

Sustainable Public Procurement in the European Union

Briefing in support of mandatory requirements

Key messages and recommendations

- Public procurement policy in the European Union (EU) fails to sufficiently incentivise Sustainable Public Procurement (SPP). This shortcoming should be addressed by integrating **mandatory SPP requirements** in horizontal and sectoral EU legislation.
- Revision of horizontal legislation should lead to:
 - binding SPP targets and procedural requirements
 - increased consideration of sustainability performance of bidders (versus bids only)
 - monitoring the outcome of SPP
 - implementation of a good governance first-principle
- Sector-specific legislation should, where relevant and appropriate, include mandatory substantive minimum requirements. The currently non-binding EU Green Public Procurement criteria provide a good blueprint of how sectoral binding criteria could look.

1 Introduction

ClientEarth is a not-for-profit environmental law organisation that uses the power of the law to protect people and the planet. We are legal experts working to shape and enforce the law to tackle the world's biggest environmental challenges.

This briefing sets out markers for the revision of EU public procurement policy, in view of **supporting the development of SPP in the EU, while securing resource efficiency and competitiveness in the internal market.**

The use of public procurement to help society achieve more than purely economic objectives, has long been embraced by the European Commission. The European Commission explicitly places EU Member States and their contracting authorities in a pivotal position for the achievement of its sustainable and social agenda.¹ However, so far, this has not resulted in a policy that truly contributes to SPP.

Against this background, this briefing first elaborates on EU public procurement policy as a powerful tool for achieving sustainability objectives (Section 2), and its current shortcomings in terms of achieving SPP (Section 3). This is followed by a section on the legal framework that conditions the integration of SPP in EU public procurement policy (Section 4). Finally, this briefing sets out concrete recommendations for the integration of mandatory SPP requirements in EU public procurement policy (Section 5).

- For the purpose of this briefing, SPP concerns all elements of sustainable development, rather than focussing on the environment such as in Green Public Procurement (GPP), or social aspects such as in Socially Responsible Public Procurement (SRPP).
- This briefing does not consider objectives related to the internal market in isolation, such as the promotion of intrastate competition.² Instead, the fundamental premise of this briefing is that, considering the impact of environmental and climate challenges on the EU economy, effective integration of SPP in EU public procurement policy is a condition for maintaining a competitive internal market in the global economic context.

2 EU public procurement policy: a powerful tool for achieving sustainability objectives

The purchasing power of Member States' contracting authorities is estimated at a total of EUR 2 trillion per year, representing 14% of the EU's Gross Domestic Product (GDP).³ Estimates are that public procurement (directly and indirectly) accounts for 15% of the EU's global greenhouse gas emissions.⁴

These statistics leave no doubt that SPP can **drive demand for and production of sustainable products**.⁵ But the potential impact of SPP reaches well beyond public procurement markets. SPP is likely to produce spill-over effects that further **increase the demand for more sustainable goods and**

¹ Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth COM(2010) 2020.

² For consideration of the objectives relating to the creation and protection of the internal market and the promotion of intrastate competition in particular, please see the Special report 28/2023 of the European Court of Auditors.

³ Public procurement - European Commission (europa.eu)

⁴ World Economic Forum, Green Public Procurement: Catalysing the Net-Zero Economy, white paper January 2022.

⁵ DB Marron, 'Buying Green: Government Procurement as an Instrument of Environmental Policy' (1997) 25 *Public Finance Review* 285; DB Marron, 'Greener Public Purchasing as an Environmental Policy Instrument' (2004) 3 *OECD Journal of Budgeting* 70.

services across the whole market, as the result of the creation of lead markets, innovation and example-setting. For example, considering that 25% of steel and 40%⁶ of cement is used for public construction, greening procurement can go a long way in driving the transition in these sectors, by de-risking necessary investments in transformations of production processes through the creation of lead markets.

Notwithstanding the above, it is also essential to start viewing public procurement **as an investment rather than an expense**. This can be achieved by focusing on the real costs of public procurement – including societal and environmental costs – instead of only the economic dimension i.e. the price of procured goods and services.

In conclusion, sustainable public procurement can be a powerful tool, not only to fulfil the needs of public authorities in their role as contracting authorities, but also to contribute to a just and inclusive society by considering environmental and social aspects.

3 Shortcomings of current public procurement policy

Horizontal public procurement legislation

The EU public procurement policy is primarily implemented through horizontal legalisation (Directive 2014/24/EU – Classic Directive) that is applicable to all sectors – unless specified otherwise. The Classic Directive has shown to be largely ineffective in achieving SPP objectives, even though it recognises the role of public procurement for facilitating the implementation of social and environmental policy objectives (point 47 of the recitals). Moreover, the public procurement procedures set out in the Classic Directive allow for the integration of SPP considerations.⁷

However, the Classic Directive proposes SPP on a purely voluntary basis. This approach has shown to be fundamentally ineffective.

