</sup>

The proposed Art. 7(3) refers to the contract design phase, and creates an obligation on the Member States to "ensure that contracting authorities and contracting entities assess the feasibility of concluding long-term energy performance contracts that provide long-term energy savings when procuring service contracts with significant energy content".<sup>109</sup> The first phrase in the proposed Art. 7(5) refers directly to the EU GPP criteria. It provides that "5. Member States may require that contracting authorities and contracting entities take into account, where appropriate, wider sustainability, social, environmental and circular economy aspects in procurement practices with a view to achieving the Union's decarbonisation and zero pollution objectives. Where appropriate, and in accordance with the requirements laid down in Annex IV, Member States shall require contracting authorities and contracting entities to take into account Union green public procurement criteria".<sup>110</sup> The proposed Art. 7(5) also includes a

provision that contracting authorities may require that tenders disclose a Global Warming Potential of new buildings (numeric indicator in kgCO<sub>2</sub>e/m<sup>2</sup> (of useful internal floor area) for each life cycle stage averaged for one year of a reference study period of 50 years), in particular for new buildings above 2000 square meters. It is linked to a provision aimed at increasing awareness of the circular economy and the whole life-cycle of carbon emissions in public procurement practices.<sup>111</sup>

Finally, under the proposed Art. 7(5), Member States will be required to support public bodies by providing guidelines and methodologies on the assessment of life-cycle costs, and by putting in place competence support centres and encouraging using aggregated procurement and digital procurement. Member States would be required to publish information on winning tenders (in line with the thresholds set out in the EU Public Procurement Directives).

### 1.4.3. The reform of the RED

The revision of the **RED** aims at increasing the share of energy from renewable resources to at least 40% by 2030 (Art. 3(1)) and to at least 49% in the building sector (Art. 15a(1)). The European Parliament Resolution of 10 March 2021 on the implementation of Regulation (EU) No 305/2011 has welcomed the Commission's objective to make the construction sector more sustainable by addressing the sustainability performance of construction products in the revision of Regulation 305/2011.<sup>112</sup> The RED too is thus strictly linked to

108 See also Recital 38.

109 See also the proposed Article 27(4).

110 Under Annex IV(c) "where a product or a service is covered by the Union green public procurement criteria, with relevance to the energy efficiency of the product or service, make best efforts to purchase only products and services that respect at least the technical specifications set at 'core' level in the relevant Union green public procurement criteria including among others for data centres, server rooms and cloud services, Union green public procurement criteria for road lighting and traffic signals, Union green public procurement criteria for computers, monitors tablets and smartphones."

111 See also Recital 42.

112 2022/2028(INI).

the EU initiatives concerning sustainable buildings as heating and cooling require much energy and it is in turn linked to energy efficiency.<sup>113</sup>

The proposed revision of the RED has limited direct specific references to public procurement. The first phrase in the proposed Art. 15a(3) indicates that the “Member States shall ensure that public buildings at national, regional and local level, fulfil an exemplary role as regards the share of renewable energy used, in accordance with the provisions of Article 9 of Directive 2010/31/EU and Article 5 of Directive 2012/27/EU”. The reference to the old EPBD and EED will have to be updated.

#### 1.4.4. The reform of the CPR

From the point of view of SPP, the most relevant proposal is the one concerning Regulation laying down harmonised conditions for the marketing of construction products, amending Regulation (EU) 2019/1020 and repealing Regulation (EU) 305/2011 - **CPR**.<sup>114</sup> The CPR revision answers two general objectives to

1. achieve a well-functioning single market for construction products and
2. contribute to the objectives of the green and digital transition, particularly the modern, resource-efficient and competitive economy.

Concerning the latter, “[t]he EU Green Deal Communication, the Circular Economy Action Plan and the Renovation Wave Communication highlighted the

*role of the CPR as part of efforts towards energy- and resource-efficient buildings and renovations and in addressing the sustainability of construction products. The proposal for a revised Energy Performance of Buildings Directive highlighted the importance of the life cycle GHG emissions of buildings and building materials to calculate the Global Warming Potential of new buildings as of 2030. The EU Forest Strategy and the Sustainable Carbon Cycle Communication announced, in the context of the revision of the Construction Products Regulation, the development of a standard, robust and transparent methodology to quantify the climate benefits of construction products and carbon capture and utilisation*”.<sup>115</sup>

Concerning specifically the linkage with the Circular Economy Action Plan and the ensuing Sustainable Products Initiative (SPI), the CPR must be seen as a dedicated instrument or product specific legislation.<sup>116</sup> As such, it has the same level of stringency as the Ecodesign for Sustainable Products Regulation (ESPR).<sup>117</sup> At the same time, specific construction products are still to be regulated by the ESPR, such as energy-related construction products.<sup>118</sup> The proposal, therefore, establishes new environmental obligations and lays the ground for “the development and the application of an assessment method for the calculation of the environmental sustainability of construction products”.<sup>119</sup>

Product standards are normally established by European Standardisation Organisations. In case the standards are in line with EU rules, they may be cited in the O.J.E.U. and thus become binding. Development of standards is too often very slow, and it happens that standards are in conflict with EU rules and cannot, therefore, be cited. In line with Regulation

113 See the proposed Recitals 11 and 23.

114 COM(2022) 144 final.

115 At pp. 1 f; references omitted.

116 COM(2022) 142 final; proposal for a Regulation establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC, Recital 20.

117 At p. 4; see also Recitals 18 and 61.

118 COM(2022) 144 final, at pp. 4 f; see also Recital 28.

119 Recital 7.

(EU) No 1025/2012 on European standardisation, the proposal for the CPR has developed a fall-back solution empowering the Commission to develop the standards itself.<sup>120</sup> This is notably the case under the proposed Art. 4(3) CPR when there are undue delays in the adoption of certain standards, or there is urgency or the standards developed are insufficient or “not in line with EU climate and environmental legislation and ambition”.<sup>121</sup> Under the proposal, the Commission is also tasked with setting inherent product requirements for the different construction product families or categories which constitute the basis for standards,<sup>122</sup> in particular concerning “(a) threshold levels and classes of performance in relation to the essential characteristics and which of the essential characteristics may or shall be declared by manufacturers and/or (b) conditions under which a product shall be deemed to satisfy a certain threshold level or to qualify for a class of performance without testing or without further testing” (Art. 4(4)).

The proposed CPR has a specific focus on public procurement. Art. 7, defining the ‘harmonised zone and national measures’ limits the power of the Member States to add ‘additional requirements’ when standards have been cited in the O.J.E.U.; this rule also applies to “to public tenders or direct attributions of contracts where those public tenders or direct attributions are executed under direct or indirect control of public entities or are executed with reference to public provisions on public tenders or direct attribution of contracts” (Art. 7(2)). This strict stance is inconsistent with the relevant role attributed to SPP under Recital 90: “Member States’ public procurement practice should target the most sustainable amongst the compliant products”.

True, the last phrase in Art. 7(2) provides that “However, harmonised technical specifications may permit or recommend Member States to link the decisions on the attribution of public tenders, of contracts or of grants or other positive incentives to sub-classes or additional classes other than those established in accordance with Article 4(4) where these still relate to environmental performances assessed in accordance with these harmonised technical specifications”.

The default approach chosen is that, once a reference to ‘harmonised technical specifications’ has been published into the O.J.E.U. there is only what - if any - space for SPP that is left by the harmonised technical specifications themselves. The ‘harmonised zone’ is generally understood as a fully (instead of minimally) harmonised zone.<sup>123</sup> Read using US categories, Art. 7(2) treats buying decisions as if they were regulatory decisions which are instead regulated under Art. 7(3) and (4).<sup>124</sup> A very limited departure from strict internal market orthodoxy is only allowed under Art. 7(7) for mandatory deposit-refund systems.

This strict approach is confirmed by the proposed Art. 84 (GPP), which is actually ‘centralising’ SPP in the construction sector. Recital 91 indicates that “contracting authorities and entities should, where appropriate, be required to align their procurement with specific green public procurement criteria or targets, to be set out in the delegated acts adopted” by the Commission (Recital 91).<sup>125</sup> This is because, “Compared to a voluntary approach, mandatory criteria or targets will ensure that the leverage of public spending to boost demand for better performing products is maximised”.

120 Recital 18; see for more details about the procedures Article 34.

121 See also Arti. 34(4) concerning the Commission’s powers to assess the conformity of the construction products standards with the standardisation requests.

122 Recital 20: “this Regulation should (re-)introduce or validate inherent product requirements. Whilst these requirements need to be laid down by the legislator, there is a need for specifying them for the more than 30 product families, each with several categories. Hence, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission to specify the requirements for the respective construction product family or category”.

123 See, however, the second phrase in Article 19(6), which is grounded on the possibility for the harmonised technical specifications to specify that their requirements only constitute ‘minimum requirement’.

124 On this category see S. Arrowsmith - P. Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge, 2009) at 21 ff.

125 See also Recital 92.

On these bases, under Art. 84(1) the Commission may adopt delegated acts “*establishing sustainability requirements applicable to public contracts, including implementation, monitoring and reporting of those requirements by Member States*”. Indeed, if Art. 84 is read together with Art. 7(2), once the Commission has established ‘sustainability requirements’, neither Member States nor an individual contracting authority may ‘set additional requirements’.

Under the proposed Art. 84(3), in setting the sustainability requirements, the Commission shall take into account

- A. the value and volume of public contracts awarded for that given product family or category or for the services or works using the given product family or category;
- B. the need to ensure sufficient demand for more environmentally sustainable products;
- C. the economic feasibility for contracting authorities or contracting entities to buy more environmentally sustainable products, without entailing disproportionate costs.

Under the proposed Art. 84(2), the sustainability requirements may - but not need to - “*take the form of mandatory technical specifications, selection criteria, award criteria, contract performance clauses, or targets, as appropriate*”.

Whereas the posed limitations (a-b) in article 84 seem appropriate to limit the delegated act, the link with the EU GPP criteria can be strengthened by adding a new paragraph (4) to Art. 84 of the CPR providing that “*Where a product is covered by the Union green public procurement criteria but not yet by harmonised technical specifications, contracting authorities and contracting entities shall make best efforts to purchase only products and services that respect at least the technical specifications set at ‘core’ level in the relevant Union green public procurement criteria including among others for Office Building Design, Construction and Management and Union green public procurement criteria for Road Design, Construction and Maintenance*”.

Finally, the use of these delegated powers also requires further discussion on its own. The Commission would be responsible for setting the desired sustainability standards in the EU when it comes to the procurement of batteries by public authorities.<sup>126</sup> Delegated acts are generally used for non-controversial legislative issues. Contrarily, the desired level of sustainability appears to be a topic which is indeed controversial, given the fact that it would move regulation of the public procurement of batteries to mandatory sustainability requirements. Alternatives are to include these criteria in the Regulation itself and to provide for a more suitable legislative route that includes a stronger role for the European Parliament and the Council.

## 2. Sustainable and Smart Mobility

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Public procurement in the transport sector consists of various services and products that can have a substantial positive impact on sustainable development if purchased sustainably, socially

and economically. This is also recognized by the broader policy framework in the EU, including 2014 Communication ‘A policy framework for climate and energy for the period from 2020 to 2030’, the 2016

<sup>126</sup> Proposed Batteries Regulation, pars. 22 and 97.

Communication ‘A European Strategy for Low-Emission Mobility’ and the 2017 Communication ‘Europe on the Move: an agenda for a socially fair transition towards clean, competitive and connected mobility for all’. This potential is also highlighted by the impact of road transport in the EU, which totals a large share of greenhouse gas emissions (72,8% in 2014). Furthermore, the public sector is responsible for an important share of new vehicle registrations, including passenger cars (3,4%), light commercial vehicles (2,8%) and buses and coaches (75%).<sup>127</sup> Examples of transport related procurements are for instance, (foreign) travel services for civil servants,

student transport services, the purchasing of the governmental fleet of cars and trucks, removalist services, and waste collection services.<sup>128</sup>

Transport services and products fall under the horizontal 2014 EU Public Procurement Directives, but – as mentioned before – there is no clear-cut or effective obligation mandating contracting authorities to procure sustainably. The following paragraphs discuss the EU’s transport-specific legal framework regarding SPP by considering the GPP criteria, the CVD and the proposal for a BR.<sup>129</sup>

## 2.1. Voluntary GPP criteria for road transport

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In 2021, the most recent batch of GPP criteria for road transport was introduced.<sup>130</sup> These EU GPP criteria concern an updated version of the criteria that were first published in 2019. This reform was necessary due to the changes introduced to the 2019 Clean Vehicles Directive,<sup>131</sup> discussed below, and which is closely related in terms of substance: *“As result of the approval of the Directive (EU) 2019/1161 of the European Parliament and of the Council of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles 1 (revised CVD), the EU GPP criteria for Road transport require some adjustments in order to achieve a full harmonisation of both public procurement*

*policy instruments. These adjustments mainly affect to the criteria on GHG emissions, while the rest will not be modified.”*<sup>132</sup>

The Technical Report of the GPP criteria provides the underlying rationale for the selected GPP criteria. It further explicates that the main changes between the 2019 and 2021 versions of the GPP criteria relate to heavy-duty vehicles, which concerns the alignment with the revised 2019 Clean Vehicles Directive by means of criteria that promote zero-emissions vehicles and tyres for which the criteria have been revised to achieve a better coherence with the tyre labelling regulation.<sup>133</sup> Accordingly, the revision was

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127 R. Rodríguez Quintero, C. Vidal-Abarca Garrido (JRC), *Revision of the EU Green Public Procurement Criteria for Road transport Technical report and criteria proposal*, October 2021.

128 In this report, we do not consider the infrastructural projects related to roads and street lighting and focus on the products and services that make use of such infrastructure in the transport sector.

129 The latter legislative instrument is of broader importance for other sectors, such as the energy transition, but it is discussed in this part of this study given the increased demand for greener mobility, including electric vehicles. Also see the explicit link between batteries and vehicles in preamble nr. 7 2019 Clean Vehicles Directive.

130 EU Commission, *Commission Staff Working Document EU green public procurement criteria for road transport*, Brussels, 18.10.2021 SWD(2021) 296 final.

131 Directive 2019/1161 of the European Parliament and the Council of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport [2019] OJ L188/116 (Clean Vehicles Directive).

132 EU Commission, *Commission Staff Working Document EU green public procurement criteria for road transport*, Brussels, 8.1.2019 SWD(2019) 2 final.

133 R. Rodríguez Quintero, C. Vidal-Abarca Garrido (JRC), *Revision of the EU Green Public Procurement Criteria for Road transport Technical report and criteria proposal*, October 2021.

required due to other regulatory actions on the EU level and not due to a substantial review process.

