

# Procurement



# The role of Green Public Procurement (GPP) under the EU Green Deal as a key lever of the transition to a circular and climate neutral Europe

## Abstract

This paper aspires to provide a comprehensive overview of the role of Green Public Procurement (GPP) as a key lever in moving towards a circular economy as well as in closing the gap between current policies and the 1.5°C climate target. Emphasis will be placed on the latest policy and legislative developments under the EU Green Deal, which highlights the significance of public procurement regime in pursuing the existing environmental goals focusing on promoting “green products”, reducing carbon footprint and enhancing resource-efficient strategies. In this context, the adoption of low-carbon choices by public buyers contributes to enhancing the design and production of sustainable and toxic-free products which constitutes a prerequisite for climate neutrality.

**Keywords:** Public Procurement, Green criteria, EU Green Deal, circular economy

## A. Introduction

The EU Green Deal,<sup>1</sup> which is the current EU growth strategy focusing on tackling climate and the other pressing environmental-related challenges, maps the transition towards a climate-neutral Europe by 2050 based on the efficient use of resources by moving to a clean, circular economy, the restoration of biodiversity and the reduction of pollution. Without putting the spotlight on the detailed provisions and actions in different environmental areas, the adoption of the EU Green Deal reflects the continuous strengthe-

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1 Available at: [https://ec.europa.eu/info/sites/info/files/european-green-deal-communication\\_en.pdf](https://ec.europa.eu/info/sites/info/files/european-green-deal-communication_en.pdf).

ning of the environmental considerations when shaping EU sectoral policies enshrined in Article 11 TFEU, which is known as the “environmental integration clause” and explicitly requires “*environmental protection requirements to be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development*”. Hence, environmental policy integration attempts to act on the recognition that more can be achieved by incorporating environmental concerns within other policy areas (such as agriculture, energy, internal market, trade, fisheries, transport, industry, tourism, economic and financial affairs) than by leaving them to explicitly “environmental policy”.<sup>2</sup> In this context, the adoption of the EU Green Deal triggers intensive discussions about the role of public procurement rules as a crucial mechanism in achieving the new and ambitious EU environmental goals.

Namely, according to the provisions of the EU Green Deal, “*public authorities, including EU institutions, should lead by example and ensure that their procurement is green. The Commission will propose further legislation and guidance on green public purchasing*”.<sup>3</sup> In addition to this, “*the Commission will propose minimum mandatory green criteria or targets for public procurements in sectorial initiatives, EU funding or product-specific legislation. Such minimum criteria will ‘de facto’ set a common definition of what a ‘green purchase’ is, allowing 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. The Commission will support these efforts with guidance, training activities and the dissemination of good practices*”.<sup>4</sup> It is therefore evident that the concept of Green Public Procurement (hereafter: GPP) may have a crucial role in the tool kit of the policy makers when developing policies that either affect environmental goods or aim to achieve the already adopted environmental objectives.

The nexus between the public procurement and the environmental policy goals under the EU Green Deal, can be explained as follows. Government expenditure on works, goods and services represent around 19% of EU GDP,

2 *European Commission*, A Blueprint to Safeguard Europe’s Water Resources COM(2012) 673. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0673&from=EN>.

3 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Sustainable Europe Investment Plan – European Green Deal Investment Plan, Brussels, 14.1.2020, COM(2020) 21 final, p. 8.

4 *Ibid.*, p. 12.

accounting for roughly EUR 2.3 trillion annually.<sup>5</sup> Due to this massive value of public procurement, and the enormous market it creates, public procurement, particularly when used in a strategic way, is a relevant and powerful way to respond to societal, environmental and economic challenges, and to shape the way in which both the public and private sector behave on the market. Hence, nowadays, public procurement satisfies a variety of concerns relating to: (a) anticorruption and transparency; (b) efficiency (the best value for money); (c) policy instruments, such as social and environmental considerations; (d) competition concerns; and (e) building an internal market for government procurement in the EU context.<sup>6</sup>

Generally, in developed as well as developing countries, a sound procurement system seems to have two groups of objectives: procurement and non-procurement.<sup>7</sup> Namely, the procurement objectives normally include quality, timeliness, cost (more than just price), minimizing business, financial and technical risks, maximizing competition and maintaining integrity, whilst the non-procurement objectives cover environmental protection priorities, social objectives and international relations (i.e. global trade agreements) objectives. At EU level, the debate about the interrelationship between the public procurement rules and the achievement of environmental goals at EU level has revived in the wake of the 2014 EU Public Procurement reform, where it was acknowledged that public procurement is a powerful tool of the competitiveness and sustainable growth agenda.<sup>8</sup> Therefore, no longer will the EU simply coordinate national procurement procedures to protect the integrity of the internal market in public contracts, but now it also seeks to deploy public procurement as a “demand-side policy” to achieve its own key economic goals.<sup>9</sup> In this context, the new Directive 2014/24/EU (hereafter: Public Procurement Directive) used the lever of public procurement to integrate strong social and environmental dimensions, without, however, specifying the conditions under which these two fields will jointly serve their original purposes.

