

The Coherence of Public Procurement Legislation in the European Union

A study into the external coherence of the
Public Procurement Directives and other
legislative instruments regulating public
procurement

prof. dr. Willem A. Janssen
July 2025



Utrecht
University



university of
 groningen

EUROPEAN COMMISSION

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs
Directorate D — Competitiveness Coordination
Unit D.2 — Public Procurement

Contact: Henning Ehrenstein

E-mail: Henning.EHRENSTEIN@ec.europa.eu

*European Commission
B-1049 Brussels*

THE COHERENCE OF PUBLIC PROCUREMENT LEGISLATION IN THE EUROPEAN UNION

A study into the external coherence between the Public
Procurement Directives and other legislative instruments
regulating public procurement

This Study is commissioned by the European Commission and is conducted in support of the evaluation of the Public Procurement Directives (2014/24/EU, 2014/23/EU and 2014/25/EU).

Author: prof. dr. W.A. (Willem) Janssen

Suggested reference: W.A. Janssen, *The Coherence of Public Procurement Legislation in the European Union*, Research Report for the EU Commission, July 2025.

Manuscript completed in July 2025

1st edition

This document has been prepared for the European Commission however it reflects the views only of the authors, and the European Commission is not liable for any consequence stemming from the reuse of this publication.

Luxembourg: Publications Office of the European Union, 2025

© European Union, 2025



The reuse policy of European Commission documents is implemented by Commission Decision 2011/833/EU of 12 December 2011 on the reuse of Commission documents (OJ L 330, 14.12.2011, p. 39). Unless otherwise noted, the reuse of this document is authorised under a Creative Commons Attribution 4.0 International (CC BY 4.0) licence (<https://creativecommons.org/licenses/by/4.0/>). This means that reuse is allowed provided appropriate credit is given and any changes are indicated.

For any use or reproduction of elements that are not owned by the European Union, permission may need to be sought directly from the respective rightholders.

PDF Web - ISBN 978-92-68-31531-6 - doi:10.2873/7419429 - ET-01-25-153-EN-N

Table of contents

List of abbreviations	7
Executive summary.....	8
Public procurement is not just regulated by the Public Procurement Directives anymore.....	8
Public procurement legislation has become fragmented and should be considered as a whole in future evaluations and reforms	9
Legal incoherencies in need of attention	10
Summary of conclusions and recommendations	12
1. Introduction	13
1.1 Public procurement in the European Union	13
1.2 Evaluation of the Public Procurement Directives	14
1.3 Regulating public procurement outside the Public Procurement Directives.....	15
<i>1.3.1 First development: from regulating ‘how to buy’ towards mandating ‘what to buy’</i>	<i>15</i>
<i>1.3.2 Second development: public procurement as an international trade instrument</i>	<i>17</i>
2. Methodology and Scope	18
2.1 Methodology: coherency and hypothesis	18
2.2 Scope of this Study	19
3. Micro Analysis - Regulating public procurement in the Public Procurement Directives	22
3.1 Introduction.....	22
3.2 Relevant provisions that interact with the other legislative instruments	23
<i>3.2.1 The public procurement principles - Article 18(1)</i>	<i>23</i>
<i>3.2.2 Compliance with environmental, social and labour law - Article 18(2)</i>	<i>24</i>
<i>3.2.3 Technical specifications - Article 42</i>	<i>28</i>
<i>3.2.4 Exclusion grounds - Article 57.....</i>	<i>29</i>
Mandatory and facultative exclusion grounds.....	29
Overriding reasons relating to the public interest and self-cleaning.....	30
Length of exclusion.....	31

3.2.5 Award criteria - Articles 67 and 68.....	31
3.2.6 Contract performance conditions - Article 70.....	33
4. Micro Analysis - Legislative instruments regulating Green and Social Public Procurement.....	35
4.1 Introduction.....	35
4.1.1 Categorising public procurement provisions.....	35
4.2 Environmental and Social Due Diligence Instruments and Public Procurement.....	36
4.2.1 The EU Green Deal, the Industrial Strategy and the EU Data Strategy	36
Public Procurement in the EU Green Deal, the EU Industrial Strategy and the EU Data Strategy.....	38
4.2.2 The Deforestation Regulation.....	39
Public Procurement and the Deforestation Regulation	40
Relationship with the Public Procurement Directives.....	42
4.2.3 The Corporate Sustainability Due Diligence Directive	49
Public Procurement and the Corporate Sustainability Due Diligence Directive.....	51
Relationship with the Public Procurement Directives.....	52
4.3 Circular economy and Public Procurement	55
4.3.1. The Circular Economy Action Plan.....	55
Public Procurement and Circular Economy Action Plan	56
4.3.2 The Ecodesign for Sustainable Products Regulation	57
Public Procurement and the Ecodesign For Sustainable Products Regulation	58
Relationship with the Public Procurement Directives.....	60
4.3.3 The Construction Products Regulation.....	63
Public Procurement and the Construction Products Regulation	64
Relationship with the Public Procurement Directives.....	66
4.3.4 The Batteries Regulation.....	68
Public Procurement and the Batteries Regulation	70
Relationship with the Public Procurement Directives.....	72
4.4 Energy Consumption and Public Procurement.....	73
4.4.1 The Renovation Wave.....	73
Public Procurement and the Renovation Wave	73

4.4.2 <i>The Energy Efficiency Directive</i>	74
Public Procurement and the Energy Efficiency Directive	75
Relationship with the Public Procurement Directives.....	77
4.5 Social conditions and Public Procurement	83
4.5.1 <i>The EU Pillar of Social Rights Action Plan</i>	83
Public Procurement and EU Pillar of Social Rights Action Plan.....	84
4.5.2 <i>The Minimum Wage Directive</i>	84
Public Procurement and the Minimum Wage Directive.....	86
Relationship with the Public Procurement Directives.....	87
4.6 Mobility and Energy Transition and Public Procurement.....	88
4.6.1 <i>The Clean Vehicles Directive</i>	88
Public procurement and the Clean Vehicles Directive	88
Relationship with the Public Procurement Directives.....	90
4.6.2 <i>The Heavy Duty Vehicles Regulation</i>	91
Public Procurement and the Heavy Duty Vehicles Regulation	92
Relationship with the Public Procurement Directives.....	92
4.6.3 <i>The Net-zero Industry Act</i>	94
Public Procurement and the Net-zero Industry Act.....	94
Relationship with the Public Procurement Directives.....	96
5. Micro Analysis – Legislative instruments regulating Public Procurement as a Trade Instrument	99
5.1 Introduction	99
5.2 Public procurement as a trade instrument	99
5.2.1 <i>The EU-China Strategic Outlook</i>	99
Public Procurement and the EU-China Strategic Outlook.....	100
5.2.2 <i>The International Procurement Instrument</i>	101
Public Procurement and the International Procurement Instrument....	102
Relationship with the Public Procurement Directives.....	105
6. Macro Analysis - Coherency issues affecting Public Procurement Legislation in the EU	107
Public procurement legislation has become fragmented	107
The need to consider public procurement legislation as a whole.....	107
Legal coherency issues in need of attention	108
The use of delegated law-making.....	109

The role of remedies for bidders across the EU 110

The role of monitoring public procurement legislation..... 111

7. Conclusions and recommendations to ensure current and future coherence of Public Procurement Legislation 113

8. Bibliography 119

Annex I. List of legislative instruments regulating public procurement in addition to the Public Procurement Directives..... 128

Annex II. About the author and Acknowledgements 136

List of abbreviations

CEAP	Circular Economy Action Plan
CJEU	Court of Justice of the European Union
CPR	Construction Products Regulation
CSDDD	Corporate Sustainability Due Diligence Directive
CVD	Clean Vehicles Directive
EED	Energy Efficiency Directive
EGD	EU Green Deal
ESPR	Ecodesign for Sustainable Products Regulation
EU	European Union
EUDR	Deforestation Regulation
FSR	Foreign Subsidies Regulation
GHG	Greenhouse gas
GPA	Government Procurement Agreement
HDVs	Heavy-duty vehicles
HDVR	Heavy Duty Vehicles Regulation
HREDD	Human Rights Environmental Due Diligence
ILO	International Labour Organisation
IPI	International Procurement Instrument
LtSM	Link to the subject-matter
MWD	Minimum Wage Directive
NZIA	Net-zero Industry Act
OECD	Organisation for Economic Co-operation and Development
TED	Tenders Electronic Daily
TEU	Treaty on European Union
TFEU	Treaty of the Functioning of the European Union
UNGPs	UN Guiding Principles on Business and Human Rights

Executive summary

Public procurement in the European Union accounts for a staggering 14-19% of the European GDP, making it a vital part of the European economy. Traditionally, these purchasing activities of public authorities are regulated by the Public Procurement Directives, notably 2014/24/EU, 2014/23/EU and 2014/25/EU, aiming to create an internal market by banning discrimination of bidders from other Member States.