The criteria provided by the Commission have, based on the available scientific evidence mentioned in the Technical Report, focused on mitigating or reducing the main environmental impacts of road transport from the product life cycle perspective. The main impacts are considered to be *'greenhouse gas (GHG) and air pollutant emissions produced by energy consumption during the use phase, GHG and air pollutant emissions produced along the supply chain of the energy carriers, environmental impacts produced during the manufacture of batteries for electric vehicles, noise emissions produced by the vehicle and tyres during the use phase.'* For this purpose, the Commission's approach to GPP criteria is to *'require criteria on type-approval CO2 emissions for cars and LCVs, and specific technologies for heavy-duty vehicles and L-category vehicles, require criteria based on air pollutant emissions performance for cars and LCVs, and specific technologies for heavy-duty vehicles and L-category vehicles, require criteria on rolling resistance of tyres, require criteria on energy efficiency of electric cars and LCVs, require criteria on battery warranties, require criteria on vehicle and tyres noise emissions, require service providers to have key competences and to apply key environmental management measures and practices, require service providers to provide adequate and frequent training for their staff, require criteria on tyres and lubricants for maintenance activities.'* Noteworthy is that the order of the impacts and measures do not reflect their importance.

The criteria of current 2021 GPP criteria can be applied to various procurement categories of vehicles and related services, such as waste collection and public transport. The criteria, which can be used voluntarily, are divided into different categories, including purchase, lease or rental of cars, LCVs and L-category vehicles (category 1), procurement of mobility services (category 2), purchase or lease of heavy-duty vehicles (category 3), outsourcing of public road transport services (category 4), procurement of post, courier and moving services (category 5). Each category suggests using selection criteria, technical specifications, award criteria and/or contract performance clauses. As mentioned, there are so-called **'core criteria'**, which are deemed to be for easy application and **'comprehensive criteria'** that are designed to reach a higher environmental performance. Furthermore, common criteria for vehicles and common criteria for service categories are included as well. There is currently no information present that would indicate the usage of these criteria by contracting authorities on the Member State level, which would be useful to consider their effectiveness in the future.

Finally, similar criteria for transport also exist on the Member State level, including the Dutch 'MVI-tool' that includes various criteria for foreign travel for civil servants, general transport services, governmental fleet (including trucks and cars) and removalist services.<sup>134</sup> Furthermore, the Irish and Danish criteria for road transport vehicles and services can also be mentioned here.<sup>135</sup>

## 2.2. The Clean Vehicles Directive - mandatory targets

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An important piece of legislation related to transport is the 2019 Clean Vehicles Directive. Its objective

is *'to provide a demand-side stimulus for clean vehicles in support of a low-emission mobility transition.'*<sup>136</sup> The

<sup>134</sup> The Dutch MVI Tool via <https://www.mvicriteria.nl/nl/webtool?cluster=6///6//nl>

<sup>135</sup> Irish criteria for road transport vehicles and services via <https://www.epa.ie/publications/circular-economy/resources/Irish-GPP-Criteria-Transport.pdf>. Danish Partnership for GPP (POGI) criteria for transport via <https://denansvarligeindkober.dk/transport>.

<sup>136</sup> Preamble nr. 33 2019 Clean Vehicles Directive.

2019 Clean Vehicles Directive complements the EU Public Procurement Directives and adds sector-specific sustainability criteria to this legislative body. Art. 1 of this Directive currently prescribes the following: *“This Directive requires contracting authorities, contracting entities as well as certain operators to take into account lifetime energy and environmental impacts, including energy consumption and emissions of CO2 and of certain pollutants, when purchasing road transport vehicles with the objectives of promoting and stimulating the market for clean and energy-efficient vehicles and improving the contribution of the transport sector to the environment, climate and energy policies of the Community.* Accordingly, an obligation can be identified for contracting authorities to have to take into account lifetime energy and environmental impacts, including energy consumption and emissions of CO2 and certain pollutants, when purchasing road transport vehicles.

The 2019 reforms changed how contracting authorities must fulfil the above general requirement from an SPP law perspective.<sup>137</sup> Whereas the 2009 Clean Vehicles Directive contained procedural and substantive criteria, the 2019 Clean Vehicles Directive contains targets for SPP. Under the 2009 Clean Vehicles Directive, the above obligation could be fulfilled in two ways by

1. setting technical specifications for energy and environmental performance in the documentation for the purchase of road transport vehicles; or
2. including energy and environmental impacts as award criteria.<sup>138</sup>

If an award based on the lowest life-cycle costs was chosen in the latter category, then the measurement method specified in Art. 6 of this Directive was made mandatory.<sup>139</sup> Although new voluntary life-cycle methods have been published by the Commission, this was, to date, the only mandatory method prescribed by EU law. Compliance with these provisions was thus mandatory, but did leave room for contracting authorities to depict how they wished to fulfil the general requirement, either by technical specifications or through award criteria.

The 2019 Clean Vehicles Directive does not contain the bi-fold manner of fulfilling the general obligation. It instead includes minimum targets.<sup>140</sup> These targets are still intended to support the market creation for clean vehicles and to simultaneously provide time for the adjustment of procurement processes. In addition, the Commission concluded from a review in 2015 that the mandatory life cycle cost methodology (old Art. 6) was used scarcely and required tailor-made alternatives to specific circumstances and enable them to take *“into account cost-effectiveness over the lifetime of the vehicle, as well as environmental and social aspects.”* Despite this limited explanation, the requirement was removed entirely. Gruyters and Michaux have rightly noted that this seems to be a contradictory development.<sup>141</sup> It can be deduced from the above that, within the EU Green Deal, the Commission appears to desire a more binding role for SPP law but decided that existing obligations in the form of mandatory life-cycle cost methods were to be deleted instead of reformed to work with the raised concerns. More detailed and coherent reasoning backing the change towards targets would have been useful to evaluate future mandatory requirements as well.

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137 Directive 2009/33/EC of the European Parliament and the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles (2009 Clean Vehicles Directive).

138 Art. 5(3a-b) 2009 Clean Vehicles Directive.

139 Art. 6 2009 Clean Vehicles Directive.

140 Art. 5 2019 Clean Vehicles Directive.

141 J. Gruyters, L. Michaux, *Levenscycluskosten: een eerste stap naar dwingend duurzaam aanbesteden?* [‘Life-cycle costs: a first step towards binding sustainable procurement?'] 19 TBR 152, at 154 and 155 (2021).

The current minimum targets of the 2019 Clean Vehicles Directive are Member State specific.<sup>142</sup> Accordingly, the Annex provides targets for clean light-duty vehicles and targets for clean heavy-duty vehicles. Furthermore, these targets are time-based, meaning that, for instance, the Netherlands has committed from 2 August 2021 to 31 December 2025 to a target of 38,5% for light-duty vehicles<sup>143</sup>, and the same period related to heavy-duty trucks to a target of 10 %.<sup>144</sup> The Directive itself confirms these targets concern minimum harmonisation, meaning that higher local, regional or national targets are explicitly allowed.<sup>145</sup>

The minimum targets are enforced using a reporting and review clause. Art. 10 of the 2019 Clean Vehicles Directive requires the Member States to submit by 18 April 2026, and every three years thereafter, to the Commission a report on the implementation of this Directive. Accordingly, those reports shall accompany the reports required by the EU Public Procurement Directives and *“they shall contain information on the measures taken to implement this Directive, on future implementation activities, as well as any other information which the Member State considers relevant. Those reports shall also include the number and the categories of vehicles covered by the contracts referred to in Article 3(1) of this Directive, based on the data provided by the Commission in accordance with paragraph 3 of this Article.”*<sup>146</sup>

At present, given the broad wording of this reporting obligation, uncertainty exists as to how such reporting must exactly take place. Still, more

importantly, it is unclear how these percentages must be calculated. The Member States are called upon to ensure the achievement of these targets. However, it is unclear what this means in practice for individual contracting authorities on the local, regional and national levels. The Directive explicitly places this burden on the Member States, which *“should have the flexibility to distribute efforts to meet the minimum targets within their territory, in accordance with their constitutional framework and in line with their transport policy objectives.”*<sup>147</sup> This would allow the subsequent allocation to be based on different factors, including *“economic capacity, air quality, population density, characteristics of the transport systems, policies to decarbonise transport and reduce air pollution”*<sup>148</sup>. Accordingly, there is a risk that this national discretionary power will limit the potential to achieve the targets. Member States have the discretion to not explicitly divide the responsibility for these obligations between their contracting authorities. For this purpose, the EU legislature could consider the inclusion of an obligation for the Member States to transparently allocate targets for individual contracting authorities to further aid the implementation process. Alternatively, the EU legislature could explicate such individual targets in the Directive, but given the enormous amount of public authorities operating in the Member States, that seems too onerous of a task.

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142 Art. 5 2019 Clean Vehicles Directive.

143 Table 3, 2019 Clean Vehicles Directive.

144 Table 4, 2019 Clean Vehicles Directive.

145 Art. 5(7) 2019 Clean Vehicles Directive.

146 Art. 10 2019 Clean Vehicles Directive.

147 Preamble nr. 19 2019 Clean Vehicles Directive.

148 Preamble nr. 19 2019 Clean Vehicles Directive.

## 2.3. Proposal for Batteries Regulation – mandatory requirements

As part of the EU Green Deal, a proposal for Batteries Regulation,<sup>149</sup> which aims to modernise the EU legislative framework on batteries, was submitted by the Commission on 10 December 2020. It is still under review in the legislative process. With this proposal, the Commission has taken another step towards introducing minimum mandatory GPP requirements. This initiative builds on the previous commitments and reports adopted by the Commission, including ‘*the strategic action plan on batteries*’, ‘*the new circular economy action plan*’, ‘*the new industrial strategy for Europe*’ and ‘*the sustainable and smart mobility strategy*’.<sup>150</sup>

The current regulatory framework on batteries, formed by the 2006 Batteries Directive,<sup>151</sup> aimed to improve the environmental performance of batteries and established common rules and obligations for economic operators. Notably through harmonised rules for heavy metal content and labelling of batteries and rules and targets for the management of all waste batteries based on extended producer responsibility.<sup>152</sup> However, the Directive covers only the end-of-life phase of batteries and does not contain any provisions in the framework of public procurement.<sup>153</sup> In April 2019, the Commission evaluated the Batteries Directive<sup>154</sup>. It reported on the implementation, impact and evaluation of the

Directive revealed not only its achievements but also the limitations of the Directive, in particular against the background of a fundamentally changed context characterised by the strategic importance of batteries and their increased use.<sup>155</sup>

In contrast to the Batteries Directive, the current proposal concerns a regulation which is, from the outset, more stringent than the current directive, given the absent need for implementation. Furthermore, it covers other aspects of the production and uses phases of batteries, such as electrochemical performance and durability, GHG emissions, or responsible sourcing.<sup>156</sup> Another amendment of interest concerns the introduction of minimum requirements in light of SPP in Art. 70 of the proposed Regulation. It reads as follows:

1. Contracting authorities, as defined in Article 2(1) of Directive 2014/24/EU or Article 3(1) of Directive 2014/25/EU, or contracting entities, as defined in Article 4(1) of Directive 2014/25/EU shall, when procuring batteries or products containing batteries in situations covered by those Directives, take account of the environmental impacts of batteries over their life cycle with a view to ensure that such impacts of the batteries procured are kept to a minimum.

149 Communication from the Commission, *Proposal for a Regulation of the European Parliament and of the Council concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) No 2019/1020*, COM(2020) 798/3 (Proposed Batteries Regulation).

150 Communication from the Commission, *Europe on the move: Sustainable Mobility for Europe: safe, connected and clean*, COM(2018) 293 final, Annex II; Communication from the Commission, *A new Circular Economy Action Plan For a cleaner and more competitive Europe*, COM(2020) 98 final; Communication from the Commission, *A New Industrial Strategy for Europe*, COM(2020) 102 final; Communication from the Commission, *Sustainable and Smart Mobility Strategy – putting European transport on track for the future*, COM(2020) 789.

151 Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC [2006] OJ L266/1.

152 Proposal for a Batteries Regulation, at 24.

153 Proposal for a Batteries Regulation, at 2.

154 Commission Staff Working Document on the evaluation of the Directive 2006/66/EC on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC, SWD(2019) 1300 final.

155 Proposal for a Batteries Regulation, at 24.

156 Proposal for a Batteries Regulation, at 53, 54 and 106.

2. The obligation set out in paragraph 1 shall apply to any contracts entered into by contracting authorities or contracting entities for the purchase of batteries or products containing batteries and shall mean that these contracting authorities and contracting entities are obliged to include technical specifications and award criteria based on Articles 7 to 10 to ensure that a product is chosen among products with significantly lower environmental impacts over their lifecycle.

3. The Commission shall, by 31 December 2026, adopt delegated acts in accordance with Article 73 supplementing this Regulation by establishing minimum mandatory green public procurement criteria or targets based on the requirements set out in Articles 7 to 10.

Accordingly, this proposed provision contains a general obligation for contracting authorities that fall under the EU Public Procurement Directives and purchase batteries or products containing batteries to consider the environmental impact of batteries throughout their life-cycle to minimise their impact. To this end, public authorities are called upon to lay down technical specifications and award criteria based on Art. 7 to 10 of the proposed Batteries Regulation to ensure that a product is chosen among those having a significantly reduced environmental impact during its life cycle. Relevant are, therefore, the mentioned articles, including Art. 7 (Carbon footprint of electric vehicle batteries and rechargeable industrial batteries), Art. 8 (Recycled content in industrial batteries, electric vehicle batteries and automotive batteries), Art. 9 (Performance and durability requirements for portable batteries of general use), and Art. 10 (Performance and durability requirements for rechargeable industrial batteries and electric vehicle batteries).

The approach of this Art. 70 proposed Batteries Regulation would leave discretion to contracting

authorities to decide how to fulfil this obligation by depicting that

1. when procuring batteries or products containing batteries to take account of the environmental impacts of batteries over their life cycle to ensure that such impacts of the batteries procured are kept to a minimum,

2. it must do this via both technical specifications and award criteria at the same time, and

3. those specifications and criteria must be based on Art. 7-10.