The emergence of the concept of GPP is directly linked to the constantly increasing role of environmental protection in the EU policy priorities and targets since 1986, with the entry into force of the Single European

5 *European Commission, Bying Green! – A Handbook on green public procurement*, 3<sup>rd</sup> edition, 2016, p. 4-5.

6 *Schebesta*, in *Schoenmakers/Devroe/Philipsen* (eds), pp. 130-131.

7 *Thai*, p. 2.

8 Recital 3 of Directives 2014/23/EU, 2014/24/EU and 2014/25/EU.

9 *European Commission, Europe 2020 – A Strategy for Smart, Sustainable and Inclusive Growth*, COM(2010) 2020 final, p. 14-17.

Act (SEA). Namely, over the last two decades, environmental issues have been placed very high on the EU political agenda, given that the current situation of the environment worldwide is alarming for a combination of reasons. In order to face these challenges and strengthen the achievement of local, regional, national and EU environmental goals, the EU legislator has conceived the green shift in public purchasing leading to the adoption of several EU green public procurement framing measures, some of which are actually binding. In a broader conceptual framework, GPP is but one of sustainable public procurement (SPP)'s components<sup>10</sup>, which encompasses the three pillars of economic, social and environmental responsibility.

According to the definition given by the Commission, GPP is *"a process whereby public authorities seek to procure goods, services and works with reduced environmental impact through their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured"*.<sup>11</sup> In other words, GPP constitutes an important tool to promote the use of greener products and services by the public authorities and, therefore, to achieve environmental policy goals relating to climate change, biodiversity loss, resource efficiency and sustainable production and consumption. Indicatively, GPP can be instrumental in addressing environmental problems, such as: deforestation (e.g. through the purchase of wood and wood products from legally harvested and sustainably managed forests), greenhouse gas emissions (e.g. through the purchase of products and services with a lower CO<sub>2</sub> footprint through their life-cycle), waste (e.g. by specifying processes or packaging which generate less waste or encouraging reuse and recycling of materials), or air, water and soil pollution (by controlling chemicals and limiting the use of hazardous substances).<sup>12</sup>

Currently, GPP is still a voluntary instrument meaning that it is up to the Member States (hereafter: MS) and their contracting authorities to implement it. In this context, the EU GPP criteria sets developed by the European Commission for 20+ priority products<sup>13</sup> are non-binding and not formally adopted as a legal act. In other words, the EU GPP criteria

10 *European Commission*, [15], pp. 219-223.

11 *European Commission, Communication, Public procurement for a better environment*, 2008.

12 [https://ec.europa.eu/environment/gpp/benefits\\_en.htm](https://ec.europa.eu/environment/gpp/benefits_en.htm).

13 Copyright and graphic paper, computer and monitors, transport, electricity, textiles, cleaning products and services, Office Building, Furniture, Food and Catering Services, Gardening products and services, wall panels, water-based heaters, waste water infrastructure, flushing toilets and urinals, imaging equipment, roads, combined heat and power, street lighting and traffic signals, Indoor lighting, sanitary tapware, EEE Health care sector.

are a supporting framework, providing concrete clauses on how to “green” public purchasing of the targeted products, and setting a non-binding level of ambition as to what is considered a sufficient “effort” in greening the purchasing.<sup>14</sup>

In general, the discussions about the role of the GPP as an environmental policy tool have been stepped up in the last decade, given that environmental concerns have become a fundamental part of EU law through the establishment of more than 130 separate environmental targets to be met between 2010 and 2050.<sup>15</sup> In this context, public procurement has explicitly emerged as a potentially effective toolkit in the hands of policy makers for achieving compliance with the adopted environmental objectives at EU law landscape. Accordingly, the main research focus of this paper revolves around the question of how the public procurement process will contribute to the transition to a circular and climate neutral Europe as prescribed in the EU Green Deal.

To this end, in the second section the role of the Public Procurement within the EU Green Deal priorities is identified, while in the third section emphasis is placed on the GPP requirements under the current EU public procurement regime. The fourth section focuses on analyzing the latest policy and legislative developments under the EU Green Deal, highlighting the interconnections between GPP, circular economy and climate objectives. In the fifth and final section some concluding remarks are briefly formulated.