Public procurement is not just regulated by the Public Procurement Directives anymore

However, public procurement is not just regulated by the Public Procurement Directives. Public procurement legislation encompasses 62 other EU directives and regulations (10 pending). This development merits the question how these 'new' legal instruments interact with the Public Procurement Directives. Is this a coherent legal framework taken in its totality?

This Study divides these 'new' legal instruments into two categories of EU secondary law, namely those legislative instruments related to (mandatory) green and social public procurement and those instruments related to trade and industry in a changed global landscape. The provisions of these legal instruments contain requirements for contracting authorities that procure on the market or grant the possibility for the EU Commission to adopt them though delegating or implementing acts in the future. Predominantly, these sectoral pieces of legislation include a limited number of provisions on public procurement in a broader, not public procurement-related, legislative setting that concerns the achievement of environmental, social and trade objectives.

This Study explores, analyses and proposes solutions for legal incoherencies between the Public Procurement Directives and other legislative instruments that regulate public procurement. A legal incoherency exists within the scope of this Study if a consistent application of both the provisions of the Public Procurement Directives and the other legislative instruments in light of their objectives leads to legal uncertainty or unclarity about their application and/or a violation of EU law. An incoherent legal framework for public procurement is undesirable, because it could lead to unwanted discussions about the application of EU law in practice, to legal uncertainty or even to violations of EU law, in practice or before national review bodies. Ultimately, it can affect the effectiveness of public procurement in the Member States.

This Study is conducted at the request of the EU Commission in light of the evaluation process of Directives 2014/24/EU, 2014/23/EU and 2014/25/EU (Public Procurement Directives), and analyses a selection of the introduced other legal instruments. The Clean Industrial Deal notes the need to 'clarify the

interactions between public procurement provisions across different pieces of legislation, to simplify application by contracting authorities’.

Public procurement legislation has become fragmented and should be considered as a whole in future evaluations and reforms

This Study concludes that the framework for public procurement has become fragmented. It considers that a significant amount of different rules currently regulate public procurement in the EU, and that a variety of legal incoherencies currently exist. This type of fragmentation can result in ineffective rules that are unclear or even in conflict with each other.

The individual provisions in the other legislative instruments regulate public procurement in addition to the Public Procurement Directives, but from their own green, social or trade regulatory perspective. Accordingly, these legal instruments instrumentalize public procurement in a specific manner, thereby creating a mix of objectives applicable to public procurement, including strategic autonomy, market integration, circular economy and energy efficiency. A picture emerges in which the coherence of public procurement regulation as a whole in the European Union has not been a central consideration in this development. This is exemplified by the differences in chosen legal basis for these instruments, but also due to the variety of approaches taken to regulating public procurement. In the different legislative instruments discussed in this Study and further exemplified by those instruments noted in Annex I, targets, exclusion grounds, award criteria, contract performance conditions or technical specifications, and combinations thereof, are proposed. Furthermore, it is sometimes unclear why a specific regulatory approach is chosen, also in light of the different legal basis including Article 114 TFEU (internal market) or Article 192 (environment) and the subsequent objectives for the legislative instrument.

Any coordinated effort to overcome current and future incoherencies requires a coordinated approach between all legislative instruments involved. Public procurement legislation must be assessed as a whole, instead of considering each individual legal instrument separately. To implement the changes proposed in this Study, an omnibus approach in which all of them can be changed at once to ensure legal coherency should be considered. Alternatively, these changes to these other legislative instruments could be included in the new proposals for Public Procurement Directives.

Legal incoherencies in need of attention

This Study identifies legal incoherencies from a micro and macro perspective, when assessing the Public Procurement Directives and the other legal instruments regulating public procurement.

More fundamentally, the regulatory nature of the Public Procurement Directives and the nature of the other legislative instruments should be clarified, when it comes to 'how' they regulate public procurement. The suggested approach could be that the Public Procurement Directives remain procedural in nature based ultimately on the public procurement principles ('how to buy'), and that the other legislative instruments merely regulate public procurement from a substantive perspective, thereby depicting, for instance, the required levels of sustainability from a minimum harmonisation perspective ('what to buy'). Alternatively, the Public Procurement Directives could still also contain exclusion grounds on 'whom not to buy from', whilst mainly containing procedural requirements on 'how to buy'.

Legal coherency can also be improved by taking away inconsistent terminology between the other legislative acts and the Public Procurement Directives, such as inconsistent wording of the new exclusion grounds in the Ecodesign Regulation and the Deforestation Regulation, or inconsistent definitions, such as in the Net-zero Industry Act. Also, the inclusion of cross-references between the legislative acts could improve compliance in practice. Furthermore, the scope of the other legislative instruments is incoherent in some cases. For instance, the Deforestation Regulation and the Energy Efficiency Directive also apply to procurement below the financial thresholds of the Public Procurement Directives. It would be more coherent to streamline the scope of public procurement legislation to above these thresholds. The effort to achieve further coherency should also consider the effects of multiple legislative instruments' applicability to the same public procurement procedure in the future.

The Corporate Sustainability Due Diligence Directive, which contains the possibility for contracting authorities to include compliance with this directive or its voluntary implementation in either award criteria or contract performance conditions in Article 31, is in conflict with the proportionality requirements in the Public Procurement Directives. As a means to further allow green and social public procurement, the link to the subject-matter requirement could be removed from the Public Procurement Directives, an explicit carve-out provision for the Corporate Sustainability Due Diligence Directive could be introduced in these Directives, or a provision in these Directives could be introduced to accommodate such corporate policies in general.

The new exclusion grounds in the other legislative instruments, such as those in the Deforestation Regulation and the Ecodesign Regulation, can co-exist with the exclusion grounds in Article 57 Directive 2014/24/EU and its equivalents in Directives 2014/23/EU and 2014/25/EU, from a strict legal coherency

perspective (punitive vs. preventative). However, in addition to more consistent terminology in terms of the wording of the exclusion grounds, it should be clarified if these new exclusion ground are also a mandatory or facultative exclusion ground, and if a subsequent application of Article 57(4)(a) Directive 2014/24/EU can indeed extend the exclusion following the imposition of a sanction. Furthermore, enforcement is becoming more diverse as ‘competent authorities’ are imposing exclusion as a sanction in addition to contracting authorities using them as a preventative measure. This requires coordination and the publication of sanctions.

There are legal norms lacking certainty. This concerns at least 1) the legal requirements with an absent link with public procurement practice, such as in the requirement to choose from a specified set of criteria in the Net-zero Industry Act or the Heavy Duty Vehicles Regulation, 2) the need to further specify who needs to achieve procurement targets, such as in relation to the Clean Vehicles Directive or 3) the need for further clarification, such as the energy efficiency first principle in the Energy Efficiency Directive, and 4) the unclear wording of ‘appropriate measures’ in Article 18(2) Directive 2014/24/EU and its equivalents in Directive 2014/23/EU, Directive 2014/25/EU and the Minimum Wage Directive. These discrepancies generate legal uncertainty and hamper practical implementation in the Member States.

Various legislative instruments contain law-making alternatives for the EU Commission, such as delegated acts and implementing acts, meaning that a major part of the development of the regulatory framework is still unclear. It is recommended to ensure that a broad coherency perspective is taken in their future adoption by ensuring that these new rules comply with the provisions of the Public Procurement Directives. There is, however, a variety of pre-conditions in each of the given competences, ranging from extensive lists of conditions to none at all. Reference can, for instance, be made to the Batteries Regulation, the Ecodesign Regulation, and the Construction Products Regulation. It is recommended to streamline these conditions, whilst also taking into account that a tailor-made approach might be necessary given the regulatory context.

To ensure an effective functioning of public procurement legislation as a whole, it is recommended to clarify that the Remedies Directive also applies in relation to the provisions in the other legislative instruments. This ensures consistency of legal review in public procurement procedures in the Member States. Given that the public procurement framework is fragmented, it is important to also consider the need to monitor these provisions coherently, and to ensure that monitoring follows a consistent method to ensure the cohesiveness of data that allows for an evaluation in due course. At present, legal instruments are monitored in different ways or not at all.

In addition to legislative solutions, it is important to stress the need for awareness about the changed regulatory landscape on the level of contracting authorities and economic operators in practice. Furthermore, it appears that the increased number of rules will require more from them in terms of professional and legally

compliant public procurement than before. This means that the quality of the procurement profession is of vital importance to ensure compliance with the law.

This Study has not conducted empirical research, which could be considered in future studies on the coherence of public procurement legislation, particularly once all the legislative instruments are implemented and used in practice. Further research could also encompass the other legislative instruments in Annex I that were not included in the scope of this Study.