Despite providing legal boundaries based on these three points, it is unclear when the requirement to 'take into account' has been fulfilled, which requirements from Art. 7-10 must be used, and what 'kept to a minimum' means. The standards of these articles on 'carbon footprint', 'recycled content' and 'performance and durability' are to be fleshed out by the Commission through delegated acts. The approach taken is either through **maximum harmonisation** (e.g. maximum thresholds for the life cycle carbon footprint in Art. 7(3)) or **minimum harmonisation** (e.g. minimum shares of reused cobalt, lead, lithium or nickel in Art. 8(3) or minimum values for performance and reusability in Art. 10). This means that contracting authorities would need to abide by the maxima and minima, but that they could, for instance, demand below such values in terms of maximum carbon footprints or beyond them in terms of minimum reusability of materials through their procurements.

Accordingly, much will depend on how the Commission will introduce these values in Art. 7-10 through delegated acts. Should these obligations become too vague, they would have no impact in practice. In addition, it is unclear why technical specifications *and* award criteria must both be used instead of leaving this choice up to the contracting

authority. For instance, in markets where technical specifications can clearly depict the sustainability requirements for a product, there is no need to include such considerations in the award criteria as well. Technical specifications have the advantage of providing a clear minimum, whereas award criteria allow for competition amongst economic operators, meaning that a better outcome could be achieved.

Finally, the Commission is also proposing to include the possibility of adopting minimum mandatory GPP criteria by delegated acts before 31 December 2026. It is important to streamline these criteria with the minima and maxima provisions that are ultimately proposed in the delegated acts related to Art. 7-10. However, as discussed in relation to the proposed article 84 CPR, this delegated power also requires further discussion on its own. The Commission would be responsible for setting the

desired sustainability standards in the EU when it comes to the procurement of batteries by public authorities.<sup>157</sup> Contrarily, this delegated power is not further limited, or no further limitations are given by Art. 70 of the proposed BR. Furthermore, delegated acts are generally used for non-controversial legislative issues. As mentioned, the desired level of sustainability appears to be a topic which is indeed controversial, given the fact that it would move regulation of the public procurement of batteries to mandatory sustainability requirements. Alternatives are to include these criteria in the Regulation itself, to provide for a more suitable legislative route that includes a stronger role for the European Parliament and the Council, or to provide further limitations for the Commission within this delegated act, which would be consistent with the other legislative proposals as discussed in Art. 84 CPR.

### 3. Farm to Fork

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The EU Green Deal's *'Farm to Fork': a fair, healthy and environmentally friendly food system* officially presented in May 2020 aims to spread sustainability along EU supply chains, from production to consumption. It tackles relevant food-related aspects, such as sustainable production and consumption, food transport, and healthy and high-quality food. The Farm to Fork Strategy sets out a range of targets for the Commission and for the Member States to be achieved, e.g., in the food processing and final retail, such as reviewing the legislation concerning

food packaging and, most importantly to *"improve the availability and price of sustainable food and to promote healthy and sustainable diets in institutional catering"*.<sup>158</sup>

The food sector is particularly relevant from the perspective of scale and the importance of its procurement.<sup>159</sup> In the EU alone, the total expenditure on food and catering services constitutes 206.3 billion €, and a large share originates from public spending.<sup>160</sup> The sector (in total) includes 1.5 million enterprises, has a turnover of 354 billion €,

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157 Proposed Batteries Regulation, pars. 22 and 97.

158 [https://food.ec.europa.eu/horizontal-topics/farm-fork-strategy/sustainable-food-consumption\\_en](https://food.ec.europa.eu/horizontal-topics/farm-fork-strategy/sustainable-food-consumption_en)

159 B. P. Denning, S. Graff, H. Wooten, Laws to require purchase of locally grown food and constitutional limits on state and local government: Suggestions for policymakers and advocates. *Journal of Agriculture, Food Systems, and Community Development*. 1(1). 2010; S. Schoenmaekers. Public Procurement, Culture and Mozzarella: "Que Dici?". *European Procurement & Public Private Partnership Law Review*, 16(3), 205-219. 2021; I. Hasquenoph, Sustainable public procurement and geography. *Public Procurement Law Review*. 2, 63-77. 2021. M. Kapala, Legal Instruments to Support Short Food Supply Chains and Local Food Systems in France. *Laws* 11(21). 2022. Ferk, B., Ferk, P. Local Preferences as non-discriminatory instrument in public procurement of fresh foods. Why, When and How. In: Piga, G., Tatrai, T., *Law and Economics of Public Procurement Reforms*. Routledge. 2017

160 2011 data from Eurostat.

and employs 8 million people.<sup>161</sup> At the same time, the food sector's importance goes far beyond its economic scale of it as the current negative state of industrial food systems contributes to widespread degradation of land, water- and ecosystems; high GHG emissions; biodiversity losses; persistent hunger and micro-nutrient deficiencies in the diet of our most vulnerable citizens alongside the rapid rise of obesity and diet-related diseases; and livelihood stresses for farmers around the EU and beyond.<sup>162</sup> In the light of contemporary challenges such as climate

change, brakages of supply chains due to pandemic and wars, security of food also rose to high level importance for the EU.

The rules relating to SPP of food, which include purchasing goods (food products) and canteen services (preparing meals) for public institutions such as e.g. schools, hospitals and elderly homes, are largely voluntary as they follow the general EU Public Procurement Directives.

### 3.1. Voluntary GPP criteria for food

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In 2019 the Commission renewed its support for GPP practices in the public food sector by revising the EU GPP voluntary criteria for food, catering services and vending machines, which has been in use since 2008.<sup>163</sup> The GPP criteria largely focuses on division between a) food and b) catering services.

#### a) Food Criteria

In technical specifications for GPP of food, contracting authorities are advised to require compliance of the product or certain amount of products with the Regulation (EU) 2018/848 that concerns organic production and labelling of organic products.<sup>164</sup> Such compliance makes the requirement verifiable and thus transparent, in line with principles of public procurement law. The requirements for procurement of marine and aquaculture products state that such products should entirely or in parts have been produced in stocks within safe biological limits addressing environmental impacts, including over-

fishing or depletion, biodiversity, and responsible and sustainable use of the resources.<sup>165</sup> However, as such technical specifications are not easily verifiable, it is recommended to use a "*certification scheme for sustainable production that is based on multi-stakeholder organizations with a broad membership and addresses environmental impacts, including biodiversity and responsible and sustainable use of the resources.*" Technical specifications can also require compliance with animal welfare standards set in Regulation (EC) No 589/2008. Moreover, vegetable fats are also to be certified in order to respect Art. 93 of Regulation (EU) No 1306/2013.

Recommendations regarding award criteria emphasise that preference should be given to tenderers who comply with the abovementioned criteria to a higher degree. It is worth noting that the GPP criteria also encourages awarding more points for fair and ethical trade products, which broadens the scope from GPP to SPP.<sup>166</sup> The rationale for

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161 2012 data from Eurostat.

162 FAO, Alliance of Bioersity International and CIAT and Editor da UFRGS. 2021. Public food procurement for sustainable food systems and healthy diets – Volume 1. Rome. <https://doi.org/10.4060/cb7960en>

163 H. Schebesta, Revision of the EU Green Public Procurement Criteria for Food Procurement and Catering Services - Certification Schemes as the Main Determinant for Public Sustainable Food Purchases?. European Journal of Risk Regulation, 9, 316-328. 2018.

164 EU GPP Criteria for Food, Catering Services and Vending Machines, p. 6.

165 Ibid., pp. 7-9.

166 Ibid., p. 14.

incorporating social elements is still found in the environmental dimension of fair and ethical trade certification schemes that often include minimum environmental considerations (e.g., avoiding unsustainable deforestation, hazardous pesticides, etc.).<sup>167</sup> Lastly, concerning contract performance clauses GPP criteria call for obliging the economic operator to collect and record invoices that should prove compliance with technical specifications and award criteria.

The recommendation for procuring seasonal food was left out of the revised GPP criteria as the environmental impact of such products is still up for debate. However, the Commission plans to re-introduce this criterion if the scientific evidence legitimises its use. So far, the scientific evidence supporting the use of seasonal food is mainly concentrated on researching GHG emissions resulting from it, which proved to be ineffective as it concerns only one dimension of the environmental impact of our food choices.<sup>168</sup>

## **b) Catering Services**

When it comes to the procurement of services, selection criteria have a more prominent role. Selection criteria serve to assess the technical and professional ability of the economic operator, which is essential as service types of contracts are usually more complex due to environmental clauses that must be met. The recommended competencies of the tenderer should be directed towards fighting food, resource and energy waste that results from conducting the contracted catering service. To achieve these objectives, the tenderer should provide efficient and data-driven menu planning and safe

disposal and waste redistribution. Continuous staff education is found crucial for maintaining such standards.<sup>169</sup> However, a verification system for the above-mentioned requirements is lacking, which leads to questioning the plausibility and enforceability of such criteria.

Technical specifications and award criteria should again be formulated, so the economic operator conducting catering services delivers products according to the EU GPP for food criteria. Thus, the GPP of catering services may have increased complexity as it concerns both the GPP of a product and a service.

Regarding contract performance clauses GPP criteria state that the economic operator should:

- provide low-impact drinking water at the premises of the catering service if possible;<sup>170</sup>
- inform the contracting authority about the purchase of new equipment for conducting service, and such new equipment should keep or improve energy efficiency compared to the old equipment;<sup>171</sup>
- provide the report on its environmental measures and practices that serves as a validation method for the execution of Technical specifications related to the same matter;
- conduct staff-training for both permanent (16 hours per year) and temporary staff (proportional to the contract period);
- set in place appropriate food and beverage redistribution to specialized organizations.

<sup>167</sup> B. Larriba, A. Espinosa Martinez M. N., Rodriguez Quintero R., Neto B., Gama Caldas, M., Wolf O., *EU GPP criteria for Food procurement, Catering Services and Vending machines*, EUR 29884, ISBN 978-92-76-12119-0, doi: 10.2760/748165, JRC 118360., p. 36

<sup>168</sup> Ibid., p. 28

<sup>169</sup> Ibid., p. 47

<sup>170</sup> Contributes to less waste production and lowers transportation environmental impact

<sup>171</sup> So that contracting authority is compliant with or mimics the efficiency requirements set in the The Energy Efficiency Directive see section "1.2 An overview of the present legislative framework building procurement" of this study at p.16.

## 3.2. An overview of the present legislative initiatives

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The Commission will adopt the new legislative framework for sustainable food systems following the Farm to Fork strategy by the end of 2023. The most relevant proposals include:

- **The sustainable food system framework initiative.** ([SFSFI](#))

It is an important piece of legislation in light of the move to mandatory requirements. It aims to make the EU food system sustainable and integrate sustainability into all food-related policies. More specifically, it will lay down rules on minimum criteria for SPP of food.

- **Revision of Regulation on the provision of food information to consumers.** ([PFIC](#)) aims to ensure better labelling information to help consumers make healthier and more sustainable food choices and tackle food waste by proposing to:

- introduce standardised mandatory front-of-pack nutrition labelling

- extend mandatory origin or provenance information for certain products.

It focuses on foods bearing nutrition and health claims and aims to establish 'nutrient profiles' (thresholds for fats, sugars and salt).

- **Review of the EU school fruit, vegetables and milk scheme** ([SVMS](#)).

The EU school scheme supports the supply of fruit, vegetables, milk, and certain milk products to children together with educational activities teaching them about agriculture and developing healthy eating habits. The Commission will review the EU school scheme as well as the measures fixing this EU aid, building on the lessons learnt from its implementation since 2017. The review will contribute to promoting sustainable food consumption, in line with the Farm to Fork Strategy.

## 4. Sustainable Products Policy and Ecodesign

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In March 2022 the Commission published a series of legislative proposals under its Sustainable Product Initiative (SPI)<sup>172</sup> and as part of the Circular Economy Action Plan. The legislative proposals and complementary instruments come in response to global demands for more efficient and sustainable products to reduce both energy and resource consumption. It is part of a wider EU approach to

sustainable product policy, ecodesign legislation and energy labelling, based on the understanding that these are effective tools for improving the energy efficiency and sustainability of products. The rationale behind it is that these instruments will help eliminate the least performing products from the market and support industrial competitiveness and innovation by promoting products with better

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<sup>172</sup> Communication on making sustainable products the norm COM(2022) 140 final, see as well [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative_en)

environmental performance throughout the internal market. The SPI therefore aims to make products placed on the EU market more sustainable, to help reach the green deal objectives of lower resource consumption and less environmental impact.

The new legal framework seeks to bring all products produced or sold in the EU in line with technical standards for sustainability, improving coherence with existing instruments regulating products in various phases of their life cycle. Legislative and non-legislative action will focus on<sup>173</sup>:

- better implementation of existing relevant legislation;
- overarching product policy principles and minimum sustainability and information requirements for most relevant products;
- rules on extended producer responsibility for sustainability, making producers responsible for intervention before products become waste (take-back schemes, providing products as a service, providing repair services, guarantees for spare parts availability);
- EU rules for requirements on mandatory sustainability labelling and disclosure of information to consumers on products along value chains;
- EU rules for mandatory minimum sustainability requirements on public procurement of products

- measures on raw materials and products (e.g. certifications demonstrating due diligence to eliminate child or slave labour and environmental impacts);

measures on production processes (e.g. to facilitate recycled content or remanufacturing and to minimise the use of hazardous substances).

The main legislative proposals regarding sustainable products are the reforms of the current Ecodesign Directive,<sup>174</sup> analysed below, and the consumer empowering directives.<sup>175</sup> The latter are addressed in the proposal for a Directive amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information,<sup>176</sup> and will not be analysed here. To support these measures targeted sectoral initiatives include the EU Strategy for Sustainable and Circular Textiles<sup>177</sup> and the revision of the Construction Products Regulation,<sup>178</sup> already analysed. The revisions will establish a framework for the setting of ecodesign requirements for energy-related products but will also widen its scope to a broader range of products, beyond energy-related products, which are currently regulated in the Energy Labelling Regulation.<sup>179</sup> The Commission has also adopted a new Ecodesign and Energy Labelling Working Plan for the period 2022–2024, which addresses new energy-related products and updating and increasing the ambition of those already regulated.<sup>180</sup> The working plan will be in place whilst the legislative reforms are ongoing.

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173 Ibid.

174 Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products (recast).

175 Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information

176 COM(2022) 143 final.

177 COM(2022) 141 final.

178 COM(2022) 144 final.

179 Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30, <https://eur-lex.europa.eu/eli/reg/2017/1369/oj>.