## **B. Identifying the role of GPP within the EU Green Deal priorities**

The EU Green Deal aspires to function as the overarching umbrella, coordinating comprehensively the developments in the field of environmental policy, which has been constantly evolving in order to deal effectively with the growing environmental problems, such as climate change, biodiversity loss, soil degradation and water scarcity. As captured in the EU Green Deal, the new EU environmental objectives, which have been adopted in different policy areas, such as circular economy, Sustainable Development Goals (SDGs), Climate Change and Decarbonization of Economy, test sorely the existing environmental policy tools. Hence, in order to achieve these ambitious and highly complicated environmental goals, “demand-side policies” such as the GPP can be a useful tool.<sup>16</sup>

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14 *Schebesta*, *European Journal of Risk Regulation* 2018, p. 319.

15 *Mélon*, *Sustainability* 2020, p. 5

16 *Martínez Romera/Caranta*, *EPPPL* 2017, pp. 281-282.

## I. Sustainable Development Goals

Since the adoption of the new Public Procurement Directive, it has become clear that a key factor in governments' public purchasers' choices is no longer exclusively the cheapest option available, but the integration of social and environmental dimensions in public procurement rules. Given the high impact of public procurement on a country's economic development, the introduction of environmental and social sustainability principles in this process aims to achieve a number of social and environmental objectives. Based on that, the concept of sustainable public procurement has emerged, capturing the need to address sustainability issues through procurement. Sustainable public procurement builds on three decades of thinking on sustainable development, following the seminal World Commission on Environment and Development (the Brundtland Report) of 1987 and the United Nations Conference on Environment and Development in 1992 (Earth Summit).<sup>17</sup>

At the beginning of 2015, the UN Sustainable Development Summit ended with the adoption of the 2030 Agenda for Sustainable Development, which encompasses 17 Sustainable Development Goals (SDGs) at its base. This Agenda is the most important international strategy on sustainability and was subscribed to by 193 UN member countries during COP21 (Paris Agreement on Climate Change in December 2015).<sup>18</sup> GPP is enshrined in SDG 12 "*Ensure sustainable consumption and production patterns*" in a specific target: No 12.7 focuses on promoting public procurement practice that are sustainable, in accordance with national policies and priorities; and No 12.7.1 reaffirms the importance of implementation of sustainable public procurement policies and action plans by the countries. Hence, incorporating sustainability considerations into public procurement will assist governments in reducing CO<sub>2</sub> emissions, protecting water and energy resources, alleviating poverty, equity and cohesion problems, and finally gaining technological innovations.<sup>19</sup>

Given that the EU Green Deal is an integral part of the 'Europe 2020' strategy to implement the United Nation's 2030 Agenda and the sustainable development goals, achieving Sustainable Development constitutes an EU priority, which does not only legitimize but also necessitates further EU action on this matter. Based on that, it is of paramount importance to discuss the ways procurement law and policy frameworks as well as actual

<sup>17</sup> Fisher, EPPPL 2017, p. 2.

<sup>18</sup> Litardi/Fiorani,/Alimonti in: Brunelli/Di Carlo (eds), p. 177.

<sup>19</sup> Nikolaou/ Loizou, Journal of Integrative Environmental Sciences 2015, p. 50.



government purchasing practices will be brought into alignment with the SDGs and the other EU Sustainable Development commitments.

## II. Circular Economy Package

In 2015 the EU decided to transform its linear economy (take-make-dispose) into a Circular Economy (CE)<sup>20</sup> aspiring to decouple economic growth and well-being from ever-increasing waste generation, strengthen environmentally sound waste management, enhance eco-design, achieve higher recycling rates and reduction of waste, stimulate competitiveness and resource-efficiency, as well as to create new jobs and opportunities for new businesses, innovations and investments by keeping the added value in products for as long as possible in the market. The CE policy pointed out in a holistic way the interrelation among resource, substance, product and waste, highlighting the interface among the waste, product and chemical legislations and taking into consideration that waste –other than pollution– can be conceived and used as the virgin material in the production process. In this regard, the life-cycling thinking incorporated in the CE concept stresses the need to take into account the environmental impacts of the entire material lifecycle in an integrated way.<sup>21</sup>

The fact that the CE put the spotlight on the life-cycle perspective constitutes a clear sign towards the building of interlinkages among the legally binding product standards, resource and waste law and policy, and the legislation on chemicals, given that the decisions made in the period when a product is conceptualized and manufactured by industry (design stage) are extremely important for all the stages of its lifetime. In this vein, the CE Package of 2015 recognized public procurement as a key driver in the transition towards the circular economy, and it sets out several actions which the European Commission will take to facilitate the integration of circular economy principles in GPP.<sup>22</sup> These include emphasizing circular economy aspects in new or updated sets of EU GPP criteria, supporting

20 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Closing the loop – An EU action plan for the Circular Economy, Brussels, 2.12.2015, COM(2015) 614 final.