Summary of conclusions and recommendations

The key recommendations of this Study to ensure current and future coherency of EU public procurement regulation are:

1. Evaluate and reform public procurement legislation in the European Union as a whole instead of each legal instrument in isolation;
2. Ensure awareness in practice and professional procurement to effectively implement these fragmented rules;
3. Clearly depict the nature of the Public Procurement Directives and their relationship with the other legislative instruments;
4. Use consistent terminology across the legislative instruments and in relation to the Public Procurement Directives;
5. Streamline the scope of the Public Procurement Directives and the other legislative instruments;
6. Include cross-references between the Public Procurement Directives and the other legislative instruments;
7. Clarify Article 18(2) Directive 2014/24/EU and its equivalents in Directives 2014/23/EU and 2014/25/EU, and their relationship with the other legislative instruments;
8. Solve the incoherence between Article 31 Corporate Sustainability Due Diligence Directive and the link to the subject-matter of the contract;
9. Streamline the system of exclusion grounds in Article 57 Directive 2014/24/EU and its equivalents in Directives 2014/23/EU and 2014/25/EU with the new exclusion grounds;
10. Clarify the scope of the Remedies Directive to include the provisions on public procurement in the other legislative instruments;
11. Ensure greater legal certainty when it comes to a number of individual provisions in the other legislative acts and their impact on public procurement;
12. Streamline the pre-conditions for delegated and implementing acts, and consider them as a whole instead of separately;
13. Consider the need to monitor and report on obligations and to provide more consistency amongst them;
14. Implement the above changes in an omnibus approach or in the future Proposals for new Public Procurement Directives.

1. Introduction

1.1 Public procurement in the European Union

Public procurement in the European Union (EU) accounts for a staggering 14-19% of the European gross domestic product (GDP), thereby representing a major part of the European economy.¹ Since the 1970s, these purchasing activities of public authorities in their role as contracting authorities have been regulated by Directives, aiming to create an internal market. Accordingly, these rules are aimed at ensuring that potentially discriminatory behaviour by public authorities, attempting to favour their own local, regional and national economic operators, is prevented and penalised.

The most recent batch of Public Procurement Directives, including 2014/24/EU, 2014/25/EU and 2014/23/EU with procedural rules for respectively works, goods and services, utilities and concessions (Public Procurement Directives), still aim to achieve this internal market objective through a detailed set of rules that apply to more than 250.000 authorities across the EU.² The directives, which are based on the principles of non-discrimination, equality, transparency and proportionality, specify the legal boundaries of notices, technical specifications, selection criteria, award criteria, exclusion grounds, abnormally low tenders, labels, procedures, contract performance clauses, and much more.³ This body of law is complemented with a Directive on Remedies⁴ and a Directive on Defence and Security Procurement.⁵

¹ European Commission, Directorate General for the Environment and ICLEI – Local Governments for Sustainability, *Buying Green! A Handbook on Green Public Procurement: 3rd Edition*. (Publications Office 2016) 4 <<https://data.europa.eu/doi/10.2779/837689>> accessed 13 April 2025.

² Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC. The coherence of these three directives is the subject of another Study in the reform process: Roberto Caranta, *The Coherence of the Public Procurement Directives*, Research Report for the Commission, June 2025.

³ Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK* (3rd ed, Sweet & Maxwell 2014) 22-24.

⁴ Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

⁵ Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC.

1.2 Evaluation of the Public Procurement Directives

At present, the Public Procurement Directives are being evaluated, as announced by the second Von Der Leyen Commission in the Political Guidelines before the summer of 2024.⁶ This Study on the Coherence of EU public procurement legislation aims to inform the evaluation process of the Public Procurement Directives. The relevance of this Study is underlined due to the conclusion that public procurement is not solely regulated by the Public Procurement Directives, but in fact is regulated by many sectoral legislative instruments as well. The Clean Industrial Deal describes this relevance as the need to ‘clarify the interactions between public procurement provisions across different pieces of legislation, to simplify application by contracting authorities.’⁷

Inspired by the Letta and Draghi reports, the EU Commission has since clarified that the reform following the above noted evaluation of the Public Procurement Directives will likely address a number of issues.⁸ In addition to an increased focus on defense and the leverage function of procurement to drive innovation, a procurement preference for European products for certain strategic sectors is tabled. This position by the Commission is further echoed in its Competitive Compass, which coins the reforms of the public procurement directives as one of its flagship initiatives.⁹ The subsequent Clean Industrial Deal considers public procurement as an instrument ‘to help overcome barriers to market entry and to support sustainable and resilient industrial ecosystems.’¹⁰ Based on this Deal, there is a need to focus on ‘non-price criteria for sustainability, resilience as well as EU content requirements in line with the Union’s international legal commitments’ because this ‘can align national spending with the EU’s broader decarbonisation and competitiveness agenda, ensuring that public spending benefits, innovation, sustainability, prosperity and creation of high-quality jobs.’¹¹

⁶ Ursula von der Leyen, ‘Europe’s Choice: Political Guidelines for the next European Commission 2024-2029’ (2024) 11.

⁷ *ibid* 8.

⁸ Mario Draghi, ‘The Future of European Competitiveness’ (2024) <<https://commission.europa.eu>> accessed 27 March 2025; Enrico Letta, ‘Much More Than A Market. Speed, Security, Solidarity: Empowering the Single Market to Deliver a Sustainable Future and Prosperity for All EU Citizens’ (2024) <<https://www.consilium.europa.eu>> accessed 27 March 2025.

⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Competitiveness Compass for the EU [2025] COM(2025) 30 final, 14-15.

¹⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - The Clean Industrial Deal: A joint roadmap for competitiveness and decarbonisation [2025] COM(2025) 85 final, 7.

¹¹ *ibid*.

1.3 Regulating public procurement outside the Public Procurement Directives

Over the years, public procurement has been placed in the spotlight to achieve Europe's broader objectives, including the fight against climate change, biodiversity loss and social inequality and international trade.¹² Its strategic implementation-oriented role is persistently emphasised by European and national policy makers.¹³ In this sense, a public procurement procedure aims to fulfil the need of a contracting authority through purchased services, works and goods related to a public task in health care, infrastructure or ICT, but simultaneously contributes to a broader policy objective in light of the environment, social or trade policy. Accordingly, public procurement feeds two birds with one stone.¹⁴

Whereas this strategic role for public procurement often remained in the policy sphere, the regulatory landscape for public procurement has been broadened outside the scope of the Public Procurement Directives through various pieces of secondary legislation. At present, it means that 52 Directives and Regulations (plus 10 pending) also regulate public procurement. Consequently, two categories of secondary law can broadly be identified: those legislative instruments related to green and social public procurement, which constitutes the majority of instruments (Section 1.3.1), and those legislative instruments related to trade in a changed global landscape (Section 1.3.2).

1.3.1 First development: from regulating 'how to buy' towards mandating 'what to buy'

The first development relates to the shift by the European legislator from solely regulating 'how to buy' to also regulating 'what to buy'.¹⁵

¹² Kleoniki Pouikli, 'Towards Mandatory Green Public Procurement (GPP) Requirements under the EU Green Deal: Reconsidering the Role of Public Procurement as an Environmental Policy Tool' (2021) 21 ERA Forum 699, 702. Public procurement is also added as a dedicated chapter in recent EU Free Trade Agreements, see for example: Horng D-C, 'Reshaping the EUs FTA Policy in a Globalizing Economy: The Case of the EU-Korea FTA' (2012) 46 Journal of World Trade 301, 309.

¹³ See for example on strategic Green Public Procurement on the website of the Directorate General for Internal Market, Industry, Entrepreneurship and SMEs: <<https://single-market-economy.ec.europa.eu>> accessed 27 March 2025.

¹⁴ For more animal-friendly idioms, visit the website of PETA: <<https://www.peta.org>> accessed 27 March 2025.