For example, estimates even in the most ambitious Member States show that GPP does not exceed 16% (over the period 2006-2017, as a share of all public procurement across all sectors),⁸ despite the European Commission's efforts to increase the voluntary uptake of GPP through the publication of several guidance documents (EU GPP criteria). Moreover, GPP national action plans show strong divergences between Member States in terms of GPP objectives (ranging from a 100% GPP objective to no objective at all).⁹

Sectoral public procurement legislation

In addition to horizontal legislation, EU public procurement policy is implemented through sectoral legalisation. In contrast to horizontal legislation, sectoral legislation often prescribes more substantive requirements.

⁶ Stockholm Environmental Institute, Fostering industry transition through green public procurement: A "how to" guide for the cement and steel sectors, June 2021.

⁷ The Directive has introduced (i) the possibility to award contracts based on the lowest life cycle costs; (ii) the expansion of the possibility to award reserved contracts to sheltered workshops or social enterprises; (iii) enhanced legal clarity regarding the use of ecolabels and; (iv) the possibility to exclude a part of the tender from the application of the public procurement procedures provided by the Directive.

⁸ Rosell, J. (2021), Getting the green light on green public procurement: Macro and meso determinants, *Journal of Cleaner Production*, 279, 123710.

⁹ GPP NAPS MAY 2023.

For example, Directive 2019/11/61 (*Clean Vehicles Directive*) requires concrete targets on the share of clean vehicles procured. Other examples include Directive 2018/2001 (*Renewable Energy Directive*), which requires Member States to use available harmonised standards when defining technical specifications for renewable energy equipment and systems to be eligible under public procurement and Directive 2010/31/EU (*Energy Performance Directive*), which imposes obligations on Member States regarding the level of resource-efficiency of public buildings. Directive 2023/1791 (*Energy Efficiency Directive*) also imposes resource-efficiency requirements for the procurement of works and buildings, and also provides that Member States may require contracting authorities to take into account wider sustainability, social and environmental and circular economy aspects.

There is also pending sectoral legislation that is relevant to SPP. The pending *Net Zero Industry Act*¹⁰ imposes to integrate in award criteria sustainability and resilience contributions. The *Ecodesign Regulation*,¹¹ also close to adoption, creates the possibility for the European Commission to adopt – by delegated act – requirements applicable to public contracts, including technical specifications, selection criteria and award criteria.

The potential of sectoral regulation to push SPP is however underexploited. Current efforts in sectoral legislation regarding SPP should be continued, reinforced and extended to sectors that are not yet addressed.

4 Legal possibilities to integrate mandatory SPP requirements in EU public procurement

Considering the EU treaties, together with the horizontally applicable Classic Directive and relevant case law of the Court of Justice of the European Union (CJEU), the following legal framework applies to the integration of SPP in EU law.

- In line with **Article 11 Treaty on the Functioning of the European Union (TFEU) – a core constitutional principle** – environmental protection requirements must be integrated in the definition and implementation of the Union's policies and activities, in view of promoting sustainable development. Article 11 TFEU, read in conjunction with Article 3(3) Treaty of the European Union (TEU), Article 3 TFEU, Article 4(3) TFEU, Article 7 TFEU and Article 37 EU Charter of Fundamental Rights compel the European Commission to take due account of environmental requirements when elaborating public procurement policy.
- The CJEU has recognised that Article 18(2) of the Classic Directive establishes a principle that public procurement must comply with environmental, social and labour law, that stands at the same level of the other general principles of public procurement law (principles of equal treatment, non-discrimination, transparency, proportionality and prohibition to exclude a contract from the scope of the Classic Directive or to artificially narrowing down competition).¹²
- On the **possibility** to include sustainability considerations in public procurement, the CJEU has confirmed that the preservation of the environment can be included in the criteria.¹³

¹⁰ Proposal for a Regulation of the European Parliament and of the Council on establishing a framework of measures for strengthening Europe's net-zero technology products manufacturing ecosystem.

¹¹ Proposal for a framework for setting ecodesign requirements for sustainable products.

¹² Case C-395/18, Tim SpA, ECLI:EU:C:2020:58.

¹³ Case C-513/99 Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin Kaupunki and HKL-Bussiliikenne, ECLI:EU:C:2002:495, [1998] ECR I-0713 para 64.

- Conversely, there are some **limitations** to the integration of sustainability considerations in public procurement. These limitations stem from the principles of equality, transparency and proportionality, derived from the free movement rules in the TFEU. An example of such limitation consists of the restrictions to prescribing the use of a **specific sustainability labels** (and thus excluding other labels).
- Another important limitation is that SPP criteria must be linked to the **subject-matter of the public contract**.¹⁴ This means that, pursuant to the Classic Directive, the SPP criteria must concern the goods, services or works covered by the contract – as opposed to the bidder, for example.