21 Hughes, *Procedia CIRP*, p. 14-15.

22 European Parliament, *Green Public Procurement and the EU Action Plan for the Circular Economy*, Study for the ENVI Committee, 2017, pp. 14-19. Available at: [https://www.euro-parl.europa.eu/RegData/etudes/STUD/2017/602065/IPOL\\_STU\(2017\)602065\\_EN.pdf](https://www.euro-parl.europa.eu/RegData/etudes/STUD/2017/602065/IPOL_STU(2017)602065_EN.pdf).

a higher uptake of GPP among European public bodies, and leading by example in its own procurement and in EU funding.<sup>23</sup>

Based on this policy, the concept of “circular public procurement” has emerged. According to the definition given by the European Commission,<sup>24</sup> it refers to an approach to greening procurement by recognizing the role that public authorities can play in supporting the transition towards a circular economy. In other words, circular procurement can be defined as the process by which public authorities purchase works, goods or services that seek to contribute to close energy and material loops with supply chains, whilst minimizing, and in the best case avoiding, negative environmental impacts and waste creation across their whole life-cycle.

Given that the transition towards a circular economy at EU level remains one of the first priorities under the EU Green Deal, a new CE Action Plan was published in March 2020 stressing the need to tackle the environmental and climate impact of our products and economic activities.<sup>25</sup> The new CE Action Plan put the spotlight on the creation of an overarching sustainable product policy framework as a way to ensure that products which are either short-lived, toxic, unrepairable, unrecyclable or simply untraceable, are phased out from the EU market. Hence, the focus is on the sectors that use most resources and where the potential for circularity is high, such as: electronics and ICT, batteries and vehicles, packaging, plastics, textiles, construction and buildings, food, water and nutrients. Additionally, there is a proposal to develop waste prevention targets, expand the use of Extended Producer Responsibility tools and restrict waste exports outside the EU. In this context, the crucial role of public procurement in treating waste as a resource with energy and materials embedded in products, which must be kept in the economic process for as long as possible and at the higher level of quality,<sup>26</sup> was reiterated in the new CE Action Plan, as will be analyzed under section D.

23 *European Commission*, Public Procurement for a Circular Economy – Good practice and guidance, 2017, p. 5. Available at: [https://ec.europa.eu/environment/gpp/pdf/Public\\_procurement\\_circular\\_economy\\_brochure.pdf](https://ec.europa.eu/environment/gpp/pdf/Public_procurement_circular_economy_brochure.pdf).

24 *Ibid.*, p. 5.

25 Available at: [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).

26 ZeroWaste, Europe, Redesigning Producer Responsibility – A new EPR is needed for a circular economy, 2015, p. 5.

### III. EU Climate Objectives

The evolution of climate change and low carbon agendas<sup>27</sup> over the last decades have gradually been raising expectation from public procurement that it should act as a practical and policy instrument for emissions' reductions. Thus, in December 2015 the Paris Agreement was adopted with the long-term goal of keeping the global temperature increase by the end of the century to well below 2°C (and pursue efforts towards 1.5°C) compared to pre-industrial levels.<sup>28</sup> More specifically, the agreement stressed the urgent need for signatory parties to "undertake rapid reductions thereafter in accordance with the best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century"<sup>29</sup> The main instrument of national voluntary pledges is the National Determined Contributions (NDC) which is put forward by each signatory party and reviewed every five years.

The EU (and its MS) has been traditionally among the leaders at international level for setting ambitious policies to tackle climate change. The EU is a signatory of all main international climate agreements and has consistently and actively contributed to the processes relating to the negotiation, adoption and entering into force of climate instruments.<sup>30</sup> In this vein, the EU has adopted a number of climate policy and legal instruments since 1992.<sup>31</sup> Focusing on the most recent developments, in 2018 the EU adopted its new and very ambitious 2030 framework for Climate and Energy relating to the implementation of the Paris Agreement. The agreed headline targets provide for at least 40% cuts in GHG emissions (from 1990 levels), 32% share for renewable energy and 32.5% improvement in energy efficiency. In this context, the "Transition to a Low-carbon Economy" Package and the "Clean Energy for all" Package were adopted.

The relevance of public procurement as regards the achievement of the climate-related commitments has been explicitly recognized in the new

27 In 1992, the United Nations Framework Convention on Climate Change (UNFCCC) was adopted aiming at the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system" (Article. 2). In 1997, the Kyoto Protocol set binding quantified emission limitation or reduction objectives for developed countries, including the EU MS, without, however, leading to their practical implementation.