¹⁵ Willem Janssen, 'Shifting Towards Mandatory Sustainability Requirements in EU Public Procurement Law: Context, Relevance and a Typology' in Willem Janssen and Roberto Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift* (1st edn, Hart Publishing 2023) 19. See also Kirsi-Maria Halonen, 'Is Public Procurement Fit for Reaching Sustainability Goals? A Law and Economics Approach to Green Public Procurement' (2021) 28 Maastricht Journal of European and Comparative Law 535; Lela

When it comes to green and social public procurement, most of the debate prior to the 2014 reforms of the Public Procurement Directives related to the question how green and social considerations could be included within the context of these directives. As one of its major results, Directive 2014/24/EU now encompasses various legal possibilities to enable green and social purchasing.¹⁶ For example, the so-called reserved procedures of Articles 20 and 77 Directive 2014/24/EU can contribute to socially and professionally integrating disabled or disadvantaged persons and pursuing health, social, and cultural services by social enterprises, respectively. Article 43 Directive 2014/24/EU enables contracting authorities to use eco-labels and Article 57 provides for exclusion grounds related to child labour or the violation of environmental law. Finally, Article 67(2) Directive 2014/24/EU provides that the most economically advantageous tender, which can include a focus on quality criteria as well, can be determined as well based on the lowest life-cycle costs in accordance with Article 68. The above non-exhaustive list of examples is procedural in nature, since they aim to regulate 'how to buy.'¹⁷

The subsequent development towards 'what to buy' was predominantly initiated under the EU Green Deal of 2019, which noted that 'public authorities, including the EU institutions, should lead by example and ensure that their procurement is green.'¹⁸ At the time, the Commission noted the ambition to propose further legislation and guidance on green public procurement. The subsequent EU Green Deal Investment Plan concluded that 'The Commission will propose minimum mandatory green criteria or targets for public procurements in sectoral initiatives, EU funding or product-specific legislation.'¹⁹

Partially sparked by a broad discussion about the level of green public procurement uptake in the Member States, this paradigm shift, with many adopted or tabled Directives and Regulations, notes that the discretion for contracting authorities to decide if they wish to procure green or social has been limited by EU law. Generally speaking, these legislative instruments, such as the Ecodesign Regulation (Article 65) and Energy Efficiency Directive (Article 7) discussed below, are broader in set-up, aiming to regulate a part of the economy from a green or social perspective, and, as a consequence, devote one or two provisions to public procurement in a broader regulatory framework. What's clear,

Mélon, 'More Than a Nudge? Arguments and Tools for Mandating Green Public Procurement in the EU' (2020) 12 Sustainability 988; Willem Janssen, 'Verplicht maatschappelijk verantwoord aanbesteden. Een eerste verkenning van een paradigmaverandering.' (2020) 1 Tijdschrift Aanbestedingsrecht en Staatssteun 19.

¹⁶ Beate Sjøfjell and Anja Wiesbrock 'Why Should Public Procurement Be About Sustainability?' in Beate Sjøfjell and Anja Wiesbrock (eds), *Sustainable Public Procurement under EU Law* (1st edn, Cambridge University Press 2015) 18.

¹⁷ Janssen (n 15) 6-8.

¹⁸ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Green Deal [2019] COM(2019) 640 final (EGD), 8.

¹⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - European Green Deal Investment Plan [2020] COM(2020) 21 final, 12.

mandating criteria or targets related to environmental or social objectives can indeed be an effective legislative course to achieve broader societal objectives related to climate change and social injustice. If effectively monitored and implemented in the Member States, it can indeed be a source of foreseeability and consistency for economic operators bidding for contracts and take away experienced difficulties for contracting authorities to procure sustainably.²⁰

1.3.2 Second development: public procurement as an international trade instrument

Within the context of a changing global geopolitical situation, related amongst other things to the need to curb undesirable influence from foreign nations on the internal market, public procurement legislation has also been introduced in recent years as a trade instrument.

In light of the backdrop of the existing Government Procurement Agreement²¹ and the inclusion of procurement chapters in international treaties²², two notable examples exist in this context, namely the Foreign Subsidies Regulation (FSR) and the International Procurement Instrument (IPI).²³ The FSR aims to address distortions caused by foreign subsidies, which would not undergo the scrutiny of the current state aid regime under Article 107 TFEU. In this context, public procurement is used, amongst other things, as a strategic instrument by introducing notification requirements of such foreign subsidies and measures to prohibit the related award of the contract. In turn, the IPI, discussed in Section 5.2.2, intends to promote reciprocity in access to international public procurement markets. The Commission may, for instance, engage in investigations and consultations regarding alleged third countries' measures or practices and impose an IPI measure, including the exclusion of economic operators.²⁴

²⁰ For a discussion on the need – and critical viewpoints for effectiveness - for a mandatory sustainability requirements in public procurement: Roberto Caranta and Willem Janssen, 'Collective Reflections on the Future of Mandatory Sustainable Public Procurement' in Willem Janssen and Roberto Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift* (1st edn, Hart Publishing 2023) and the other chapters contained in the same book.

²¹ Agreement of Government Procurement under the WTO, Agreement on Government Procurement, as amended on 30 March 2012 (GPA).

²² See the aforementioned EU-Singapore trade agreement, but also the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (2017) OJ L 11, 14.1.2017, p. 23–1079 (CETA).

²³ Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market (FSR); Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI).

²⁴ This is expanded upon in the IPI Section of this study, 5.2.2.

2. Methodology and Scope

This Study explores, analyses and proposes solutions for legal incoherencies, if any, between the Public Procurement Directives and other legislative instruments that regulate public procurement in the European Union.

2.1 Methodology: coherency and hypothesis

The focus of this Study is underpinned by the conceptual starting point that the legal framework for public procurement is coherent if it is seen ‘as emanating from or as explainable by a set of consistent principles and policies.’²⁵ From the perspective of the EU legislature, consistency of EU regulatory frameworks has also been given a significant role in the European Treaties.²⁶ In addition to the integration provisions of Articles 8-11, Article 7 TFEU notes that ‘The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.’ In addition, it has also been deemed an important focus area of the Better Regulation Guidelines.²⁷

Delving into the situation in which the Public Procurement Directives and the other legislative instruments apply simultaneously to a public procurement procedure, a legal incoherency is deemed to exist under this Study if a consistent application of both the provisions of the Public Procurement Directives and the other legislative instruments in light of their objectives, leads to legal uncertainty or unclarity about their application and/or a violation of EU law.²⁸

The working hypothesis of this Study is that the ‘other’ legislative instruments potentially have a different regulatory scope and/or objective when compared to the Public Procurement Directives, yet their focus is similar, being the regulation of public procurement. This justifies the identification and assessment of possible legal incoherencies between the provisions in the Public Procurement Directives and provisions on public procurement introduced in these other legislative

²⁵ Jack Balkin, ‘Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence’ (1993) 103 *The Yale Law Journal* 105; Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (rev ed, repr, Clarendon Press 2001); Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press; Oxford University Press 1978). Also see generally on coherence of EU law: Sacha Prechal (ed), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press 2008); Elisabetta Manunza, ‘Public procurement Law as an Expression of the Rule of Law: On How the Legislature and the Courts Create a Layered Dynamic Legal System Based on Legal Principles’, *Public Procurement Law Review*, 32(5), 319-334.

²⁶ See, for instance, Articles 11(3), 13 and 21 TEU.

²⁷ Better Regulation Guidelines, November 2023.

²⁸ Leonhard Den Hertog and Simon Stroß, ‘Coherence in EU External Relations: Concepts and Legal Rooting of an Ambiguous Term’ (2013) 18 *European Foreign Affairs Review* 373; Christian Franklin, ‘The Burgeoning Principle of Consistency in EU Law’ (2011) *Yearbook of European Law* 11. See, for instance, Joined cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] EU:C:2007:133, par. 53 and 58.

instruments. Accordingly, it is assumed in this Study that incoherencies would be undesirable for the coherence of the overall EU public procurement framework, as it would lead to undesirable discussions about the application of EU law in practice and could lead to legal uncertainty or even violations of EU law, in practice or before the national review bodies.

This Study applies the European Legal Methodology, which concerns doctrinal legal work in a European law context.²⁹ This Study is qualitative. It explores and analyses the text of the provisions on public procurement in both the Public Procurement Directives and the other legislative instruments, within the scope of their objectives and preceding policy framework, and builds on the discussions in the literature on this topic. It first considers their context, then presents a micro level analysis of each instrument and their relationship with the Public Procurement Directives, and then considers overarching issues on a macro level.

As a form of exploration to identify current and future legal incoherencies, this study was presented at two meetings of the Expert Group on Public Procurement by the European Commission (EXPP) after which oral and written input was provided. Furthermore, written input was provided by the Network of First Instance Public Procurement Review Bodies. It has also been debated with relevant members of the European Public Procurement Group (<https://eplgroup.eu/>) and of the SAPIENS network (<https://sapiensnetwork.eu>). Ultimately, however, this was not an empirical exercise, and no statistical findings are presented in this Study.

2.2 Scope of this Study

The scope of this Study is limited to the following instruments:

- The Public Procurement Directives;³⁰
- The Batteries Regulation;³¹
- The Construction Products Regulation (CPR);³²

²⁹ Karl Riesenhuber (ed), *European Legal Methodology* (Intersentia 2021).

³⁰ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

³¹ European Parliament and Council Regulation (EU) 2023/1542 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/E [2023] OJ L 191 (Batteries Regulation).