5 Recommendations for stronger integration of SPP in EU public procurement

Considering the above, the shortcomings of EU public procurement policy in the area of SPP should be addressed by integrating **mandatory SPP requirements**.

Mandatory SPP requirements can take many forms including: (i) minimum mandatory sustainability requirements; (ii) targets; (iii) product specific legislation; and (iv) procedural requirements. Each of these approaches have their strengths and weaknesses in terms of efficiency, effectiveness and subsidiarity of regulatory intervention, depending on the context.

It is essential to tailor mandatory requirements to the relevant legal context (horizontal or sectoral legislation), the relevant sector if applicable, and the need for flexibility to allow public authorities to adapt their procurement procedures to geographic particularities and realities on the ground. Well adapted mandatory SPP requirements empower contracting authorities to design procurement procedures that contribute to securing resource efficiency and competitiveness in the internal market.

Considering the above, different types of mandatory SPP requirements should be combined. **We recommend that binding targets and principles be integrated in horizontal legislation, and that targeted and more detailed substantive mandatory SPP requirements be integrated in sectoral legislation.**

For a stronger integration of SPP in horizontal legislation, we recommend:

➤ Introducing binding SPP targets and procedural requirements

Targets and procedural criteria should act as default rules and serve as a basis for the development of substantive criteria at sectoral and/or national level. These targets and procedural requirements should be general in nature to apply cross-sectorally. At the same time, they should be sufficiently concrete and verifiable. Targets could, for example, consist of carbon dioxide (CO₂) reduction objectives. Procedural criteria, could for example, consist of a comply or explain principle, that requires contracting authorities to justify when the procurement procedure does not integrate SPP criteria.

➤ Introducing the possibility to assess the sustainability performance of bidding companies

¹⁴ Ibid.

This likely requires removing or re-defining the current subject-matter requirement that is central to the Classic Directive.¹⁵ The subject-matter requirement restricts the extent to which contracting authorities can consider the sustainability performance of the company, in addition to the sustainability performance of the project. A more flexible approach allowing for increased assessment at company level opens new possibilities. For example, it would allow to assess the bidder's performance by exploiting data reported by companies under the Corporate Sustainability Reporting Directive,¹⁶ and allow for extending the application of the CO₂-ladder approach¹⁷ to the CO₂ performance of companies.

➤ **Introducing a good governance first-principle**

The Classic Directive should impose obligations on Member States to support the training of public procurers as well as inform and educate (small-size) market operators on public procurement rules/procedures and the possibility to integrate SPP considerations.¹⁸ This could take the form of an obligation to institutionalise meetings of public procurement experts at national, EU and international level to exchange general best practices on SPP and develop multi-level governance discussions on sectoral needs in terms of SPP.

➤ **Imposing monitoring obligations on the outcome of application of SPP requirements**

The Classic Directive should impose an obligation on Member States to monitor the outcomes of public procurement procedures that include SPP. This would allow Member States to identify best practices, which can be shared with other contracting authorities across the EU.

For strengthening and consolidating SPP in sectoral regulation, we recommend:

➤ **Sector-specific mandatory substantive minimum requirements**

Where appropriate, sectoral legislative initiatives should include substantive minimum mandatory requirements that are adapted to the relevant sector. To a certain extent, this is already happening, but it should be developed further (see above, Section 3).

➤ **Using existing voluntary EU GPP criteria as a blueprint for developing substantive mandatory minimum requirements**

In adopting sector-specific mandatory substantive minimum requirements, priority should go to making key elements of EU GPP criteria binding upon contracting authorities. Despite lacking social considerations, making the EU GPP criteria binding on contracting authorities should be considered low-hanging fruit, as it prevents having to develop sectoral requirements from scratch.

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¹⁵ The subject-matter approach appears in various provisions of the Classic Directive. See also: Case C-513/99, *Concordia Bus* [2002] ECR I-7213, para 64.

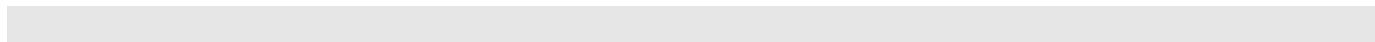
¹⁶ Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022.

¹⁷ See: [The CO2 Performance Ladder as a Tool for Low-Carbon Procurement \(iisd.org\)](https://iisd.org)

¹⁸ An illustrative example in this respect is the public procurement platform developed by the Dutch government, enabling both contracting authorities as well as market operators/participants to procure more sustainably in general (see [here](#)).

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