28 UNFCCC, Paris Agreement (Paris, 12 December 2015), Article 2.1.

29 Paris Agreement, Article 4.1.

30 Martínez Romera/Caranta, EPPPL 2017, p. 283.

31 Bogojević, in Gray/Tarasofsky/Carlarne (eds), pp. 671-688.

Public Procurement Directive, since the integration of energy efficiency considerations in procurement, public administrations across EU MS could save up to 20% of their energy use by 2020, with corresponding carbon reductions.<sup>32</sup> At global level, Sustainable Public Procurement (SPP) has been introduced by at least 56 national governments and many more local governments, who have long understood how public procurement can improve sustainability, including through lowering greenhouse gas emissions.<sup>33</sup>

In the wake of the EU Climate Law under the EU Green Deal<sup>34</sup> and the urgency of climate challenges, the rationale for climate-oriented public purchasing in the EU is valid more than ever. Hence, GPP offers authorities the option to make purchase decisions based on implicit carbon prices that are higher than the general carbon price, as well as taking into account more environmental impacts than solely carbon emissions.<sup>35</sup> This implies that when buying green products and services, authorities can substantially reduce their own environmental impact<sup>36</sup> by using their discretion towards the actual integration of more stringent climate consideration in their public procurement decisions. Given that GPP has been (more actively) on the EU political agenda for more than a decade now, MS should start designing and implementing more ambitious low-carbon strategies where public procurement can play a more prominent role in ensuring compliance with the relevant environmental objectives.

### C. Unpacking the GPP requirements in the EU Public Procurement regime

In the wake of the well-known CJEU case law in this field,<sup>37</sup> the 2014 EU Public Procurement Reform led to the adoption of Article 18(2), which

32 *Correia/Howard/Hawkins/Pye/Lamming*, *Journal of Purchasing and Supply Management* 2013, p. 58.

33 *Baron (OECD)*, *The Role of Public Procurement in Low-Carbon Innovation*, Background Paper for the 33<sup>rd</sup> Round Table on Sustainable Development, 12-13 April 2016, OECD Headquarters, Paris, available at: <https://www.oecd.org/sdroundtable/papersandpublications/The%20Role%20of%20Public%20Procurement%20in%20Low-carbon%20Innovation.pdf>.

34 Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0080&from=EN>.

35 *Martinez Romera/Caranta*, *EPPPL* 2017, p. 282.

36 *Chiappinelli/Zipperer*, *DIW Economic Bulletin* 2017, p. 524.

37 *C-513/99 Concordia Bus Finland*, *C-448/01 EVN AG & Wienstrom* and *C-368/10 Dutch Coffee or Max Havelaar*.

explicitly recognizes that “MS shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with 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 listed in Annex X”. Hence, the new Public Procurement Directive facilitates the integration of environmental considerations at various stages of the public procurement procedure, including allowing for environmental requirements, the use of criteria underlying environmental labels, and the option to take into account environmental factors in the production process and life-cycle analysis.<sup>38</sup>

More specifically, as regards the definition of the subject matter of the contract, the contracting authorities as buyers have a wide discretion and the Directive does not prevent them from implementing environmental considerations when deciding on a purchase.<sup>39</sup> However, a limit on their discretionary power can be found in Article 18(1), which provides that “*the design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition*”.

Furthermore, the technical specifications, which define the characteristics required of a work, service or supply according to Article 42 of the Directive, may be formulated in terms of performance or functional requirements including environmental aspects.<sup>40</sup> Indicatively, they may cover environmental and climate performance levels, production processes and methods at any stage of the life-cycle of works and packaging.<sup>41</sup> In the same vein, Article 43 spells out the conditions under which the contracting authorities may purchase works, supplies or services with specific environmental, social or other characteristics requiring – in the technical specifications, the award criteria or the contract performance conditions – a specific label as means of proof that the works, services or supplies at stake correspond to the required characteristics. Here, the label requirements must concern

38 European Commission, Public Procurement Reform Factsheet No. 7: Green Public Procurement, 2014.

39 SIGMA, Incorporating Environmental Considerations into Public Procurement, Brief 13, 2016, p. 5. Available at: <http://www.sigmapweb.org/publications/Public-Procurement-Policy-Brief-13-200117.pdf>.

40 Weatherill in Bogojevic/Groussot/Hettne, p. 41-42.

41 van den Abeele, Integrating social and environmental dimensions in public procurement: one small step for the internal market, one giant leap for the EU?, Working Paper 2014.08, Brussels, 2014, p. 12. Available at: <https://www.etui.org/publications/working-papers/integrating-social-and-environmental-dimensions-in-public-procurement-one-small-step-for-the-internal-market-one-giant-leap-for-the-eu>.

only criteria which are linked to the subject-matter of the contract, and are based on non-discriminatory criteria which are objectively verifiable by the contracting authorities. Additionally, the labels must be established in an open and transparent procedure, accessible to all interested parties and set by a third party over which the economic operator cannot exercise a decisive influence.