180 Communication from the Commission Ecodesign and Energy Labelling Working Plan 2022-2024 2022/C 182/01.

Ecodesign and energy labelling regulations are currently complemented by harmonised European standards.<sup>181</sup>

Public procurement is given a prominent place in the new Sustainable Product Policy and Ecodesign, with the aim of leveraging public procurement to increase market demand for sustainable products. The 2022 Communication of the Commission on

*making sustainable products the norm* indicates that the Ecodesign Regulation “[...] aims to leverage the weight of public spending to boost demand for more environmentally sustainable products by setting mandatory criteria for the public procurement of these products, drawing where appropriate on existing voluntary criteria. This means that contracting authorities would be required to use green procurement criteria to purchase specific groups of products”<sup>182</sup>

## 4.1. Voluntary GPP criteria for sustainable products

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The existing voluntary GPP criteria address a wide range of products. This section focuses on those which are identified as priority groups by the Proposal for establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125 (EDSP) analysed below.<sup>183</sup> These are: electronics, ICT, textiles and furniture (high impact intermediary products such as steel, cement and chemicals are also a priority but will not be addressed here). It is important to highlight the relationship of GPP with the EU Ecolabel, which applies to thousands of certified goods and services across Europe. The EU Ecolabel works in accordance with ISO standard 14024, under which it is considered a Type I label. Having products or services awarded with the EU Ecolabel ensures easier access to GPP.

The GPP criteria are designed to be verified by providing test reports and each of the criteria is accompanied by the relevant test methods which contracting authorities can rely upon to verify

compliance and make sure that all the performance claims that tenderers make in their tender process are not only verifiable but also repeatable, auditable and comparable. These test methods, which contracting authorities can choose, are based on internationally recognised methods and standards. The GPP criteria suggest a series of actions regarding the demand for test reports depending on whether these are required during the tender stage or the execution of the contract. In the bidding phase self-declarations could be considered sufficient, to reduce the burden on both tenderers and contracting authorities. However, the bidder with the most economically advantageous tender could be required to provide proof. If the proof provided by the bidder is deemed sufficient, the contract can be awarded. If the proof is deemed insufficient or non-compliance, the next highest scoring bidder would be considered for the contract and requested such proof if the means of verification concerns a technical specification, or the additional points that had been awarded to the first selected bidder would be removed and the tender

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181 These technical specifications indicate that a product complies with the mandatory requirements. Only then can the manufacturer affix the CE marking and sell it in the EU. There is a list of [harmonised standards for ecodesign and energy labelling](#). National [market surveillance](#) authorities verify whether products sold in the EU follow the requirements laid out in ecodesign and energy labelling regulations. Furthermore, the ecodesign directive and the energy labelling regulation have established a consultation forum (X03609) to consult stakeholders on the implementation of the directive and regulation. The list of members includes representatives from EU countries, industry and civil society. The group is open for observers from candidate and EFTA countries, and from organisations that have a legitimate interest in the discussion. A number of non-EU countries (USA, Australia, Brazil, China and Japan) have legislation similar to the EU's ecodesign and energy labelling directives.

182 COM(2022) 140 final, at p. 6.

183 COM(2022) 142 final.

ranking recalculated, when the means of verification concerns award criteria. Bidders are also able to provide verification based on products holding the EU Ecolabel (or a Type I Ecolabel according to ISO 14020), verification of which would be requested following the same approach as for test results. Regarding the contract management phase, test failures may give rise to penalties or even the possibility to terminate the contract when they take place during its execution.<sup>184</sup>

As required by Art. 44(2) of Directive 2014/24/EU, contracting authorities shall accept other appropriate means of proof and therefore must also accept certificates/tests reports issued by other equivalent assessment bodies.

*Electronics and ICT:* Computers, monitors, tablets and smartphones<sup>185</sup>- the EU GPP criteria were published in 2021.<sup>186</sup> They focus on the most significant environmental impacts during their life cycle and relate to: product life extension, energy consumption, hazardous substances and end-of-life management.

*Textiles:* The EU GPP criteria for textiles were published in 2017, and a Procurement Practice Guidance document followed in 2000.<sup>187</sup> They include criteria for both textile products and services. For products, the GPP criteria relate to finished, intermediary and accessory products with both natural, synthetic and man-made cellulose fibres.<sup>188</sup> The criteria for textiles focus on the most significant environmental impacts along their life cycle of the products, which include: fibre sourcing; chemical restrictions; durability and lifespan extension; energy conservation during use and design for reuse and recycling.

*Furniture:* The EU GPP criteria for furniture were published in 2017.<sup>189</sup> They also apply to goods and services,<sup>190</sup> including criteria for: a) refurbishment service for existing used furniture; b) the procurement of new furniture items, and c) the procurement of furniture end-of-life services. The key environmental impacts during the lifecycle of furniture refer to its materials and components, the manufacturing, assembly and/or treatment of components, its packaging, distribution, use phase and end-of life impacts.

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184 GPP for computers, monitors, tables and smartphones, p. 5.

185 The product group includes: a) Stationary devices: stationary computers (including desktop computers, integrated desktop computers, desktop thin clients, desktop workstations) and computer displays (monitors) and b) Portable devices: portable computers (including notebook computers; two-in-one notebooks; mobile thin clients and mobile workstations), tablets and smartphones.

186 EU GPP criteria. They are accompanied by the Technical background report. For data centres, server rooms and cloud services see: Technical background report and EU GPP criteria (published in 2020); for imaging equipment, consumables, and print services see: Technical background report and EU GPP criteria (published in 2020)

187 Technical background report; EU GPP criteria (published in 2017); Procurement Practice Guidance Document (published in 2020).

188 They include: a) Textile clothing and accessories: uniforms, workwear, personal protective equipment (PPE) and accessories consisting of at least 80 % by weight of textile fibres in a woven, non-woven or knitted form; b) Interior textiles: textile products for interior use consisting of at least 80 % by weight of textile fibres in a woven, non-woven or knitted form. This includes bed linen, towels, table linen and curtains; c) Textile fibres, yarn, fabric and knitted panels: intermediate products intended for use in textile clothing and accessories and interior textiles, including upholstery fabric and mattress ticking prior to the application of backings and treatments associated with the final product; d) Non-fibre elements: intermediate products that are to be incorporated into textile clothing and accessories, and interior textiles. This includes zips, buttons and other accessories, as well as membranes, coatings and laminates that form part of the structure of clothing or interior textiles and which may also have a functional purpose. For services, the GPP criteria relate to laundry, maintenance and take-back services for textile products that may be owned by the contracting authority or provided as part of a rental arrangement.

189 Technical background report and EU GPP criteria (published in 2017)

190 Furniture products include free-standing or built-in units, whose primary function is to be used for storage, placement or hanging of items and/or to provide surfaces where users can rest, sit, eat, study or where, whether indoor or outdoor use. It does not include products whose primary function is not to be used as furniture, such as streetlights, railings, fences, ladders, playground equipment, etc. Furniture products which consist of more than 5% (weight by weight) of materials other than solid wood, wood-based panels, cork, bamboo, rattan, plastics, metals, leather, coated fabrics, textiles, glass or padding materials, are not considered furniture for the purposes of the GPP criteria.

## 4.2. The Proposal for a Ecodesign Regulation for Sustainable Products

The main objectives of the Proposal for a Ecodesign Regulation for Sustainable Products (EDSP) Regulation are to reduce the negative life cycle environmental impacts of products and improve the functioning of the internal market. These objectives seek to resolve the problems and their causes analysed in the impact assessment. They reflect the fact that some of the products available on the internal market generate unnecessary adverse environmental impacts.<sup>191</sup> The EDSP contains a series of references to public procurement, which are analysed below.

The proposed EDSP Regulation establishes consistent EU-wide rules for improving the environmental performance of products, such as household appliances, information and communication technologies or engineering. It sets out minimum mandatory requirements for the energy efficiency of these products. This helps prevent creation of barriers to trade, improve product quality and environmental protection. In particular, it establishes a framework to improve the environmental impact of products and to ensure free movement in the internal market by setting ecodesign requirements that products shall fulfil to be placed on the market or put into service. The proposed Regulation defines ‘ecodesign’ as the integration of environmental sustainability considerations into the characteristics of a product and the processes taking place throughout the product’s value chain (art. 2.6) and ‘ecodesign requirement’ as a performance requirement or an information requirement aimed at making a product more environmentally sustainable (art. 2.7). The ecodesign requirements, which shall be further elaborated by the Commission in delegated acts, relate to:

- (a) product durability and reliability;
- (b) product reusability;
- (c) product upgradability, reparability, maintenance and refurbishment;
- (d) the presence of substances of concern in products;
- (e) product energy and resource efficiency;
- (f) recycled content in products;
- (g) product remanufacturing and recycling;
- (h) products’ carbon and environmental footprints;
- (i) products’ expected generation of waste mate.

The EDSP Regulation also establishes a digital product passport (‘product passport’), which provides for setting of mandatory GPP criteria and creates a framework to prevent unsold consumer products from being destroyed (Art. 1).

A series of priority groups have been identified in the value chains featuring in the new Circular Economy Action Plan. They include: electronics, ICT, textiles, furniture and high impact intermediary products such as steel, cement and chemicals.

The EDSP proposal clarifies that the Energy Labelling Regulation will continue to apply in parallel to the proposed regulation to energy-related products. Coherence will be ensured. This means, for instance, that as a principle such products must only bear the energy label specified under the Energy Labelling Regulation.<sup>192</sup>

Specific references to public procurement in the proposed EDSP Regulation can be found in Art. 4-5 and 58.

<sup>191</sup> Proposal for a Regulation establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC, p. 1.

<sup>192</sup> EDSP, p. 3.

Art. 4 empowers the Commission to adopt delegated acts to supplement the EDSP by establishing ecodesign requirements for, or in relation to, products to improve their environmental impact. Among the requirements the Commission may develop are: requirements applicable to public contracts, including implementation, monitoring and reporting of those requirements by Member States (Art. 4(h)).

Art. 5 establishes the general framework for the adoption of ecodesign requirements. It lays down the product aspects that those requirements can improve, taking into consideration all stages of the product life cycle (durability; reliability; reusability; upgradability; reparability; possibility of maintenance and refurbishment; presence of substances of concern; energy use or energy efficiency; resource use or resource efficiency; recycled content; possibility of remanufacturing and recycling; possibility of recovery of materials; environmental impacts, including carbon and environmental footprint; expected generation of waste materials). Those requirements may apply to one specific product group or horizontally to more product groups, where technical similarities allow for the setting of common requirements. Ecodesign requirements include performance requirements and information requirements. Art. 5 also lays down a number of conditions to be met by the Commission when preparing ecodesign requirements, as well as a number of criteria that those requirements would need to meet. These include taking into consideration GPP (Art. 5(4)(c)).

Art. 58 is entirely devoted to GPP, specifying that the requirements the Commission may develop may **take the form of mandatory technical specifications, selection criteria, award criteria, contract**

**performance clauses, or targets**, as appropriate. The EDSP argues that *'compared to a voluntary approach, mandatory criteria or targets will ensure that the leverage of public spending to boost demand for better performing products is maximised. The criteria should be transparent, objective and non-discriminatory'*.<sup>193</sup> When establishing such requirements, the Commission shall take into account the following criteria:

- the value and volume of public contracts awarded for that given product group or for the services or works using the given product group;
- the need to ensure sufficient demand for more environmentally sustainable products;
- the economic feasibility for contracting authorities or contracting entities to buy more environmentally sustainable products, without entailing disproportionate costs.<sup>194</sup>

The specific criteria which will be adopted based on the EDSR proposal apply both to direct procurement of products and in public works or public services contracts where those products will be used for activities constituting the subject matter of such contracts.<sup>195</sup>

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193 Recital 87

194 Art. 58(2)

195 Recital 87

### 4.3.1. Social criteria and due diligence

The proposed EDSP Regulation focuses on GPP, and deliberately leaves out references to social criteria. It postpones developing an interaction between sustainable products and due diligence in supply chain obligations for both companies and contracting authorities. In particular, the EDSP, establishes that whilst *“the objectives of this legislation will be further supported by the legislation on Corporate Sustainable Due Diligence, in particular the environmental due diligence rules it lays down for companies”*<sup>196</sup> social aspects are excluded from its scope. It does foresee, however, that social requirements are among the aspects which could be considered for inclusion, following

the evaluation of the Regulation after 8 years from the date of its application.<sup>197</sup>

This seems like a missed opportunity to address the significant social dimension of the production and consumption of goods and their human rights impacts. In particular, the priority products, and very prominently electronics and textiles, feature high in the international agenda for combatting forced labour, child labour, human trafficking and labour rights abuses in general. Excluding social criteria and ignoring the relevance of due diligence in supply chains for procurement sends the wrong signal to both contracting authorities and the market.

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<sup>196</sup> EDSP, p. 3.

<sup>197</sup> EDSP, p. 8.

# SPP RELEVANT INITIATIVES OUTSIDE THE GREEN DEAL

A number of legislative initiatives not directly flowing from the EU Green Deal – and often preceding it – are potentially relevant for SPP. A very relevant three for the protection of human and workers' rights are:

- Proposal for a Directive on Corporate Sustainability Due Diligence (CSDD)

- Proposal for a Corporate Sustainability Reporting Directive (CSRD)

- Proposal for Minimum Wages Directive (MW)

These two and their relationship with SPP will be analysed below.

## 1. Proposal for a Corporate Sustainability Due Diligence

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In February 2022 the Commission published its awaited proposal for a Directive on corporate sustainability due diligence (CSDD),<sup>198</sup> which aims to foster sustainable and responsible corporate behaviour throughout global value chains, including both social and environmental considerations. As it stands a reduced group of economic operators<sup>199</sup> will be required to identify and, where necessary, prevent, end or mitigate adverse impacts of their activities on human rights, such as child labour and exploitation of workers, and on the environment, e.g. pollution and biodiversity loss.<sup>200</sup> The new rules are presented as key to advance the green transition and protect human rights in the EU and beyond.

Unlike other due diligence regulations, including non-financial reporting legislation at both EU and national level, the CSDD contains strong sanctions, which range from fines in case of non-compliance to civil liability for damages that could have been avoided with appropriate due diligence measures.

Whilst contracting authorities and SMEs, which account for the vast majority of public suppliers, are not directly included within the scope of the CSDD, it is clear that it can have a significant impact on corporate behaviour and their approach towards the supply chain. According to the Commission, the aim of the CSDD is to ensure that the EU, including

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<sup>198</sup> European Commission, Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937COM(2022) 71 final, 23.2.2022.

<sup>199</sup> Scope of the Directive: a) EU companies: Group 1: all EU limited liability companies of substantial size and economic power (with 500+ employees and EUR 150 million+ in net turnover worldwide); Group 2: Other limited liability companies operating in defined high impact sectors, which do not meet both Group 1 thresholds, but have more than 250 employees and a net turnover of EUR 40 million worldwide and more. For these companies, rules will start to apply 2 years later than for group 1; b) Non-EU companies active in the EU with turnover threshold aligned with Group 1 and 2, generated in the EU; c) Small and medium enterprises (SMEs) are not directly in the scope of this proposal.