³² European Parliament and Council Regulation (EU) 2024/3110 laying down harmonised rules for the marketing of construction products and repealing Regulation (EU) No 305/2011 [2024] OJ L 2024/3110 (CPR).

- The Ecodesign for Sustainable Products Regulation (ESPR);³³
- The Energy Efficiency Directive (EED);³⁴
- The Net-zero Industry Act (NZIA);³⁵
- The Minimum Wage Directive (MWD);³⁶
- The Deforestation Regulation (EUDR);³⁷
- The Clean Vehicles Directive (CVD);³⁸
- The Corporate Sustainability Due Diligence Directive (CSDDD);³⁹
- The International Procurement Instrument (IPI);⁴⁰
- the Heavy Duty Vehicles Regulation.⁴¹

These legislative instruments are placed into their policy context by including, amongst others:

- the EU Green Deal (EGD);⁴²
- the 2020 Circular Economy Action Plan (CEAP);⁴³

³³ European Parliament and Council Regulation (EU) 2024/1781 establishing a framework for the setting of eco-design requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC [2024] OJ L 2024/1781 (ESPR).

³⁴ European Parliament and Council Directive (EU) 2023/1791 on energy efficiency and amending Regulation (EU) 2023/955 (recast) [2023] OJ L 231 (EED).

³⁵ Regulation (EU) 2024/1735 of the European Parliament and of the Council of 13 June 2024 on establishing a framework of measures for strengthening Europe's net-zero technology manufacturing ecosystem and amending Regulation (EU) 2018/1724, OJ L 2024/1735 (Net-zero Industry Act).

³⁶ Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union, OJ L 275 (Minimum Wage Directive).

³⁷ European Parliament and Council Regulation (EU) 2023/1115 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 [2023] OJ L 150 (EUDR).

³⁸ Directive of the European Parliament and the Council (EU) 2019/1161 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles [2019] OJ L 188 (Clean Vehicles Directive).

³⁹ European Parliament and Council Directive (EU) 2024/1760 of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L 2024/1760 (CSDDD).

⁴⁰ European Parliament and the Council Regulation of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI) [2023] OJ L 173 (IPI).

⁴¹ Regulation (EU) 2024/1610 of the European Parliament and of the Council of 14 May 2024 amending Regulation (EU) 2019/1242 as regards strengthening the CO₂ emission performance standards for new heavy-duty vehicles and integrating reporting obligations, amending Regulation (EU) 2018/858 and repealing Regulation (EU) 2018/956, OJ L 2024/1610 (Heavy Duty Vehicles Regulation).

⁴² Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Green Deal [2019] COM(2019) 640 final (EGD).

⁴³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A new Circular Economy Action Plan – For a cleaner and more competitive Europe [2020] COM(2020) 98 final (Circular Economy Action Plan).

- the 2020 Renovation Wave;⁴⁴
- the 2019 China-EU Strategic Outlook;⁴⁵
- the 2020 EU Industrial Strategy;⁴⁶
- the 2021 EU Pillar of Social Rights Action Plan.⁴⁷

This Study will examine the external coherence between Directive 2014/24/EU and the noted other legislative instruments as the starting point of the analysis. Directive 2014/24/EU is the most extensive body of law regulating public procurement, and the other Directives 2014/23/EU and 2014/25/EU often overlap in terms of substance, making the drawn conclusions transferable between these directives. Finally, this Study does not cover all legislative instruments regulating public procurement outside the scope of the Public Procurement Directives as included in Annex I. It is noted that there is a substantial list of legislative instruments in the first category of green and social public procurement,⁴⁸ but also in the second category.⁴⁹ The relevance of this Study is, thus, broader than the discussed legislative instruments. Given the relatively recent introduction of the discussed legislative instrument, this Study mostly relies on the legislative provisions and the literature due to the fact that case-law is predominantly absent.

⁴⁴ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - A Renovation Wave for Europe - greening our buildings, creating jobs, improving lives (COM(2020) 662 final).

⁴⁵ Joint Communication to the European Parliament, the European Council and the Council - EU-China – A strategic outlook [2019] JOIN(2019) 5 final (EU-China Strategic Outlook).

⁴⁶ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - A New Industrial Strategy for Europe [2020] COM(2020) 102 final (EU Industrial Strategy).

⁴⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Pillar of Social Rights Action Plan [2021] COM(2021) 102 final (EU Pillar of Social Rights Action Plan).

⁴⁸ As present, there are 62 legislative instruments with rules on public procurement (52 adopted, 10 pending in the legislative process) as noted in Annex I.

⁴⁹ For instance, the Foreign Subsidies Regulation.

3. Micro Analysis - Regulating public procurement in the Public Procurement Directives

3.1 Introduction

Since the 1970s, when the Council Directive 71/305/EEC for ‘the coordination of procedures for the award of public contracts’ was adopted, public procurement constitutes an essential tool for realising the European internal market.⁵⁰ This is also reflected in the consistent choice of the European legislator to maintain Article 114 TFEU as the legal basis for all the Public Procurement Directives.⁵¹ It is, thus, the achievement of the internal market that is the central objective of this regulatory body.⁵² However, since the 2014 amendment, these directives, as the current prime legislative body of law, have accommodated the achievement of other public policy objectives related to smart, sustainable, and inclusive growth.⁵³ As such, public procurement’s significant share of the EU’s GDP makes it an influential means for achieving social, environmental and trade objectives, as noted before as well.⁵⁴

Directive 2014/24/EU, the so-called ‘Classic Directive’, regulates procurement by means of public contracts, meaning the ‘acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.’⁵⁵ Moreover, Directive 2014/25/EU regulates public procurement, but for activities related to

⁵⁰ Cases C-19/00 *SIAC Construction Ltd* [2001] EU:C:2001:553, par 32 and C-31/87 *Beentjes* [1988] EU:C:1988:422, par 11.

⁵¹ Council Directive (EEC) 71/305 on the co-ordination of procedures for the award of public works contracts [1971] OJ L185, Council Directive (EEC) 93/37 on the coordination of procedures for the award of public works contracts [1993] OJ L199, Directive of the European Parliament and of the Council (EC) 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134, and Directive of the European Parliament and of the Council (EU) 2014/24 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94; Michael Streinicke, ‘Introduction’ in Michael Streinicke and Peter L. Vesterdorf (eds), *Brussels Commentary on EU Public Procurement Law* (Bloomsbury Publishing, Nomos/Hart, 2019) 4.

⁵² Sue Arrowsmith, ‘The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies’ (2012) 14 Cambridge Yearbook of European Legal Studies 1, 49.

⁵³ Directive of the European Parliament and of the Council (EU) 2014/24 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94, rec 2. Note also the discussion on objectives and principles in R. Caranta, *The Coherence of the Public Procurement Directives*, Research Report for the Commission, June 2025.

⁵⁴ Janssen (n 15) 5.

⁵⁵ Directive 2014/24/EU, art 1(2).

gas and heat,⁵⁶ electricity,⁵⁷ water,⁵⁸ transport services,⁵⁹ ports and airports,⁶⁰ postal services,⁶¹ extraction of oil and gas and exploration for, or extraction of, coal and other solid fuels.⁶² Added in the 2014 reforms, Directive 2014/23/EU regulates the award of concession contracts.⁶³ Concessions refer to both works and services concessions, meaning contracts for pecuniary interest for which the consideration consists either solely in the right to exploit the works or services that are the subject of the contract or in that right together with payment.⁶⁴ All of these directives only apply should the value of the related contract exceed the set financial thresholds.⁶⁵

3.2 Relevant provisions that interact with the other legislative instruments

To consider the coherence of public procurement regulation in the EU, it is first essential to detail the provisions in Directive 2014/24/EU that interact with the other legislative instruments in light of their rationale and conditions.

3.2.1 The public procurement principles - Article 18(1)

The backbone of the Public Procurement Directives are the public procurement principles. Particularly, Article 18 Directive 2014/24/EU codifies the principles of public procurement, namely the principles of equality, non-discrimination, transparency and proportionality. According to Article 18(1) Directive 2014/24/EU, ‘contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.’ Moreover, under the same provision, it is underlined 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.’⁶⁶ Respectively, Article

⁵⁶ European Parliament and Council Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94, art 8.

⁵⁷ Directive 2014/25/EU, art 9.

⁵⁸ *ibid* art 10.

⁵⁹ *ibid* art 11.

⁶⁰ *ibid* art 12.

⁶¹ *ibid* art 13.

⁶² *ibid* art 14.

⁶³ European Parliament and Council Directive 2014/23/EU on the award of concession contracts [2014] OJ L 94, art 1(1).

⁶⁴ Directive 2014/23/EU, art 5(1)(a) and (b).