With respect to the selection and award of contracts phase, there is scope for introducing environmental considerations. Namely, according to the Article 56(2), contracting authorities may circumvent the general rule of awarding the contract based on the most economically advantageous tender (Article 67) “*where they have established that the tender does not comply with the applicable obligations referred to in Article 18(2)*.” The use of this ambitious but optional provision to reject a tenderer who fails to take into account environmental (and/or social) impacts of their tender, lies exclusively in the power of the contracting authorities and the MS. In addition to this, as regards environmental considerations, Article 57(4) of the Directive sets out non-binding grounds on which economic operators may be excluded from participation in a procurement procedure. It is again left to the contracting authorities to bring these voluntary exclusions for violation of environmental obligations to life. In the same vein, but this time based on a compulsory provision enshrined in Article 69(3), “*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)*”.

Moreover, as shown by *Concordia* and a number of subsequent cases, award criteria provide the most relevant opportunity for green public procurement.<sup>42</sup> Article 67 is therefore of paramount importance, since it gives MS the discretionary power to provide that contracting authorities may not use price only or cost only as the sole award criterion. This allows the contracting authorities to award a contract in line with the optimum price-quality ratio assessed on the basis of criteria which may include environmental considerations as well.<sup>43</sup> However, again this discretion is not unrestricted. According to Article 67(3)-(5) award criteria must: have a link to the subject-matter of the contract; be specifically and objectively quantifiable; have been advertised/notified previously; respect EU law and comply with the fundamental principles of equal treatment, non-discrimination and transparency.

42 *Martinez Romera/Caranta*, EPPPL 2017, p. 291.

43 *SIGMA*, Incorporating Environmental Considerations into Public Procurement, Brief 13, 2016, p. 9. Available at: <http://www.sigmaxweb.org/publications/Public-Procurement-Policy-Brief-13-200117.pdf>.

An additional innovative element of great importance relating to the “greening” of the public procurement process is the codification of the life-cycle costing in Articles 67(2) and 68. In light of this concept, *“the most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing”* which *“covers parts or all of the costs over the life cycle of a product, service or works”*. This includes *“costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs”*.

Finally, at the contract performance stage, the Directive in Article 70 authorizes the contracting authorities to set out specific conditions relating to the performance of a contract, provided that they are linked to the subject matter of the contract, are not directly or indirectly discriminatory and are indicated in the call for competition or in the procurement documents. As explicitly indicated in this provision, contract performance conditions *“may include economic, innovation-related, environmental, social or employment-related considerations”*, creating a potentially dynamic field to be enacted by the contracting authorities.

As highlighted in legal doctrine, from “secondary considerations” in the 2004 Directives, the need to include social and environmental considerations in public tendering procedures has resulted in coining new terms, much more powerful and all-encompassing, such as “horizontal policies”, “sustainable procurement” or even “strategic procurement”.<sup>44</sup> Following this reform, it has been left up to the MS to determine how and to what extent they may seek to achieve environmental goals through the public procurement requirements. Nevertheless, the practical enforcement of these provisions remains largely untapped so far.

#### **D. Strengthening the links between GPP, Circular Economy and climate policies**

As briefly mentioned beforehand, in the new CE Action Plan adopted in March 2020 all action areas of the circular economy (production, consumption, end-life management) are addressed through the lens of climate neutrality, with a focus on key product value chains (electronics and ICT, batte-

<sup>44</sup> Dragos/Neamtu, EPPPL 2013, pp. 301-302.

ries and vehicles, packaging, plastics, textiles, construction and buildings, food, water and nutrients). More specifically, emphasis is placed on measuring circularity contribution to climate mitigation, strengthening the role of circularity in future revisions of the National Energy and Climate Plans and promoting the certification of carbon removals. In addition, with respect to the business and finance perspectives, the Action Plan laid the basis for integrating CE in EU Taxonomy Regulation, supporting EU Ecolabel criteria for financial products as well as promoting Circular Economy solutions in State Aid, business strategies, financial instruments and reporting.

Concerning GPP particularly, in a dedicated section of the CE Action Plan (“2.2 Empowering consumers and public buyers”), it is laid down that the Commission will propose minimum mandatory GPP criteria and targets in sectoral legislation and phase in compulsory reporting to monitor the uptake of GPP without creating unjustified administrative burden for public buyers. Furthermore, the Commission will continue to support capacity building with guidance, training and dissemination of good practices and encouraging public buyers to take part in a “Public Buyers for Climate and Environment” initiative, which will facilitate exchanges among buyers committed to GPP implementation.