<sup>200</sup> In order to comply with the corporate due diligence duty, companies need to: integrate due diligence into policies; identify actual or potential adverse human rights and environmental impacts; prevent or mitigate potential impacts; bring to an end or minimise actual impacts; establish and maintain a complaints procedure; monitor the effectiveness of the due diligence policy and measures; and publicly communicate on due diligence.

both the private and public sectors, acts on the international scene in full respect of its international commitments in terms of protecting human rights and fostering sustainable development, as well as international trade rules. This necessarily must reflect on the way the public sector procures. However, we miss a direct reference to SPP in the CSDD. Contrary to the European Parliament proposal, which established the temporary or indefinite exclusion of undertaking from public procurement, among others, as a sanction for infringement of due diligence obligations (Article 18)<sup>201</sup>, there is not one single reference to public procurement in the Commission's proposal. We believe this is not aligned with the goals of policy coherence the EU aspires to and has committed to in the framework of its adherence to the UN Guiding Principles of Business and Human Rights, and is

a missed opportunity to include the public sector in the regulation of global supply chains which do not contribute to human rights and environmental abuses.

Directly related to this initiative, also an element of the 'Just and Sustainable Economy Package', is the Communication on Decent Work Worldwide<sup>202</sup>, which aims to implement decent work worldwide as the core driver of an inclusive, sustainable and resilient recovery from the COVID-19 pandemic. The Communication sets out both EU internal and external policies to articulate this aim. It also recognises that socially responsible public procurement is a powerful tool to combat forced labour and child labour.

## 2. Proposal for a Corporate Sustainability Reporting Directive

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The current Non-Financial Reporting Directive<sup>203</sup> establishes an obligation for certain large companies to disclose information on the way they operate and manage social and environmental challenges. In particular it requires large public-interest companies with more than 500 employees, including listed companies, banks, insurance companies and other companies designated by national authorities as public-interest entities, to publish information related to: a) environmental matters; b) social matters and

treatment of employees; c) respect for human rights; d) anti-corruption and bribery; and e) diversity on company boards (in terms of age, gender, educational and professional background). The rationale behind the disclosure of this information is to help investors, civil society organisations, consumers, policy makers and other stakeholders to evaluate the non-financial performance of large companies and encourage companies under the scope of the legislation to develop a responsible approach to business.<sup>204</sup> This

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201 European Parliament, Resolution on Corporate due diligence and corporate accountability with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), 10.3.2021; see as well European Parliament, Directorate-General for External Policies, 'EU human rights due diligence legislation: Monitoring, enforcement and access to justice for victims'- Human Rights Due Diligence Legislation -Options for the EU: Briefing 2, 2020 (by C. Methven O'Brien and O. Martin-Ortega) and In-Depth Analysis- Commission proposal on corporate sustainability due diligence: analysis from a human rights perspective. PE 702.560 - May 2022 (by C. Methven O'Brien and O. Martin-Ortega).

202 Communication on decent work worldwide for a global just transition and a sustainable recovery, COM(2022) 66 final, 23.2.2022.

203 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

204 See, O. Martin-Ortega, J. Hoekstra 'Reporting as a Means to Protect and Promote Human Rights? The EU Non-Financial Reporting Directive.' *European Law Review* (2019) 44 (5). pp. 622-645.

Directive does not contain any obligation for public authorities regarding their public procurement.

The proposed new Directive on Corporate Sustainability Reporting (CSRD),<sup>205</sup> aims to amend the existing reporting requirements of the NFRD by extending extends the scope to all large companies and all companies listed on regulated markets (except listed micro-enterprises); reinforcing

the audit (assurance) of reported information requirements; introduces more detailed reporting requirements, and a requirement to report according to mandatory EU sustainability reporting standards and establishing the need for a digital ‘tag’ of the reported information, in order to make it machine readable. Again, this proposed Directive does not refer to public procurement nor does it extend any reporting obligations to contracting authorities.

### 3. Proposal for Minimum Wages Directive

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Minimum wage policy in the EU is a patchwork of different national traditions and legal frameworks. It can be provided by collective agreements (as is the case in 6 Member States) or by statutory minimum wages set by law (as is the case in 21 Member States). As a result, minimum wage levels diverge considerably, and leave many workers unprotected.

While setting minimum wages is the competence of Member States, the EU has a supporting and complementary role.<sup>206</sup> In 2020, the Commission published a proposal for a directive to improve the adequacy of minimum wages in the EU (MW).<sup>207</sup> It aims to not only protect workers in the EU by ensuring adequate minimum wages allowing for a decent living wherever one works, but also to help to close the gender pay gap, strengthen incentives to work and create a level playing field in the internal market.<sup>208</sup> Member States are asked to establish procedural frameworks to set and update minimum

wages based on clear criteria. Relatedly, these updates will occur at least every two years and involve social partners.

MW arguably might be one of the most important current political initiatives for a more social Europe—aiming to strengthen collective bargaining and statutory minimum wages in the EU. It has however been widely criticised, as vague and non-binding.<sup>209</sup> Indeed, the MW establishes a framework for adequate minimum wages rather than setting a common EU minimum wage. In other words it establishes procedural steps that are to be taken but does not establish an obligation to achieve specific outcome. Therefore if we can talk at all about obligation it is procedural rather than substantive.

On 14 September 2022, the European Parliament approved the MW introducing the principle of a minimum wage in the EU. Member States will have

205 Proposal for Directive amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting. COM(2021)189 final

206 <https://epthinktank.eu/2022/06/15/directive-on-adequate-minimum-wages-eu-legislation-in-progress/#:~:text=In%20October%202020%2C%20the%20European,fair%20wages%20and%20working%20conditions>.

207 Proposal for a Directive on adequate minimum wages in the European Union Brussels, 28.10.2020 COM(2020) 682 final 2020/0310 (COD).

208 On equal pay and public procurement see further: M. Andhov, B. Bergsson, “Equal Pay and EU public procurement law – case study of mandatory Icelandic ÍST85 standard”. (2021): Nordic Journal of European Law, Vol. 4 No. 1 pp 1-24.

209 See: E. Menegatti, “Much ado about little: the Commission proposal for a Directive on adequate wages”, Italian Labour Law e-Journal, Issue 1, Vol. 14(2021) <https://doi.org/10.6092/issn.1561-8048/13369>; <https://socialeurope.eu/more-ambitious-european-minimum-wages-directive-demanded>

two years to transpose the directive into national law.

The proposal is relevant from SPP perspective as, in recent years, consideration of a minimum wage as a special condition in public procurement contracts, has been much discussed in the CJEU rulings and literature.<sup>210</sup> The CJEU case law has considered compliance of performance conditions establishing obligation of minimum wage through the lens of public procurement law and the Posted Workers Directive.<sup>211</sup> The CJEU found that the ability of public buyers to introduce social considerations in terms of a minimum wage in procurement procedures was limited. Only the 2015 judgement in the *RegioPost* case did the CJEU show a somewhat more open approach to balancing social considerations and provision of services in public procurement.<sup>212</sup> The main issues in the CJEU cases regarding minimum wage were focused on how to fight social dumping whilst ensuring open competition in the internal market. However, two elements must be emphasised. Firstly, the CJEU was deciding the cases based on old public procurement directives which did not include equivalent of current Art. 18(2) Directive 2014/24/EU<sup>213</sup> the so-called ‘sustainability principle’ or as the wording of the MW calls it ‘social clause’.<sup>214</sup> Secondly, the three cases that considered issues of minimum wage were considered specifically as a requirement included in the contract performance conditions of the public contract.

Art. 9 of the MW explicitly refer to public procurement by stating: “In accordance with Directive 2014/24/EU, Directive 2014/25/EU and Directive 2014/23/EU, Member States shall take appropriate measures to ensure that in the performance of public procurement or concession contracts economic operators comply with the wages set out by collective agreements for the relevant sector and geographical area and with the statutory minimum wages where they exist.”

The question is whether the above mentioned case law in *Rüffert* and *Bundesdruckerei* in the light of the MW will still be good law or whether the MW will change the status quo? In the *Rüffert* case, the CJEU relied on the definition of collective agreements indicated in Art. 3(8) of the old Posted Workers Directive, which indicated the three main elements that a collective agreement should meet to be considered universally applicable, which is critical for its implementation in public procurement context and public contracts.<sup>215</sup> To be declared universally applicable, collective agreement or arbitration award must be

1. observed by all undertakings,
2. in the geographical area, and
3. in the profession or industry concerned.

In the *Rüffert* case, the CJEU pointed out that a lack of the first element of this definition precluded the possibility of relying on the collective arrangement as a basis for determining contractors’ obligations in the public procurement contract.

210 Case C-346/06 *Rüffert* EU:C:2008:189; Case C-549/13, *Bundesdruckerei* EU:C:2014:2235; and Case C-115/14 *RegioPost*, EU:C:2015:760; See also: F Costamagna, “Minimum Wage between Public Procurement and Posted Workers: Anything New after the *RegioPost* Case?” (2017) 42 EL Rev 101; A.Sanchez Graells (ed.), *Smart Public Procurement and Labour Standards: Pushing the Discussion after RegioPost* (2018 Hart Publishing).

211 Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services PE/18/2018/REV/1.

212 C-115/14 *RegioPost*, ECLI:EU:C:2015:760.

213 Art. 36(2) Directive 2014/25/EU of the European Parliament and the Council on procurement by entities operating in the water, energy, transport and postal services sectors and Articles 30(3) Directive 2014/23/EU of the European Parliament and the Council on the award of concession contracts.

214 Proposal for a Directive on adequate minimum wages in the European Union Brussels, 28.10.2020 COM(2020) 682 final 2020/0310 (COD) p 5.

215 Directive 96/71/EC concerning the posting of workers in the framework of the provision of services from of 16 December 1996.

MW does not directly address the Posted Workers Directive. However, it refers to the Directive Enforcing Posted Workers Directive.<sup>216</sup> Regarding the latter and the EU Public Procurement Directives, the MW states that the content of these acts has been “*duly analysed and taken into account during the preparation process of the proposed Directive. As a result, the Proposal is, on the one hand, coherent with the existing provisions and, on the other hand, introduces legislative developments necessary to achieve the Union’s goals.*”<sup>217</sup> Art. 9 of the MW points out two elements foreseen in Art. 3(8) of the amended Posted Workers Directive i.e.: “geographical area” and “relevant sector,” leaving out the requirement of “observation by all undertakings” and “general application to all similar undertakings.”<sup>218</sup>

A different formulation in Art. 9 of the requirements for collective agreements broadens the scope of which collective agreement will apply to the public procurement context, therefore modifying the *Rüffert* case law by removing some of the requirements previously relevant. At the same time, the MW does not affect CJEU’s decision in the *Bundesdruckerei* case. The CJEU stated that Art. 56 TFEU precludes applying legislation of the state to which the contracting authority belongs, which requires a tenderer who intends to carry out a public contract by having recourse exclusively to workers employed by a subcontractor established in other Member State than that to which the contracting authority belongs, to pay those workers a minimum wage fixed by the contracting authority’s Member State legislation. The solution proposed in Art. 9 will apply to collective agreements and regulations in

force at the place where the contractor’s employees will perform the contract. Consequently leading us to the conclusions that wages are to be set by the laws local to the place of performance of the contract.

The wording used in the MW is a specification of Art. 18(2) Directive 2014/24/EU. Further, the preamble of the MW emphasises that the effective implementation of minimum wage protection set out by legal provisions or provided by collective agreements is essential in the performance of public procurement and concession contracts.<sup>219</sup> The risk of non-compliance is highlighted particularly in the context of sub-contracting chains under awarded public contracts, resulting in workers being paid less than the wage level agreed in the sectoral collective agreements. Therefore the preamble emphasises also the need for compliance with Art 71(1) Directive 2014/24/EU on subcontracting, which itself refers to Art 18(2).

Recital 5 in the proposed MW claims that the new legislation requires Member States to take appropriate measures to ensure compliance with the wages set up in relevant collective agreements or with statutory minimum wages can contribute to strengthening the enforcement of the so-called ‘sustainability principle’ under Art. 18(2) Directive 2014/24/EU.<sup>220</sup> This statement has to be critically assessed. It is doubtful that the effect of the MW will be achieved solely by repetition of the wording of Art. 18(2) Directive 2014/24/EU in the MW. Particularly as the shortcomings of drafting and enforceability of Art. 18(2) have not been yet addressed and clarified as well as its application throughout the Directive

216 Directive (EU) 2014/67/EU of the European Parliament and the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’).

217 Proposal for a Directive on adequate minimum wages in the European Union Brussels, 28.10.2020 COM(2020) 682 final 2020/0310 (COD) p. 5.

218 Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services PE/18/2018/REV/1

219 Recital 24 Proposal for a Directive on adequate minimum wages in the European Union Brussels, 28.10.2020 COM(2020) 682 final 2020/0310 (COD)

220 Ibid 5.

2014/24/EU. Consequently the Art. 9 of the MW does not provide the needed additional “bite” to the Art. 18(2) that is needed. It in fact copy-paste very similar wording which as addressed somewhere

else is problematic e.g. the provision is addressed to Member States rather than to the contracting authorities.<sup>221</sup>

## 2.1. Equal Pay

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The majority of minimum wage earners are women. Therefore it is argued that the MW supports gender equality and the reduction of the gender pay gap by setting a framework for adequate minimum wages in the EU. The value of the MW is highlighted as indirectly contributing to the effective implementation of the policy objectives of Directive 2006/54/EC, which aims to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To seek compliance with the Equal Pay Directive, similarly to minimum wage, it is necessary to adjust the wording of the current procurement directives.

### 2.1.1. Enforcing minimum and equal pay in SPP

How can contracting authorities in public procurement enforce minimum wage and equal Pay? The selection stage of a public procurement process is when contracting authorities focus on who the bidders are and if they comply with the applicable laws. As already mentioned, the requirement of minimum wage and also equal pay is covered by Art. 18(2). Referring to Art. 18(2), contracting authorities may exclude the non compliant bidder in

the exclusion phase of the qualification stage in the procurement proceedings.<sup>222</sup> Contracting authorities also have a general right not to award a contract in case of non-compliance with Art. 18(2)<sup>223</sup>, an obligation to reject an abnormally low tender in case of non-compliance with Art. 18(2) and are to require subcontractors' compliance with Art. 18(2).