⁶⁵ See Article 4 of Directive 2014/24/EU for the thresholds in this directive. These thresholds are verified and revised through a delegated act in accordance with Article 6. See for example Commission Delegated Regulation (EU) 2023/2495 of 15 November 2023 amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the thresholds for public supply, service and works contracts, and design contests.

⁶⁶ Albert Sánchez Graells, *Public Procurement and the EU Competition Rules* (Hart Publishing 2015).

3(1) Directive 2014/23/EU and Article 36(1) Directive 2014/25 embed also the above principles.

More specifically, the principle of equality safeguards that all economic operators are subjected to the same conditions with a view to ensuring equality of opportunities.⁶⁷ As a specification of equality, the principle of non-discrimination requires that direct or indirect discrimination based on nationality is forbidden, which is crucial in light of the aim of the Public Procurement Directives. Moreover, the principle of transparency is considered a key driver of the principle of equality by opening up competition and ensuring impartiality of procurement procedures.⁶⁸ Accordingly, 'all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract.'⁶⁹ Lastly, the principle of proportionality, rooted in Article 5 TFEU, requires that criteria in the context of public procurement, such as award criteria, selection criteria, and exclusion grounds, must be proportionate and, thus, linked to the subject matter of the contract.⁷⁰

3.2.2 Compliance with environmental, social and labour law - Article 18(2)

Article 18(2) Directive 2014/24/EU notes that 'Member States 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.' Article 30(3) Directive 2014/23/EU and Article 36(2) Directive 2014/25/EU contain the same provision.

Annex X Directive 2014/24/EU includes references to mostly ILO conventions, including those on the freedom of association and the protection of the right to organise and on forced labour, but also to environmental conventions, such as the Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer, or the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention).

The same provision applies to subcontractors, given that Article 71(1) Directive 2014/24/EU provides that 'observance of the obligations referred to in Article

⁶⁷ Case C-496/99 *Succhi di Frutta* [2004] EU:C:2004:236, par 110.

⁶⁸ Case C-324/98 *Telaustria* [2000] EU:C:2000:669, par 62.

⁶⁹ Case C-496/99 *Succhi di Frutta* [2004] EU:C:2004:236, par 111.

⁷⁰ Case C-513/99 *Concordia Bus* [2002] EU:C:2002:495, par 59.

18(2) by subcontractors is ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit.’ Furthermore, Article 18(2) is relied upon by Articles 69 and Article 56 Directive 2014/24/EU discussed below.

Article 18(2) Directive 2014/24/EU constitutes a major driver of this Directive’s endeavour to integrate environmental protection in public procurement.⁷¹ Recital 91 highlights in this light and more broadly that ‘Article 11 TFEU requires that environmental protection requirements be integrated into the definition and implementation of the Union policies and activities [...] This Directive clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts.’

Despite the acknowledgement that Article 18(2) Directive 2014/24/EU encompasses a ‘principle’ of ‘cardinal value’ by the Court of Justice of the European Union (CJEU)⁷², its normative impact remains ambiguous and debated.

The discussed legislative instruments under Section 4 related to green and social procurement, such as the Deforestation Regulation and the Minimum Wage Directive, fall under Article 18(2) Directive 2014/24/EU’s scope, because these instruments can be considered to be EU environmental, social or labour law. This obligation is, notably, broader than only procurement related obligations, given that this provision refers in general to the applicable obligations for economic operators in the respective fields of law.

Article 18(2) Directive 2014/24/EU refers solely to ‘appropriate measures’ that ‘shall’ be taken⁷³ by the Member States, thereby referring to national legislators,⁷⁴ thus hindering its direct enforceability of this provision before national review bodies. Nevertheless, without proper implementation on the national level, Article 18(2) Directive 2014/24/EU is to be seen as an ineffective obligation, thereby also limiting the effect of this provision at present and its relationship with the discussed other legislative instruments.⁷⁵ Given that this provision gains ‘teeth’ through its implementation, the unclarity about what ‘appropriate measures’ are, can lead to a limited implementation in the Member States. For instance, as it can lead to a translation in their official language,⁷⁶ or

⁷¹ Marta Andhov, ‘Contracting Authorities and Strategic Goals of Public Procurement - A Relationship Defined by Discretion?’ (2021) University of Copenhagen Faculty of Law Research Paper No. 2021-1058 1, 8 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3794794> accessed 26 March 2025.

⁷² Case C-395/18 *Tim SpA* [2020] EU:C:2020:58, par. 38.

⁷³ Andhov (n 71) 8.

⁷⁴ Janssen (n 15) 9-10.

⁷⁵ Pouikli (n 12); Janssen (n 15) 6; Caranta R, ‘Towards Socially Responsible Public Procurement’ (2022) 23 ERA Forum 149, 161.

⁷⁶ For instance, Article 18(2) Law 4412/2016 (Greece). However, under the same provision, supervisory bodies, that responsible for the execution of public contracts, along with contracting

have a limited implementation by referring to the obligation for contracting authorities to provide economic operators with information about these obligations in addition to their obligation to ensuring economic operator's commitment to compliance in general.⁷⁷ This appears to fall short of implementing respective obligations through additional monitoring or sanctioning mechanisms, explainable by the fact that 'appropriate measures' remains open for interpretation. Referring to 'contracting authorities' in this provision instead of 'Member States' would create an explicit requirement for these authorities, and overcome implementation issues.⁷⁸

Article 18(2) is, thus, one of the exceptions in Directive 2014/24/EU as it is not strictly procedural in nature, but substantive in terms of what standards need to be upheld by contracting authorities by referring to a broad array of laws. Accordingly, the relationship between this provision and the other legislative instruments is that of compliance of the latter's legal obligations during the performance of public contracts by economic operators. In practice, this can lead to a high administrative burden for contracting authorities, given the broad nature of this obligation, meaning that its practical effectiveness can also be questioned.

The above issue is further enhanced by the reliance of Article 69(3) Directive 2014/24/EU on Article 18(2). In addition to the requirements about abnormally low tenders in general, 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).' Article 69(3) Directive 2014/24/EU constitutes a clear obligatory provision in this Directive that sanctions non-conformity with environmental, social, and labour provisions.⁷⁹ Nonetheless, this provision encounters specific practical barriers to its effective application. Notably, the activation of Article 69(3) Directive 2014/24/EU heavily depends on each Member State's discretion to define abnormally low tenders⁸⁰ and on other unforeseen factors, such as the extent of any deviation from the prices of the other tenders.⁸¹ In addition, particularly concerning major international entities with extensive supply chains, contracting authorities may struggle to identify the existence of an abnormally low tender, effectively investigate potential breaches of sustainability provisions outside of the EU, or, even more, establish a causal

authorities and entities are responsible for monitoring and certifying compliance with these obligations.

⁷⁷ See the Dutch implementation in Article 2.81 and 2.81a Aanbestedingswet 2012.

⁷⁸ Marta Andhov, Roberto Caranta, Willem Janssen and Olga Martin-Ortega, 'Shaping Sustainable Public Procurement Law in the European Union' (2022) 1, 55 <www.greens-efa.eu> accessed 12 February 2025.

⁷⁹ Andhov et al. (n 78) 57.

⁸⁰ *ibid* 56.

⁸¹ Grith Skovgaard Ølykke, 'The provision on abnormally low tenders: a safeguard for fair competition?' in Grith Skovgaard Ølykke and Albert Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar Publishing, 2016) 161.

link between the two.⁸² Lastly, legal vacuums can arise when abnormally low tenders result from other factors that do not oblige the contracting authorities to turn down the tender, or when bids are manipulated, for example, by inflating the prices of other items, such as logistic services or project management, above cost, thus avoiding rejection.⁸³

Directive 2014/23/EU on concessions contains no similar provision about abnormally low tenders. Directive 2014/25/EU does regulate the occurrence of abnormally low tenders in Article 84 and explicitly mandates their rejection in case they derive from infringement of the applicable obligations referred to in Article 36(2) Directive 2014/25/EU, which resembles the same obligations referred to in Article 18(2) Directive 2014/24/EU, as previously noted.

Furthermore, similar reliance on Article 18(2) Directive 2014/24/EU is found in Article 56(1) Directive 2014/24/EU, which provides that ‘contracts shall be awarded on the basis of criteria laid down in accordance with Articles 67 to 69’ on the conditions that the tender abides by the contract notice’ or the invitation’s requirements, conditions, and criteria, as well as that the tender does not fall in one of the exclusion grounds of Article 57 and meets the selection criteria following Article 58. Nevertheless, under the same provision, contracting authorities are allowed not to award a contract to the tenderer with the most economically advantageous tender in case they establish that ‘the tender does not comply with the applicable obligations referred to in Article 18(2).’⁸⁴ Therefore, Article 56(1) Directive 2014/24/EU allows the rejection of a tender on the grounds of not complying with the applicable obligations referred to in Article 18(2) of the same Directive.