In this context, the new Action Plan introduces legislative and non-legislative measures targeting areas where action at the EU level brings real added value. In a nutshell, the measures that will be introduced under the new action plan aim to make sustainable products the norm in the EU, empower consumers and public buyers, ensure less waste, make circularity work for people, regions and cities and lead global efforts on circular economy. In addition to this, GPP elements are taken into consideration in sectors beyond the CE Action Plan, such as the EU energy efficiency directive and the Farm to Fork Strategy.

### *I. Circular Economy Action Plan: recent developments*

A new vision for products in the EU by adopting a Sustainable Product Policy Framework is placed at the epicenter of the new CE Action Plan. Given that many products break down too quickly, cannot be easily reused, repaired or recycled, and many are made for single use only, the development of a new overarching framework addressing all products placed on the EU market, supporting more sustainable patterns of consumption and cutting waste generation, has emerged as a top priority. This framework aims to tackle both the fact that production processes in Europe are not resource efficient and lead to air, water and soil pollution, and that consumers do



not repair products or are overloaded with eco-labels, some of which might constitute misleading green claims.

In this context, the European Commission has decided to adopt a legislative proposal to ensure high environmental performance of all products and, to the extent possible and relevant, services on the EU market, by setting out sustainability principles and specific requirements linked to environmental and, where appropriate, social aspects. Within this Sustainable Products Policy Initiative the revision of the Eco-design Directive beyond energy related products is prescribed, while the presence of harmful chemicals in products such as electronics and ICT equipment, textiles, furniture, steel, cement and chemical is addressed. This initiative aims to improve durability, reusability, upgradability, reparability and energy-efficiency of products, restrict single-use and counter premature obsolescence, incentivise product-as-a-service and promote digitalisation, including digital product passports.

The Sustainable Products Policy Initiative will be developed in close coordination with other initiatives announced in the CE Action Plan, in particular the initiative on empowering consumers for the green transition and the initiative on the substantiation of environmental claims using product and organisational environmental footprint methods. Namely, concerning the former initiative, it aspires to address the lack of specific Union rules on key sustainability information for consumers by revising consumer law in order to ensure that consumers receive trustworthy and relevant information on products at the point of sale, including on their lifespan and the availability of repair services, spare parts and repair manuals. Beyond the establishment of the “right to repair”, emphasis is placed on further strengthening consumer protection against greenwashing and premature obsolescence through a legislative proposal to ensure companies substantiate their environmental claims using Product and Organisation Environmental Footprint methods.

The first initiative delivered under the new CE Action Plan is the Commission’s legislative proposal for a new Batteries Regulation published on 10 December 2020.<sup>45</sup> Given that every year, approximately 800.000 tons of automotive batteries, 190.000 tons of industrial batteries, and 160.000 tons of consumer batteries enter the European Union, and not all of these are properly collected and recycled at the end of their life, thus increasing the risk of releasing hazardous substances and leading to a waste of resour-

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45 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 2019/2020, Brussels, 10.12.2020, COM(2020) 798 final.

ces, this new EU law aims to minimise batteries' harmful effects on the environment. The proposed rules cover batteries' full life cycle, from design and production to reuse and recycling. In line with other sustainability-related policies, this initiative would update EU rules to ensure that all batteries (especially those used in the growing market for electric vehicles) are produced sustainably (i.e. with low resource consumption and little waste generated), and can be easily recycled. According to Article 70 of the proposed regulation, contracting authorities of Member States shall adopt mandatory green public procurement criteria when procuring batteries or products containing batteries.

With respect to the end-of-life management, the CE Action Plan aims at preventing waste from being created in the first place and once waste has been created, requires it to be transformed into high-quality resources. To this end, the measures to be developed will focus on adopting specific waste reduction targets for more complex streams, enhancing the implementation of the requirements for EPR schemes, harmonising separate waste collection systems, reviewing the rules on waste shipments facilitating recycling or re-use within the EU,<sup>46</sup> and assessing the scope to develop further EU-wide end-of-waste criteria for certain waste streams. As regards the reduction of packaging waste in particular, the Commission will review the requirements on packaging and packaging waste in the EU, including the assessment on how to improve packaging design to promote reuse and recycling as well as increase recycled content in packaging. To this end, the introduction of minimum mandatory GPP criteria and targets for packaging is considered in order to tackle excessive packaging and reduce packaging waste.

## *II. EU energy efficiency directive*

As already highlighted, under the European Green Deal, the Commission has committed to stronger action on climate change aiming to assess how the EU's greenhouse gas emissions could responsibly be reduced by at least 50% to 55% by 2030. As the efficient use of energy is key to achieving such a target, the revision of the EU Energy Efficiency Directive aims at further stimulating EU efforts to promote energy efficiency and achieve energy savings in the fight against climate change. This Commission proposal for a Directive (recast) published on 14 July 2021 and contributes to other European Green Deal initiatives. Based on the current energy efficiency directive

46 Proposal for a Regulation of the European Parliament and of the Council on shipment of waste and amending Regulation (EU) No 1257/2013 and (EU) No 2020/1056, Brussels, 17.11.2021, COM(2021) 709 final.