Based on Art. 60 Directive 2014/24/EU, the contracting authority may require certificates, extract from relevant register and other documents as proof of bidders' compliance with minimum wage/equal pay requirement. This means that bidder will be also able to demonstrate their compliance by providing measures equivalent to the proofs requested by contracting authority and the latter is obliged to accept such equivalency. In case a bidder's country does not issue such documents or certificates, they might be replaced by “*a declaration on oath or, in Member States or countries where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the Member State or country of origin or in the Member State or country where the economic operator is established.*”<sup>224</sup> In principle, it is also possible to use a European standard as a means of proof. However, currently, there is no European standard on minimum wage/equal pay. Art. 62 Directive

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221 M. Andhov, “Commentary to article 18(2)” in R. Caranta, A. Sanchez-Graells (eds.) *European Public Procurement. Commentary on Directive 2014/24/EU* (Edward Elgar 2021) 199; M. Andhov, “Contracting authorities and strategic goals of public procurement – a relationship defined by discretion?” in: Sanja Bogojevic, Xavier Groussot, Jörgen Hettne (eds.): *Discretion in EU Procurement Law* (Hart Publishing 2019), pp. 117-138.

222 Art. 57(4)(b) Directive 2014/24/EU.

223 Art. 56(1) Directive 2014/24/EU.

224 Art. 60(2)(b) Directive 2014/24/EU.

2014/24/EU solely refers to quality assurance and environmental management standards. The only European standard which considers social aspects is the one on accessibility for disabled persons.<sup>225</sup>

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<sup>225</sup> European Committee for Standardisation available at: [www.standards.cen.eu/dyn/www/f?p=CENWEB:105](http://www.standards.cen.eu/dyn/www/f?p=CENWEB:105) [Accessed 18. August 2022].



## PART III

# CHANGES TO THE EU PROCUREMENT SPECIFIC LEGAL FRAMEWORK

The shift towards ‘what to buy’ in public procurement is necessarily taking place through sectoral legislation and its implementing rules and standards. The EU Public Procurement Directives are instead the place to enact general rules applicable to all public contracts. These general rules are important as sectoral legislation will not cover all subject matters of procurement and concessions and the operationalisation of sectoral legislation through implementing rules and standards will be an often slow and grinding process.

It is therefore essential that the general rules in the 2014 EU Public Procurement Directives are

amended to give effect to the indication in the EU Green Deal calling public authorities, including the EU institutions, to “*lead by example and ensure that their procurement is green*”<sup>226</sup>

This section focuses on changes needed to strengthen the sustainability principle and the provisions linked to sustainability in the EU Public Procurement Directives when they will be revised in the coming years and builds on the outcomes of the earlier study.<sup>227</sup> Reference will be made to Directive 2014/24/EU, the classic procurement directive, but parallel changes should be introduced in the Concessions and Utilities Directives.

## 1. Strengthening the sustainability principle

As already indicated in the introduction to the study (see: p.9) according to the CJEU judgment in *Tim* case Art. 18(2) is both a principle and a cardinal value which the MSs must ensure compliance with. However, the way Art. 18(2) is drafted today puts severe limitations to its effectiveness as a

means to achieve sustainability. First, the wording refers to the Member States, not to the contracting authorities. While contracting authorities may be implied in the notion of ‘State’,<sup>228</sup> this should be made explicit to strengthen the enforceability of the provision.<sup>229</sup> Secondly, Art. 18(2) foresees that the

<sup>226</sup> COM(2019) 640 final, paragraph 2.1.3.

<sup>227</sup> M. Andhov, R. Caranta et al, *Sustainability Through Public Procurement: The Way Forward – Reform Proposals*, 2020. DOI: <http://dx.doi.org/10.2139/ssrn.3559393>, Also see, W.A. Janssen, ‘Verplicht maatschappelijk verantwoord aanbesteden: een eerste verkenning van een paradigmaverandering’ [Mandatory sustainable public procurement: a first exploration of a paradigm change], *Tijdschrift Aanbestedingsrecht & Staatssteunrecht*, 1, 2020, pp. 19-30.

<sup>228</sup> M. Andhov, “Commentary to article 18(2)” in R. Caranta, A. Sanchez-Graells (eds.) *European Public Procurement. Commentary on Directive 2014/24/EU* (Edward Elgar 2021); p. 199.

<sup>229</sup> M. Andhov, “Contracting authorities and strategic goals of public procurement – a relationship defined by discretion?” in: S. Bogojevic, X. Groussot, J. Hettne (eds.): *Discretion in EU Procurement Law* (Hart Publishing 2019).

“Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations”. As we are discussing here ‘obligations’ the provisions might be understood as obliging the Member States to put in place or strengthen monitoring and sanctioning mechanisms, but this is apparently not as it has been understood by most Member States, having contented themselves with some cut and paste of the provision in their procurement legislation.

Besides the wording of Art. 18(2), a consistent application of the provision is necessary throughout the entire text of the EU Public Procurement Directives. What is now Art. 18(2) should more generally become a true *tête de chapitre* of the SPP provisions in the directive, directing contracting authorities to prefer sustainable options.

An obligation is an obligation, but under the 2014 EU Public Procurement Directives contracting authorities have wide margins to simply turn their gaze away from breaches of “*applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions*”. Today, only Art. 69(3) Directive 2014/24/EU on abnormally low tenders is actually couched in terms of a mandatory exclusion from the procedure as it provides that “*Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 18(2)*”. The last phrase of Art. 56(1) of Directive 2014/24/EU takes instead a cavalier approach to obligations, providing that “*Contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the*

*tender does not comply with the applicable obligations referred to in Article 18(2)*”. Basically, if it is cheap but not too cheap - and EU law does not set a threshold for qualifying a tender as abnormally low, so it is the Member State or the contracting authority deciding on this<sup>230</sup> - a contracting authority may well take the bargain and be oblivious about the obligations. This does not only goes against the ‘exemplary role’ of public buyers called by the EU Green Deal,<sup>231</sup> it is totally at odds with the same principle of equal treatment and pushes economic operators to disregard environmental and social obligations to try and regain a competitive advantage.<sup>232</sup> Indeed it has been rightly argued that “*It is difficult to conceive a contracting authority awarding a contract to a tender that does not comply with legal obligations, regardless of whether it leads to an abnormally low offer*”.<sup>233</sup> But the law allows this.

If possible even more intractable is the issue of coordination between Art. 18(2) and 57 of Directive 2014/24/EU. Art. 57 on exclusion grounds distinguishes between EU mandatory exclusion grounds and EU facultative exclusion grounds, giving the Member States the power to make exclusion mandatory for these grounds or some among them. Issues pertaining to different aspects of sustainability are dispersed in Art. 57, even if facultative exclusion is the default position. More into the details, an economic operator :

- shall be excluded in case of conviction by final judgment for “*child labour and other forms of trafficking in human beings*”(Art. 57(1)(f));
- shall be excluded “*where the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social*

230 G.S. Ølykke, C. Clausen, ‘Comment to Article 69’ in R. Caranta, A. Sanchez-Graells (eds.) *European Public Procurement. Commentary on Directive 2014/24/EU* (Edward Elgar 2021) pp. 731 f.

231 COM(2019) 640 final, at p. 8.

232 See the link between respect of those obligations and fair competition in G.S. Ølykke - C. Clausen, ‘Comment to Article 69’ in R. Caranta, A. Sanchez-Graells (eds.) *European Public Procurement. Commentary on Directive 2014/24/EU* (Edward Elgar 2021) pp. 738.

233 See P. Fritton - J. Zoell, ‘Comment to Article 56’ in R. Caranta, A. Sanchez-Graells (eds.) *European Public Procurement. Commentary on Directive 2014/24/EU* (Edward Elgar 2021) pp. 575

security contributions and where this has been established by a judicial or administrative decision having final and binding effect” (Art. 57(2) first phrase);

- may be excluded “where the contracting authority can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions” (Art. 57(2) second phrase);

- may be excluded “where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2)” (Art. 57(4)(a) first phrase).<sup>234</sup>

Besides the different standard of proof placed on contracting authority, the lukewarm approach taken towards exclusion means that economic operators engaged in environmental and social dumping are rarely barred from procurement markets, thus imperilling the competitive playing field.

This already quite complex panorama might get a bit more complex with the approval of the **Proposal for a Regulation regarding certain commodities and products associated with deforestation and forest degradation**.<sup>235</sup> Art. 23 thereof, regulating penalties, provides “1. Member States shall lay down rules on penalties applicable to infringements of the provisions of this Regulation by operators and traders and shall take all measures necessary to ensure that they are implemented. Member States shall notify the Commission of those provisions and without delay of any subsequent amendments affecting them. 2. The penalties provided for

shall be effective, proportionate and dissuasive. Penalties shall include as a minimum: ... (d) temporary exclusion from public procurement processes”. Arguably this will introduce a new mandatory exclusion ground, only one embedded in sectoral legislation rather than in the 2014 EU Public Procurement Directives.

While the latter approach of adding an exclusion clause outside the EU Public Procurement Directives is leading to possible uncertainty, a bigger issue is that, unlike the last phrase of Art. 56(1) of Directive 2014/24/EU, the details and the differences in the rules just recalled make it difficult to read an obligation in Art. 57(2) second phrase or in Art. 57(4)(a). The differences in the legal treatment are only partially justified by the objective difficulties in proving the breaches of the different relevant obligations. Proving child labour should not be easier or more difficult than proving a breach of any other of the ILO convention listed in Annex X. And it is unacceptable that, “where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2)”, it might still sit on its hands and go along with a delinquent tenderer. This will still fall short of introducing an obligation to investigate breaches of the relevant obligations. Contracting authorities will often not be equipped to manage such investigation, particularly in the context of extraterritorial enforcement of Art. 18(2) through the entire supply chain of a product or service.<sup>236</sup> Promoting and financing these investigations should instead be up to the Member States and the Commission, as it should be sharing the relevant information.

234 Those violations might also be relevant for an exclusion under Article 57(4)(c) (grave professional misconduct): see Recital 101; again this exclusion is not EU mandatory.

235 Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 COM(2021) 706 final 2021/0366 (COD).

236 Concerning exclusion for grave professional misconduct, the second phrase in Recital 101 of Directive 2014/24/EU indicates that “Bearing in mind that the contracting authority will be responsible for the consequences of its possible erroneous decision, contracting authorities should also remain free to consider that there has been grave professional misconduct, where, before a final and binding decision on the presence of mandatory exclusion grounds has been rendered, they can demonstrate by any appropriate means that the economic operator has violated its obligations, including obligations relating to the payment of taxes or social security contributions”; this hardly will prod contracting authorities into action to enforce sustainability obligations: see R. Caranta, ‘Towards socially responsible public procurement’ in ERA Forum 2022.

However, if no reform is adopted along the lines proposed, the entire shift towards mandatory SPP will be easily undermined by contracting authorities deciding to close deals with tenderers having breached the obligations under Art. 18(2) or submitting tenderers in breach of the same obligations.

Finally on Art. 18(2), as already recalled, mandatory SPP criteria will be developed slowly and will not cover all and every sector of EU Public Procurement Directives. To achieve the ambitious goals laid down in the European Green Deal and in other policy documents, the contracting authorities should be nudged towards SPP by inviting them to adopt sustainable purchasing practices as a general and default approach, unless they have good reasons not to do so.

## 2. The need to revise and streamline requirements along the procurement cycle

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Following *Concordia Bus* and later cases, the provisions of Directive 2014/24/EU relevant for SPP include requirements aimed at enforcing the non-discrimination principle when contracting authorities pursue SPP policies and practices. These requirements are however differently articulated and worded in different provisions. Eg Art. 42 refers to the proportionality principle, Art. 43 requires stakeholders participation in setting labels and Art. 68 foresees a 'reasonable effort' condition.

Since these requirements risk having a chilling effect on public buyers they should be reconsidered to see whether they are indeed necessary and streamlined (i.e. worded the same in the different provisions) to avoid generating confusion among buyers and sellers and everyone involved in procurement including the courts and the auditors.

It is suggested that, faithful to the case law, all relevant requirements boil down to the need to ensure objectivity in the choice of the contractor.

## 3. Removal of the link to the subject matter

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The CJEU developed the 'link to the subject-matter of the contract'(L2SM) concept in its case law regarding the possibility of including environmental considerations in award criteria for public contracts. In the *Concordia* case the CJEU held it is possible: *"provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the*

*fundamental principles of Community law, in particular, the principle of non-discrimination.*"<sup>237</sup>

With this seminal ruling, the CJEU opened the door to GPP award criteria, and L2SM featured among the counterweights to this opening in order to make sure that green criteria were not used to discriminate among economic operators. Since then, L2SM has been considered in a variety of cases where e.g. the

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237 Case C-513/99, *Concordia Bus* [2002] ECR I-7213 para 64.

‘objectivity criterion’ was scrutinised under the *EVN Wienstrom* case.<sup>238</sup>

Over the last two decades SPP matured and L2SM has been often quoted as the main pain point in purchasing a variety of sustainability agendas under public procurement. In this context, the L2SM should be reconsidered and possibly done away.

Following the 2014 reform, it has both become generally relevant but it has also been clearly linked to the life cycle of the relevant goods and services.<sup>239</sup> What is still problematic is the consideration of CSR policies in selection criteria, which very much dampens one central tool for SPP.<sup>240</sup> It is suggested that, in view of the upcoming Corporate Sustainability Reporting Directive (CSRD) and Corporate Sustainability Due Diligence Directive (CSDD), the 2014 EU Public Procurement Directives should be reformed expressly allowing reference to the CSRs policies covered under the mentioned directives. If so, the L2SM should be simply substituted with a reference to the life cycle of the goods or services purchased. Particularly so as L2SM seems inextricably linked to the life cycle of the relevant good or service, while the notion of the life cycle is autonomous from L2SM and much less ambiguous, being expressly defined in Directive 2014/24/EU under Article 2(20): *Life cycle’ means all consecutive and/or interlinked stages, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of the product or the works or the provision of the service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilisation.*

Art. 68 on Life cycle costing mostly mimics Art. 2(20) and also refers to climate change. L2SM is not expressly used. Only when regarding ‘environmental externalities’ does Art. 68(2) specify that it is required that they are “*linked to the product, service or works during its life cycle*”.<sup>241</sup> In this way, the link encompasses both the goodS or serviceS sought and their life cycle.

For reasons of clarity and to enhance SPP, it is recommended that the L2SM is abandoned. Reference in Art. 42, 43, 45, 67, 678 and 70 of Directive 2014/24/EU is made to ‘the product, service or works during (or and) its life cycle’ rather than to the L2SM.