Similarly, Article 76(6) Directive 2014/25/EU enables contracting entities to not ‘award a contract to the tenderer submitting the best tender where they have established that the tender does not comply with the applicable (environmental, social and labour) obligations referred to in Article 36(2)’ of the same Directive. A respective provision is not present in Article 38 Directive 2014/23/EU.

⁸² Janssen (n 15) 11-12; Guilia Botta, ‘The interplay between EU public procurement and human rights in global supply chains: Lessons from the Italian legal context’ (2023) 4(3) *European Journals of Public Procurement Markets* 51, 52
<<https://www.doi.org/10.54611/LEPQ5875>> accessed 26 March 2025.

⁸³ Janssen (n 15) 11-12.

⁸⁴ Directive 2014/24/EU, art 56(1).

To conclude in terms of legal coherency, this means the following:

- Article 18(2) Directive 2014/24/EU is a substantive requirement ensuring the compliance with a broad scope of labour, social and environmental law during the performance of the contract. The same applies to its equivalents in Article 30(3) Directive 2014/23/EU and Article 36(2) Directive 2014/25/EU.
- The legislative instruments related to green and social procurement discussed in this Study fall within the scope of Article 18(2) Directive 2014/24/EU, meaning that this provision interacts with these instruments;
- There is, however, significant unclarity about the workings of Article 18(2) Directive 2014/24/EU, given that it is unclear what 'appropriate measure' means for national legislators or what is required in the contract performance phase in relation to this provision;
- Accordingly, this legal uncertainty leaves room for insufficient national implementations of this provision (e.g. copy-and-paste provisions or broad and limited obligations), thereby limiting the effectiveness of the enforcement of the other legislative instruments discussed below.

Based on the above legal coherency discussion, the following recommendations are made:

- There is a need to further explicate what 'appropriate measures' are in Article 18(2) Directives 2014/24/EU;
- Further enhancement of this provision could, furthermore, be done by referring to 'contracting authorities' in this provision instead of 'Member States', thereby creating an explicit requirement for these authorities;
- These recommendations are of importance for the workings of Article 18(2) Directive 2014/24/EU and its equivalents, but also for related Articles 69(3) and 56(1) of the same Directive that refer to this provision.

3.2.3 Technical specifications - Article 42

According to Article 42(1) Directive 2014/24/EU, technical specifications 'lay down the characteristics required of a works, service or supply' in accordance with Annex VII point 1, such as measurements and environmentally friendly

material characteristics.⁸⁵ Under the same provision, they ‘may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle,’ provided that ‘they are linked to the subject-matter of the contract and proportionate to its value and its objectives.’ Accordingly, technical specifications shall enable access of economic operators to public procurement, rather than favouring, for instance, a single market participant. Following Article 42(3) Directive 2014/24/EU, technical specifications shall be formulated (i) ‘in terms of performance of functional requirements, including environmental characteristics;’ (ii) ‘by reference to technical specifications;’ (iii) by combinations of (i) and (ii).

Respectively, both Articles 36 Directive 2014/23/EU and 60 Directive 2014/25/EU integrate substantially the same regulations, with the former adopting more concise wording and the latter incorporating the same text with Article 42 Directive 2014/24/EU.

3.2.4 Exclusion grounds - Article 57

Article 57 Directive 2014/24/EU includes mandatory and facultative exclusion grounds, establishes, amongst other things, the possibility of derogation, the notion of self-cleaning and defines the onus of proof and the maximum period of exclusion.

Mandatory and facultative exclusion grounds

Under Article 57(1) Directive 2014/24/EU, the mandatory exclusion grounds shall be applied by contracting authorities if the economic operator, a member of its administrative, management, or supervisory body, or a person that has ‘powers of representation, decision or control therein’ has been convicted by final judgment for (i) ‘participation in a criminal organisation,’⁸⁶ (ii) ‘corruption,’⁸⁷ (iii) ‘fraud,’⁸⁸ (iv) ‘terrorist offences or offences linked to terrorist activities,’⁸⁹ or ‘inciting or aiding or abetting or attempting to commit an offence,’⁹⁰ (v) ‘money

⁸⁵ Fredo Schotanus and Jolien Grandia, ‘Public Procurement Policy and Purchasing Strategy’ in Jolien Grandia and Leentje Volker (eds) *Public Procurement – Theory, Practices and Tools* (Palgrave MacMillan 2023) 92.

⁸⁶ Council Framework Decision 2008/841/JHA on the fight against organised crime [2008] OJ L 300, art 2.

⁸⁷ Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union [1997] OJ C 195, art 3; Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector [2003] OJ L 192, art 2(1).

⁸⁸ Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities’ financial interests [1995] OJ C 316, art 1.

⁸⁹ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L 88 (Directive 2017/541), art 1 and 3.

⁹⁰ Directive 2017/541, art 4.

laundering or terrorist financing,’⁹¹ (vi) ‘child labour and other forms of trafficking in human beings.’⁹² Furthermore, according to Article 57(2) Directive 2014/24/EU, contracting authorities shall exclude an economic operator when a ‘judicial or administrative decision having final and binding effect’ has convicted it of violating ‘its obligations relating to the payment of taxes or social security contributions.’

On the other hand, facultative exclusion grounds may be enabled by contracting authorities, following Article 57(4) Directive 2014/24/EU, if the economic operator, amongst other exclusions, for instance, (i) has violated the applicable environmental, social, and labour obligations referred to in Article 18(2) of the same Directive, (ii) is in state of bankruptcy, insolvency, winding-up proceedings, liquidation, or equivalent legal procedures, unless ‘the contracting authority has established that the economic operator in question will be able to perform the contract,’ (iii) ‘is guilty of grave professional misconduct, which renders its integrity questionable,’ (iv) ‘has entered into agreements with other economic operators aimed at distorting competition’, can be demonstrated by any other appropriate means than a judicial or administrative decision, unless the economic operator fulfils its obligations ‘by paying or entering into a binding arrangement.’⁹³ Furthermore, given the facultative character of this exclusion ground, contracting authorities should apply the principle of proportionality,⁹⁴ and automatic exclusions are not allowed.⁹⁵

Overriding reasons relating to the public interest and self-cleaning

Article 57(3) Directive 2014/24/EU provides for derogations from the mandatory exclusion grounds in case of ‘overriding reasons relating to the public interest such as public health or protection of the environment.’ Moreover, under the same provision, a derogation can also be applied if ‘an exclusion would be clearly disproportionate’.

Moreover, Article 57(6) Directive 2014/24/EU provides that any economic operator that falls under the scope of the above exclusion grounds, both mandatory and facultative, ‘may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion.’ If this evidence is considered sufficient, the economic operator ‘shall not be excluded from the procurement

⁹¹ European Parliament and Council Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L 141, art 1.

⁹² European Parliament and Council Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101, art 2.

⁹³ Directive 2014/24/EU, art 57(2).

⁹⁴ Case C-171/15 *Connexxion* [2016] EU:C:2016:948, par 31.

⁹⁵ Case C-395/18 *Tim SpA* [2020] EU:C:2020:58, par 53.

procedure.⁹⁶ Accordingly, the economic operator shall prove that ‘it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.’⁹⁷ However, under the same provision, in case of exclusion by final judgment, the economic operator shall not be entitled to make use of the benefit of self-cleaning during the period of exclusion resulting from that judgment.

Length of exclusion

Lastly, under Article 57(7) Directive 2014/24/EU, Member States ‘shall determine the maximum period of exclusion’ if this has not been set by final judgment. Accordingly, the maximum period of exclusion ‘shall not exceed five years from the date of the conviction by final judgment’ regarding the mandatory exclusion grounds, and ‘three years from the date of the relevant event’ in case of the facultative exclusion grounds.⁹⁸

Directive 2014/25/EU explicitly refers to Article 57 Directive 2014/24/EU regarding the application of the respective exclusion grounds. Similarly, Article 38(4-10) Directive 2014/23/EU adopts the same structure and substance as Article 57 Directive 2014/24/EU. Particularly, Article 38(4-5) adopts the same mandatory exclusion grounds, Article 38(6) provides for derogations, such as ‘public health or protection of the environment’, Article 38(7) includes the same facultative exclusion grounds, including ‘violation of applicable obligations referred to in Article 30(3)’, Article 38(9) prescribes the notion of self-cleaning, and, lastly, Article 38(10) defines the same maximum exclusion time.

3.2.5 Award criteria - Articles 67 and 68

Under Article 67(1) and (2) Directive 2014/24/EU, ‘contracting authorities shall base the award of public contracts on the most economically advantageous tender,’ which ‘shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.’ Accordingly, it is up to the contracting authorities to determine these award criteria and their weighting.⁹⁹ Moreover, award criteria are deemed to be linked to the subject-matter of the contract ‘where they relate to the works, supplies or services to be provided under

⁹⁶ Directive 2014/24/EU, art 57(6), first paragraph.