(2012/27/EU, amended in 2018 by Directive 2018/2002), the public sector must lead by example by renovating 3% of buildings owned and occupied by the central governments starting from 01 January 2014 and by including energy efficiency considerations in public procurement.

Furthermore, according to the latest legislative proposal,<sup>47</sup> Article 7 strengthens the public procurement provisions by extending the obligation to take into account the energy efficiency requirements by all public administration levels, and by removing conditionalities with regard to cost-effectiveness, technical and economic feasibility. The amendments will include a provision that Member States may require that public bodies consider where appropriate circular economy aspects and green public procurement criteria in public procurement practices. In addition to this, Member States will be required to support public bodies by providing guidelines and methodologies on the assessment of lifecycle costs, and by putting in place competence support centres and encouraging the use of 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 public procurement directives).

### *III. Proposal for a legislative framework for sustainable food systems (2023) within the Farm to Fork Strategy*

The Farm to Fork Strategy published in May 2020 aims to make the EU food system fair, healthy and environmentally friendly, and has been hailed as a cornerstone of the European Green Deal. It is the first time in the history of EU food law that the Union has addressed food sustainability in a comprehensive manner, from primary production to the consumer.<sup>48</sup> The strategy includes ambitious and concrete targets on pesticides, fertilizers, organic farming and antimicrobial resistance to be achieved by 2030. In this context, the proposal for a legislative framework for sustainable food systems (FSFS) constitutes one of the flagship initiatives of the Farm to Fork Strategy. Namely, its goal is to accelerate and make the transition to sustainable food systems easier. It will also have as its core objective the promotion of policy coherence at EU level and national level, mainstream sustainability in all food-related policies and advocacy of strong and resilient food systems.

47 Proposal for a Directive of the European Parliament and of the Council on energy efficiency, Brussels, 14.7.2021, COM(2021) 558 final.

48 Schebesta/Candel, Nature Food, 2020, p. 586. Available at: Game-changing potential of the EU's Farm to Fork Strategy (nature.com).

The preparatory work, including the related impact assessment, that will precede the adoption of the legislative proposal by the end of 2023, will also cover the mandatory sustainability criteria for public procurement aiming to improve the availability and price of sustainable food options and to promote healthy and sustainable diets in institutional catering. More specifically, the Joint Research Centre's forthcoming work focuses on defining minimum mandatory EU GPP criteria together with nutritional/health and social criteria for sustainable food procurement in schools, hospitals and public institutions. In addition to this, the Commission will also review the EU school scheme to focus it on healthy and sustainable food and strengthen the educational messages on the importance of healthy nutrition, sustainable food production and reducing food waste.

## **E. Concluding remarks**

In conclusion, the analysis in the previous sections has attempted to map out how the latest policy and legislative developments in the field of environmental protection constitute the driving forces in strengthening the role of public procurement as a regulatory compliance mechanism exceeding the simple act of buying a good or service. Given the predominant role of public authorities in mass consumption, it is apparent that they can use their power to structure the selection-process for goods, services and works in a way that would reduce the environmental impact and promote main environmental policy goals. This has been highlighted by the EU Green Deal, which aims at strengthening the role of the GPP as an environmental policy instrument, despite its limited uptake so far.

Even though the current EU Public Procurement regime opened the door for a potential transition towards a more operational integration of environmental considerations into the public purchasing, the existing legal uncertainties undermine EU legislator's good intention. Namely, the voluntary GPP uptake coupled with the wide scope of contracting authorities' discretion in pursuing environmental goals hampers any dynamic features aiming to increase implementation and enforcement. In addition to this, due to the legally ambiguous formulation of Article 18(2), the obligation of MS and contracting authorities to take appropriate measures to ensure that the economic operators comply with the enforceable requirements in the fields of environmental, social and labour law may turn into an idle declaratory policy statement.

In this context, the EU Green Deal focuses on how to ensure that social and environmental compliance constraints that are not inherent to the act

of buying are adequately deployed when shaping the buying decision. Being an overarching policy framework, which encompasses other policy areas such Sustainable Development, Circular Economy and Climate change, it calls for determined efforts for giving effect to the GPP in order to bring the realization of “smart, sustainable and inclusive growth” closer. Addressing this challenge and examining ways to empower the role of public procurement as a mechanism for supporting the EU environmental policy commitments, the new CE Action Plan, which targets how products are designed, promotes circular economy processes, encourages sustainable consumption, and aims to ensure that waste is prevented and the resources used are kept in the EU economy for as long as possible, emerges as the most dynamic policy framework in achieving this objective.

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