The objectivity criterion must take the central role in safeguarding equal treatment. Whether pertaining to the good or service purchased or to its life cycle, sustainability claims must be substantiated and proven. This is already clear concerning labels (Art. 43(1)(b)) and implicitly regarding technical specifications as well (Art. 42). According to Recital 92, the award criteria should allow “*for a comparative assessment of the level of performance offered by each tender in the light of the subject matter of the contract, as defined in the technical specifications*”.

Any possible residual – and arguably inflated – risk that references to “*research and development to be carried out, production, trading and its conditions, transport, use and maintenance*” might be used to discriminate among economic operators may be addressed under Art. 18(1), which is of general application throughout all phases of the procurement process.

<sup>238</sup> Case C-448/01 *EVN Wienstrom* [2003] ECR I-14527.

<sup>239</sup> M. Andhov, R. Caranta, A. Wiesbrock (eds), *Cost and EU Public Procurement Law: Life-Cycle Costing for Sustainability* (Routledge Publishing 2020).

<sup>240</sup> M. (Andhov) Andrecka, “Corporate Social Responsibility and Sustainability in Danish Public Procurement” in *3/2017 EPPPL*, pp. 333-345.

<sup>241</sup> M. Andhov, “Commentary to article 68” in R. Caranta, A. Sanchez-Graells (eds.) *Commentary of the Public Procurement Directive (2014/24/EU)* (Edward Elgar 2021).

## 4. Changing the rules on reserved contracts

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There seems to be a clear policy push to stimulate social enterprises and their activities on the market by the EU and the Member States. The European Parliament even called for a stronger recognition of their purpose in society in 2018.<sup>242</sup> This is often because social enterprises aim to achieve societal objectives, such as the fight against climate change or social inclusion, instead of solely focussing on profit-making and when the profit is made it is reinvested into the strategic goals of the social enterprises. Accordingly, the question can be raised if such entities can effectively compete in a public procurement procedure or if this dual focus of their business hampers their competitive nature in a traditional procurement setting. Accordingly, the Directive 2014/24/EU contains a reserved procedure that can be held with entities that fulfil the requirements of Art. 77. These criteria, however, are substantively strict which means that in practice these procedures are not used, or only used scarcely. Changing these criteria has the potential to increase SPP through the activities of social enterprises.

More specifically, there is legal uncertainty in the application of this provision. It is required that profits are distributed or redistributed, but it is unclear how this must be done. The article refers to ‘participatory considerations’, which is broad and unclear. Similarly, and more problematically, the organisation of the social enterprise is limited severely by requiring that *‘the structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles,*

*or require the active participation of employees, users or stakeholders’.* In addition to the unclarity related to terminology such as ‘employee ownership’, ‘participatory principles’ or ‘active participation’, it is not clear how this limited view of the organisation of a social enterprise is necessary for this reserved procedure. It means that in practice a very limited amount of social enterprises can participate.

The requirement under Art. 77(2)(d) should be deleted. It requires that *“the organisation has not been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years”.* This is inconsistent with Recital 108 which explains the *ratio* of the reserved regime in the need *“to ensure the continuity of public services”.* To do so, according to the recital, *“this Directive should allow that participation in procurement procedures for certain services in the fields of health, social and cultural services could be reserved for organisations which are based on employee ownership or active employee participation in their governance, and for existing organisations such as cooperatives to participate in delivering these services to end users”.* There is no reason - besides a possible compromise between the lawmakers - why continuity should become irrelevant after just three years (Art. 77(3)).<sup>243</sup> More importantly, however, the requirement is inconsistent with a long standing case law of the CJEU that, while admitting the possibility to limit the right of participation to procurement procedures to avoid the danger of distortion to the competition, however requires that exclusion to be proportional

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<sup>242</sup> European Parliament resolution of 5 July 2018 with recommendations to the Commission on a Statute for social and solidarity-based enterprises (2016/2237(INL)).

<sup>243</sup> See M. Turudic, ‘Comment to Article 77’ in R. Caranta, A. Sanchez-Graells (eds.) *European Public Procurement. Commentary on Directive 2014/24/EU* (Edward Elgar 2021) 834.

and therefore based on a case by case analysis. An outright ban is instead unlawful.<sup>244</sup>

Finally, It might also be considered that the CJEU has recently held in *ASADE* case that contracts may

still be reserved to social enterprises under Art. 76 even if they do not meet the requirements under Art. 77.<sup>245</sup>

## 5. Amending the Remedies Directives

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The substantive EU Public Procurement Directives come assorted with Remedies Directives (Directives 89/665/EEC and 92/13/EEC, both amended by Directive 2007/66/EC) providing avenues for redress in case of breaches of EU and national procurement and concessions rules.

Those rules have been drafted keeping in mind the traditional understanding of EU procurement and concessions as exclusively aimed at creating an EU public contracts market. Art. 1(3) of Directive 89/665/EEC provides that “*The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review*”.

The new strong role of procurements and concessions as a tool to achieve societal goals requires extending the standing to civil society, with a specific role acknowledged to NGOs. NGOs should be allowed to challenge procurement decisions adopted in breach of EU or national mandatory criteria. Arguably this

is already the case for environmental aspects under the provision of Art. 9(2) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted on 25 June 1998 in the Danish city of Aarhus and known since as the Aarhus Convention.<sup>246</sup> However, there is no reason why standing should be limited to mandatory SPP criteria concerning the environment, excluding NGOs caring after human rights and other social aspects.

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<sup>244</sup> E.g. C-144/17, *Lloyd's of London* EU:C:2018:78, paragraph 35; C-213/07, *Michaniki*, EU:C:2008:731, paragraph 48; those cases concern the Member States, but equal treatment is a Treaty based general principle, and as such it is higher law with reference to the directives. This does not impinge on the lawfulness of the reserved contracts, as those are based on an appreciation of the specificity of some situations (see Recital 108).

<sup>245</sup> C-436/20, *ASADE*, ECLI:EU:C:2022:559; the Court of Justice affirmed C-70/95, *Sodemare*, EU:C:1997:301.

<sup>246</sup> COM(2020) 643 final available at [communication\\_improving\\_access\\_to\\_justice\\_environmental\\_matters.pdf \(europa.eu\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0643&from=de)





## PART IV

# REFLECTIONS AND CONCLUSIONS

Below, the reflections and conclusions of this Study are summarised and further discussed. They are categorised in a general part (1) and more specific sections in Parts 2 and 3 of this Study, namely on

legislative initiatives following from the EU Green Deal and other initiatives and on the Directive 2014/24/EU on public procurement.

## 1. General

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» This Study has analysed the current and future mandatory requirements and legal possibilities within EU law for the public procurement of sustainable works, goods and services, which is becoming increasingly important in light of the need to address climate change and social injustice.

» Part 2 of this Study has analysed the general development from regulating ‘how to buy’ to ‘what to buy’ in the EU. This concerns a discussion of the existence and introduction of mandatory SPP requirements in the EU. This has been considered a positive trend in the EU’s legislative approach, given the need to increase the uptake of SPP. It is also a trend shift given the contrary past legislative approach to leave it up to either national legislatures to mandate sustainable public procurement or to the discretion of individual contracting authorities to decide whether and if so to what extent to procure green and/or social outcomes. Part 3 of this Study has analysed the current legal possibilities to procure sustainable outcomes within the scope of the 2014 EU Public Procurement Directives in this light.

» Prior to the conclusions related to Part 2 and 3, it must be emphasised that for any legislative change

to become effective in practice requires attention for the professionalisation of contracting authorities in the EU. Only if these authorities are sufficiently equipped in terms of knowledge and budgets, will they be able to fulfil the requirements of mandated SPP in practice. Training of public buyers, knowledge sharing between the Member States and guidance from the EU Commission is, therefore, important. Furthermore, mandating SPP has a potential positive side-effect in which budgetary discussions are geared towards achieving sustainability objectives instead of focussing on cost-saving exercises.

» The review of a selected part of the current *aquis* and tabled legislative proposals has found that mandatory requirements exist in the scope of the horizontal 2014 EU Public Procurement Directives, but are mostly emerging in many sectoral pieces of legislation based on the implementation of the EU Green Deal. Many legislative instruments are still part of the EU legislative process.

» A plethora of different mandatory requirements can be identified from this analysis, ranging from procedural requirements (i.e. the obligation to use sustainable award criteria and/or technical



*limitations of voluntary approaches*”.<sup>248</sup> This appears to highlight a call to make them mandatory rather than only being oblivious about them. Moreover, if the reform proposals below are not amended from total to minimum harmonisation, all the effort put in developing the EU GPP criteria would be in vain. The ‘core criteria’ appear easier to implement in practice and legislation, than the ‘comprehensive criteria’ which are more advanced and detailed. In any event, in those Member States where the introduction of such criteria cannot currently be fulfilled, the applicability of the criteria should be progressive and can also be accompanied by sunset clauses of e.g. 5 years after which the SPP minimum criteria would apply in full.

» There needs to be a shift from GPP criteria to a wider set of SPP criteria. SPP criteria should include both GPP and socially responsible procurement criteria. Social criteria shall refer to employment, social inclusion, working conditions and human rights in supply chains. They should too be established as ‘core’ and ‘comprehensive’ criteria for the relevant products and services, in line with existing and future GPP.

» Given the potential of the current voluntary EU GPP criteria, it would be useful to measure their uptake and use on the Member State level, which would enable a discussion about their effectiveness in practice.

» Finally, it has been observed that these mandatory obligations are predominantly introduced in light of ‘green’ objectives, following the EU Green Deal, but that social obligations are not gaining as much attention and could even be said to be lagging behind, which is important given the need for sustainable development in which economic, social and environmental development go hand in hand. A better integration of social considerations is needed, including for policy coherence as corporate social obligations increase. This includes considering establishing reporting obligations for contracting authorities in relation to their human rights in supply chain actions.

## 2. Legislative Initiatives - amendment proposals

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### 2.1. Directive on the Energy Performance of Buildings (EPBD)

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» The EPBD is structured as total harmonisation, which is in line with the most orthodox internal market doctrine. It is argued here that minimum harmonisation, allowing for higher standards should instead be preferred. The proposed Art. 11(2) of the EPBD provides that *“Member States may set requirements related to the greenhouse gas emissions of,*

*or to the type of fuel used by heat generators provided that such requirements do not constitute an unjustifiable market barrier”*. Given that what is or is not ‘justifiable’ is not so easy to ascertain, the provision can have a chilling effect on Member States wanting to go further in decarbonising their building industry, and should be altered in this regard towards minimum

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248 COM(2020) 98 final.

harmonisation. Accordingly, Art. 11(2) of the EPBD should be aligned with Art. 1(2) of the EED proposal.<sup>249</sup>

» Recital 8 of the proposed EPBD states: *“Minimizing the whole life-cycle greenhouse gas emissions of buildings requires resource efficiency and circularity. This can also be combined with turning parts of the building stock into a temporary carbon sink”*. The latter point is taken up in the proposal in a very weak way. Under Art. 7(4) of the proposed EPBD, *“Member States shall address, in relation to new buildings, the issues of healthy indoor climate conditions, adaptation to climate change, fire safety, risks related to intense seismic activity and accessibility for persons with disabilities. Member States shall also address carbon removals associated to carbon storage in or on buildings”*. It is recommended that a new provision is added after Art. 7(4) providing that *“When designing works procurement, public authorities shall consider whether new buildings or some of their parts may act as carbon sink, including under Article 3(1)(1) of Regulation (EU) 2018/841 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework (LULUCF)”*.

» The above proposed provision might be a specification of a more general mandate to public authorities to consider environmental impacts in the design of buildings. The proposed Recital 52 of the EPBD indicates that, *“Recent years have seen a rise in the number of air-conditioning systems in European countries. That creates considerable problems at peak load times, increasing the cost of electricity and disrupting the energy balance. Priority should be given to strategies which enhance the thermal performance of buildings during the summer period. To that end, there should be focus on measures which avoid overheating, such as shading and sufficient thermal capacity in the building construction, and further development and application*

*of passive cooling techniques, primarily those that improve indoor climatic conditions and the micro-climate around buildings.”* This indication is not really taken up further in the proposal. Alternatively to what proposed in the above paragraph, the new provision to be added after Art. 7(4) EPBD should provide that *“When designing works procurement, public authorities shall consider (a) in the relevant Union green public procurement criteria including among others for Office Building Design, Construction and Management and Union green public procurement criteria for Road Design, Construction and Maintenance; (b) nature based solutions which avoid overheating, such as shading and sufficient thermal capacity in the building construction, and further development and application of passive cooling techniques, primarily those that improve indoor climatic conditions and the micro-climate around buildings, and (c) whether new buildings or some of their parts may act as carbon sink, including under Article 3(1)(1) of Regulation (EU) 2018/841 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework (LULUCF)”*. What is recommended is that the EPBD gives stronger directions to the contracting authorities in the Member States on the aspects to consider in the all important phase of building design that precedes public procurement.

» Alternatively, and aiming at accrued environmental benefits, only the two last letters of the above proposal should be retained and an additional provision should also be added after Art. 7(4) EPBD providing: *“Where a product or a service is covered by the Union green public procurement criteria, with relevance to energy efficiency of the product or service, contracting authorities and contracting entities shall make best efforts to purchase only products and services that respect at least the technical specifications set at ‘core’ level in the relevant Union green public procurement criteria*

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249 “2. The requirements laid down in this Directive are minimum requirements and shall not prevent any Member State from maintaining or introducing more stringent measures. Such measures shall be compatible with Union law. Where national legislation provides for more stringent measures, the Member State shall notify such legislation to the Commission.” (COM(2021) 558 final).

*including among others for data centres, server rooms and cloud services, Union green public procurement criteria for road lighting and traffic signals, Union green public procurement criteria for computers, monitors tablets and smartphones, Union green public procurement criteria for*

*Office Building Design, Construction and Management and Union green public procurement criteria for Road Design, Construction and Maintenance”, Union green public procurement criteria for Road lighting and traffic signals”.*

## 2.2. Energy Efficiency Directive (EED)

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» Contrary to the EPBD and CPR, the EED proposal adheres to a minimum harmonisation approach that is generally to be preferred when

legislating SPP (Art. 1(2) of). It can be the model for other legislative initiatives.

## 2.3. Renewable Energy Directive (RED)

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» To further enhance reference to EU GPP criteria, the proposed Art. 15(a)(3) of the RED should be completed with the following phrase: “*Where a product or a service is covered by the Union green public procurement criteria, with relevance to energy efficiency of the product or service, contracting authorities and contracting entities shall make best efforts to purchase only products and services that respect at least the technical specifications set at ‘core’ level in the relevant Union green public procurement criteria including among others for*

*data centres, server rooms and cloud services, Union green public procurement criteria for road lighting and traffic signals, Union green public procurement criteria for computers, monitors tablets and smartphones, Union green public procurement criteria for Office Building Design, Construction and Management and Union green public procurement criteria for Road Design, Construction and Maintenance”, Union green public procurement criteria for Road lighting and traffic signals”.*

## 2.4. Proposal for a Construction Product Regulation (CPR)

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» Under Art. 84 of the CPR proposal, read together with Art. 7(2) thereof, once the Commission has established ‘sustainability requirements’, neither a Member States nor an individual contracting authorities may ‘set additional requirements’. As mentioned relating to EPBD, this type of total harmonisation problematically limits even more the room of manoeuvre of more ambitious contracting authorities, so that they might be forced to walk back from what they already do, thus increasing rather than decreasing harmful emissions and other externalities.

» Therefore, the first phrase in Art. 7(2) of the CPR should provide “*The requirements making up the harmonised zone are minimum requirements and shall not prevent any Member State from maintaining or introducing more stringent measures requiring higher environmental standards. Such measures shall be compatible with Union law. Where national legislation provides for more stringent measures, the Member State shall notify such legislation to the Commission”.*

» Consequently, the last phrase in Art. 7(2) of the CPR should provide: “*Harmonised technical*

*specifications may require the Member States to link the decisions on the attribution of public tenders, of contracts or of grants or other positive incentives to sub-classes or additional classes other than those established in accordance with Article 4(4) where these still relate to environmental performances assessed in accordance with these harmonised technical specifications.”*

» Alternatively, and limiting the amendment to public procurement, the last phrase in Art. 7(2) of the CPR should provide: *“This paragraph shall not apply to public tenders or direct attributions of contracts where those public tenders or direct attributions are executed under direct or indirect control of public entities or are executed with reference to public provisions on public tenders or direct attribution of contracts. .... Harmonised technical specifications may permit or recommend Member States to link the decisions on the attribution of public tenders, of contracts or of grants or other positive incentives to sub-classes or additional classes other than those established in accordance with Article 4(4) where these still relate to*

*environmental performances assessed in accordance with these harmonised technical specifications.”*

» In this light, a new paragraph (4) should be added to Art. 84 of the CPR providing that *“Where a product is covered by the Union green public procurement criteria but not yet by harmonised technical specifications, contracting authorities and contracting entities shall make best efforts to purchase only products and services that respect at least the technical specifications set at ‘core’ level in the relevant Union green public procurement criteria including among others for Office Building Design, Construction and Management and Union green public procurement criteria for Road Design, Construction and Maintenance”*.

» More specifically, a letter should be added to Art. 84(3) of the CPR: *“(d) the relevant Union green public procurement criteria”*.

## 2.5. Clean Vehicles Directive (CVD)

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» There is a need to further specify the current broad wording of the monitoring obligations of the set targets, including specific provisions on how these percentages must be calculated and reported, in Art. 10 of the CVD, which can also enhance the usability of the accrued data.

» The inclusion of an obligation for the Member States to make transparent the allocation of responsibility for the EU targets for individual contracting authorities instead of only including the general Member State targets in the CVD should be considered to further enhance the possibility that the targets are met.

» The link with the voluntary EU GPP criteria on road transport could also be enhanced here in a similar way as suggested above in relation to the

RED, by including *“Where a product or a service is covered by the Union green public procurement criteria, contracting authorities and contracting entities shall make best efforts to purchase only products and services that respect at least the technical specifications set at ‘core’ level in the relevant Union green public procurement criteria including among others for road transport”*.

## 2.6. Proposal for a Batteries Regulation (BR)

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» The discretion for contracting authorities and entities to go beyond the set standards in the proposed BR based on minimum harmonisation should be kept in this proposal so that they can ask more of their economic operators than is stipulated by EU law.

» It is suggested to streamline the minimum and maximum values of Art. 7-10 of the BR that are to be established in the respective delegated acts, with the public procurement criteria that are to be delegated act in Art. 70, with a view to keeping the minimum harmonisation approach.

» Art. 70 of the BR should be altered to allow for technical specifications or award criteria (instead of ‘and’) when fulfilling the relevant obligations, and vague terminology such as ‘kept to a minimum’ and ‘take into account’ should be avoided.

» The delegated power given to the Commission to further set sustainability levels in Art. 70 of the BR should be carefully considered, and limitations should be provided to this delegated power that are consistent with other discussed delegated acts in EU legislation, such as in Art. 84 of the CPR, including

A. the value and volume of public contracts awarded for that given product family or category or for the services or works using the given product family or category,

B. the need to ensure sufficient demand for more environmentally sustainable products and

C. the economic feasibility for contracting authorities or contracting entities to buy more environmentally sustainable products without entailing disproportionate costs.

## 2.7. Future initiatives on food procurement

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When drafting future legislative initiatives relevant to food procurement, it is crucial to recognise that food is not a commodity or a consumer good. It rather is a common resource and a human right, as defined by the United Nations, crucial for our wellbeing and existence. The recent supply chain frictions (COVID-19, Ukrainian-Russian war) have – again – put the question of Europe’s dependency on external trade links to question.<sup>250</sup> Consequently, the food safety and security of the supply as well as health and nutrition diets should be considered when drafting the proposals.

When drafting mandatory minimum sustainable requirements, it is crucial to make food fit public procurement and vice versa. This means that the sustainability principle defined as a cardinal value of the EU Public Procurement Law should be the guiding principle in the law making. Accordingly, the recommendations on the policy level are as follow:

» As a legislative method, minimum harmonisation should be chosen, leaving discretion for national legislatures to legislate beyond the EU standard, and for contracting authorities to ask more of their economic operators than stipulated by EU law.

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<sup>250</sup> W. Raza, J. Grumiller, H. Grohs, J. Essletzichler, N. Pintar, Study requested by the INTA committee: “Post Covid-19 value chains: options for reshoring production back to Europe in a globalised economy”, European Union, 2021. See: [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-industrial-strategy\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-industrial-strategy_en)

» The link with the voluntary EU GPP criteria for food, catering services and vending machines should be enhanced. In a similar way as suggested in above proposals introduced could be the following wording “Where a product or a service is covered by the Union green public procurement criteria, contracting authorities and contracting entities shall make best efforts to purchase only products and services that respect at least the technical specifications set at ‘core’ level in the relevant Union green public procurement criteria including among others for food, catering services and vending machines”.

» Requiring local food is currently forbidden under EU Public Procurement law. Similarly preferring seasonal food and food from short supply chains or small farmers raises a question of preferential treatment. Therefore, it is necessary for future legislation to address the possibility to prefer local food procurement, particularly because the EU explicitly mentions school fruit, vegetables and milk in its scheme by stating that “EU countries

may encourage **local, short supply chain, organic and quality scheme products if they wish**”<sup>251</sup> The solutions to overcome this legal obstacle could include:

- to set a maximum amount of allowed local food content e.g. 20%;
- to provide for a set-aside for local food;
- to create a food exception from the EU Public Procurement Directives similar to the current Art. 14 Directive 2014/24/EU.

» The future mandatory minimum SPP criteria should also take into account local food environments, regional food economies and national food production.<sup>252</sup> It should be underlined that there may be a need for additional measures, such as those related to land reconversion and/or farmers support.<sup>253</sup>

## 2.8. Proposal for a Regulation on Ecodesign of Sustainable Products (EDSP)

» The inclusion of mandatory requirements for sustainable products applicable to public procurement in the Regulation should be considered instead of leaving it to potentially being adopted by delegated acts by the Commission (as currently foreseen in Arts. 4(h) and 58).

» The explicit exclusion of social criteria as part of procurement criteria and mandatory requirements in the Regulation to be developed via Commission delegated acts and future social public procurement criteria, should be reconsidered;

» The relationship between public procurement criteria and due diligence in supply chains should be considered, both for environmental and human rights impacts.

251 EU Commission (DG Agriculture), EU school fruit, vegetables & milk scheme

252 ICLEI - Local Governments for Sustainability, IFOAM Organics Europe, Sustainable Public Procurement of Food: a Goal within Reach, May 2021 available at [https://foodpolicycoalition.eu/wp-content/uploads/2021/06/Sustainable-public-procurement-of-food-a-goal-within-reach\\_EU-FPC-website.pdf](https://foodpolicycoalition.eu/wp-content/uploads/2021/06/Sustainable-public-procurement-of-food-a-goal-within-reach_EU-FPC-website.pdf)

253 Ibid.

## 2.9. Proposal for Corporate Sustainability Due Diligence Directive (CSDD)

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» A clear link between public procurement and due diligence in corporate supply chains should be established by cross-referencing the CSDD and the EU Public Procurement Directives. Review Art. 24 of the CSDD to include a reference to exclusion

from tendering for public contracts, along the lines of: *“Member States shall ensure that companies applying for public support and bidding for public contracts certify that no sanctions have been imposed on them for a failure to comply with the obligations in this Directive”.*

## 2.10. Proposal for Corporate Sustainability Reporting Directive (CSRD)

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» A clear link between public procurement and sustainability reporting should be established. This can be done in the amendments to article 51 (Penalties) of Directive introduced in Article 1 CSRD, to include: Art. 51.4 *“Member States shall*

*ensure that companies applying for public support and bidding for public contracts certify that no penalties have been imposed on them for a failure to comply with the obligations in this Directive”.*

## 2.11. Proposal for Directive for Minimum Wages (MW)

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» Art. 9 of the MW should be altered to strengthen its mandatory character. This should be done by drawing on the alerted wording of suggested Art.18(2) below in section 3 of this Study. Consequently, Art 9 should read: *“In accordance with Directive 2014/24/EU, Directive 2014/25/EU and Directive 2014/23/EU, contracting authorities shall make sure that in the performance of public contracts or concessions, economic operators comply with the wages set out by collective agreements for the relevant sector and geographical area and with the statutory minimum wages. Member States shall take appropriate additional measures, including monitoring and sanctioning, to ensure that in the performance of public contracts, economic operators comply with the above-mentioned obligations.”*

» The enforceability of MW in the public procurement context could also be enhanced by creating a similar provision as Art 23 of the Proposal for a Regulation regarding certain commodities and products associated with deforestation and forest degradation regulating penalties for violations.<sup>254</sup> The provision in MW could read, *“1. Member States shall lay down rules on penalties applicable to infringements of the provisions of this Directive by employers and shall take all measures necessary to ensure that they are implemented. 2. The penalties provided shall be effective, proportionate and dissuasive. Penalties shall include, as a minimum: a) temporary exclusion from public procurement processes”.*

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<sup>254</sup> Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 COM(2021) 706 final 2021/0366 (COD).

### 3. Revising EU Public Procurement Directives

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When aiming to further mandate SPP in the context of the EU Public Procurement Directives, the following recommendations should be considered:

» The successor to Art. 18(2) Directive 2014/24/EU can be rephrased to provide that the “*Contracting authorities shall make sure that in the performance of public contracts economic operators comply with provisions in the fields of environmental, social and labour law, established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X. Member States shall take appropriate additional measures, including monitoring and sanctioning, to ensure that in the performance of public contracts economic operators comply with the above mentioned obligations*”.

» A recital in the revised Directive 2014/24/EU can refer explicitly to the need for contracting authorities to ensure that economic operators comply with their corporate sustainability due diligence and sustainability reporting obligations under EU law in the performance of public contracts.

» Art. 18(2) Directive 2014/24/EU can also be complemented by providing that “*When no mandatory obligations in the fields of environmental, social and labour law, established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions are applicable, contracting authorities shall prefer the more sustainable alternatives among those available when designing their contracts, including with reference to EU comprehensive GPP or SPP criteria unless they give reasons against this*”.

» The successor to Art. 56 Directive 2014/24/EU can be amended to provide that: “*Contracting*

*authorities shall not award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with the applicable obligations referred to in Article 18(2)*”.

» What is now Art. 57(4)(a) Directive 2014/24/EU can be decoupled from the facultative exclusion ground and be drafted to provide that “*Contracting authorities shall exclude a tenderer where they have established a violation of applicable obligations referred to in Article 18(2)*”.

» The requirement of the link to the subject matter of a contract can be removed and replaced by a reference to the life cycle of a product/service throughout the EU Public Procurement Directives.

» The terminology used in Art. 77 should be further clarified, and the requirement under Art. 77(2)(d) should be deleted to expand its use in practice and to further stimulate social enterprises.

» Art. 1(3) of Directive 89/665/EEC (and of Directive 92/13/EEC) can be amended to the effect that “*The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement and to any NGO active in the fields of environmental, social and labour law, including those defending human rights. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review*”.

# ANNEX 1: ABOUT THE AUTHORS

**Marta Andhov** (PhD) is an Associate Professor in European Public Procurement Law at the Faculty of Law at the University of Copenhagen and a researcher at the [Centre for Private Governance](#) (CEPRI). Her research focuses on public procurement law, sustainability, and public contracts. She is a widely published and recognised expert in public procurement law. She is a leader of the [Purchase Power - Sustainable Public Procurement Through Private Law Enforcement](#) project and steering committee member of the Marie Skłodowska-Curie Innovative Training Network [Sustainability and Procurement in International, European, and National Systems](#) (SAPIENS). Marta is a co-host of [BESTEK - the Public Procurement Podcast](#).

**Roberto Caranta** is a Professor at the Law Department of the University of Torino. He is a leading legal expert in Sustainable Public Procurement, the Coordinator of the Marie Skłodowska-Curie Innovative Training Network [Sustainability and Procurement in International, European, and National Systems](#) (SAPIENS), a member of the EU Trade and Investment Policy – International Training Network, co-founder of the [European Procurement Law Group](#) and co-editor of the [European Procurement Law Series](#). Roberto co-edited the [European Public Procurement Commentary to Directive 2014/24/EU](#) (Elgar Publishing, 2021), which is the golden standard reference when it comes to the interpretation of EU Public Procurement law.

**Willem Janssen** (PhD) is an Associate Professor in European and Dutch Public Procurement Law at the law department of Utrecht University and a researcher at the [Centre for Public Procurement](#)

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**Olga Martin-Ortega** is a Professor of International Law at the School of Law, University of Greenwich, where she leads the [Business, Human Rights and Environment Research Group](#). Olga is a member of the Board of Directors of the London Universities Purchasing Consortium. She has written extensively on public procurement and human rights, including the co-edited volume [Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer](#) (Edward Elgar, 2019). She works with the Local Government Association, the Higher Education Procurement Academy and the OSCE, training public sector buyers, producing professional guidance and supporting them in developing human rights due diligence in their supply chain.



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