⁹⁷ Directive 2014/24/EU, art 57(6), second paragraph.

⁹⁸ *ibid* art 57(7).

⁹⁹ Case C- 513/99 *Concordia Bus* [2002] EU:C:2002:495, para 59; Case C-368/10 *Commission v the Netherlands* [2012] EU:C:2012:284, para 84.

that contract in any respect and at any stage of their life cycle,' including parameters like the specific process of production, provision or trading of those works, supplies or services, or for another stage of their life cycle.¹⁰⁰ Lastly, contracting authorities shall specify in the procurement documents the weighting of each award criterion to define the most economically advantageous bid, so that tenderers can verify relative weight factors other than price,¹⁰¹ unless this is determined based on price alone.¹⁰²

Article 82 Directive 2014/25/EU integrates the same award criteria. Similarly, Article 41(2) Directive 2014/23/EU enables the consideration of 'environmental, social or innovation-related criteria' by contracting authorities or entities when defining the 'overall economic advantage' for them.

Furthermore, Article 68 Directive 2014/24/EU, which is referred to in Article 67 of the same Directive, notes that life-cycle costing shall 'cover parts or all of the following costs over the life cycle of a product, service or works: (a), costs, borne by the contracting authority or other users, such as: (i), costs relating to acquisition, (ii), costs of use, such as consumption of energy and other resources, (iii), maintenance costs, (iv), end of life costs, such as collection and recycling costs. (b), 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.' Article 68(2) Directive 2014/24/EU provides instructions for the evaluation of 'costs imputed to environmental externalities,' namely (i) 'objectively verifiable and non-discriminatory criteria,' (ii) accessibility to all interested parties, and (iii) delivery of the data required 'with reasonable effort by normally diligent economic operators.' Besides, in case of the enactment of an EU legislative act regulating a mandatory common method for the calculation of life-cycle costs, this shall be applied to the assessment of life-cycle costs.¹⁰³ Thereby, life-cycle costs are considered to balance the economic, social, and environmental perspectives of public procurement by embedding them in the described real methodology.¹⁰⁴

Article 83 Directive 2014/25/EU also embeds the above 'life-cycle costing', whereas a respective provision is missing from Directive 2014/23/EU.

¹⁰⁰ Directive 2014/24/EU, art 67(3).

¹⁰¹ Christopher Bovis, 'The principles of public procurement regulation' in Christopher Bovis (eds) *Research Handbook on EU Public Procurement Law* (Elgar 2016) 49.

¹⁰² Directive 2014/24/EU, art 67(5).

¹⁰³ *ibid* art 68(3).

¹⁰⁴ Lennart Michaux and Joris Gruyters, 'Life Cycle Costing' (2020) 15 *European Procurement & Public Private Partnership Law Review* 61, 64; Marta Andhov, Roberto Caranta, Anja Wiesbrock (eds), *Cost and EU Public Procurement Law: Life-Cycle Costing for Sustainability*, Routledge 2020.

3.2.6 Contract performance conditions - Article 70

Under Article 70 Directive 2014/24/EU, '[c]ontracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract within the meaning of Article 67(3) and indicated in the call for competition or in the procurement documents,' such as 'economic, innovation-related, environmental, social or employment-related conditions.' Article 87 Directive 2014/25/EU resembles the same regulation as above, while a respective provision is missing from Directive 2014/24/EU.

To conclude in terms of legal coherency, this means the following:

- The above provisions on technical specifications, exclusion grounds, award criteria, and contract performance conditions are procedural in nature. They constrain contracting authorities on 'how to buy' in line with the public procurement principles (procedural).

Based on the above legal coherency discussion, the following recommendations are made:

- The provisions on technical specifications (Article 42), exclusion grounds (Article 57), award criteria (Article 57) and contract performance conditions (Article 70) interact with the other legislative instruments in the next Sections, when the provisions in these legislative instruments also regulate the criteria from the perspective of 'what to buy' (substantive). The same interaction takes place for the equivalent provisions in Directive 2014/23/EU and 2014/25/EU;
- To avoid future incoherencies, it is recommended to clearly depict the regulatory nature of the Public Procurement Directives and the nature of the other legislative instruments, when it comes to 'how' they regulate public procurement;
- One preferred approach could be that the Public Procurement Directives remain procedural in nature based ultimately on the public procurement principles ('how to buy'), and that the other legislative instruments merely regulate public procurement from a substantive perspective, thereby depicting, for instance, the required levels of sustainability from a minimum harmonisation perspective ('what to buy');
- Alternatively, the Public Procurement Directives could still also contain exclusion grounds on 'whom not to buy from', whilst mainly containing procedural requirements on 'how to buy'. This could, for instance, be justified due to their binary implementation (i.e. these grounds either apply or they do not, rather than requiring an evaluation that similar to award criteria).

4. Micro Analysis - Legislative instruments regulating Green and Social Public Procurement

4.1 Introduction

Within the shift of regulating ‘how to buy’ to regulating ‘what to buy’ in public procurement, this Section will discuss and assess the policy documents and subsequent legislative instruments in the scope of this study, divided into five themes:

- Environmental and Social Due Diligence Instruments and Public Procurement (4.2);
- Circular Economy and Public Procurement (4.3);
- Energy Consumption and Public Procurement (4.4);
- Social Conditions and Public Procurement (4.5);
- Mobility and Energy Transition and Public Procurement (4.6).

4.1.1 Categorising public procurement provisions

The discussion of the relationship between the Public Procurement Directives and the legislative instruments regulating green and social public procurement is built upon the following categorisation of mandatory requirements, which includes two categories of ‘what to buy’: minimum mandatory public procurement requirements and targets.¹⁰⁵ Generally speaking, a mandatory sustainability requirement is a legal environmental or social requirement that directs the decision-making process of a contracting authority.¹⁰⁶

Firstly, these requirements can take the form of minimum mandatory public procurement requirements, which are defined as legal requirements that direct the decision-making process of a national, regional or local authority in a mandatory manner, by specifying a contracting authority’s demand in an environmental or social manner (substantive), or by mandating the competitive set-up of a public procurement procedure in an environmental or social manner (procedural).¹⁰⁷ Substantive requirements direct the environmental or social level that is required in a public procurement procedure (i.e. prescribed technical specifications), whereas procedural requirements only regulate the competitive set-up of a public procurement procedure (i.e. sustainability needs to be taken into account in the technical specifications). These requirements can be sectoral,

¹⁰⁵ Janssen (n 15); Roberto Caranta and Willem Janssen, ‘Collective Reflections on the Future of Mandatory Sustainable Public Procurement’ in Willem Janssen and Roberto Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift* (1st edn, Hart Publishing 2023).

¹⁰⁶ Product-specific requirements are not included in the typology for this Study, given that they regulate the entire market and not specifically the public procurement market alone.

¹⁰⁷ Janssen (n 15) 17.

such as the Batteries Regulation, or horizontal across sectors, such as the Eco-design Regulation.

Secondly, targets can be defined as an obligation for national, regional or local public authorities, often in their role as contracting authorities, to gear their (procurement) activities towards achieving an environmental or social objective within a certain timeframe.¹⁰⁸ These targets are often expressed in the form of percentages or a general volume, such as in the Clean Vehicles Directive.

4.2 Environmental and Social Due Diligence Instruments and Public Procurement

4.2.1 The EU Green Deal, the Industrial Strategy and the EU Data Strategy

The EU Green Deal (EGD) was adopted in 2019, functioning as an ‘overarching umbrella,’ aiming to hold the development of European environmental policy and law together.¹⁰⁹

In general, the EGD aims to foster the Commission’s ambition to tackle ‘climate change and environmental-related challenges,’ by introducing a ‘new growth strategy that aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy,’ in line with the United Nations’ 2030 Agenda and the sustainable development goals.¹¹⁰ Particularly, it intends to increase, amongst other things, the EU’s climate ambition for 2030 and 2050,¹¹¹ supply clean, affordable, and secure energy,¹¹² mobilise industry for a clean and circular economy,¹¹³ build and renovate in an energy and resource efficient way,¹¹⁴ accelerate the shift to sustainable and smart mobility,¹¹⁵ design a fair, healthy, and an environmentally-friendly food system (From ‘Farm to Fork’).¹¹⁶

The EGD functions as an adhesive for the many environmental initiatives that the Commission has adopted, including, for instance, the Deforestation Regulation (EU) 2023/1115, Energy Efficiency Directive (EU) 2023/1791, and Corporate

¹⁰⁸ Marta Andhov and Federica Muscaritoli, ‘Climate Change and Public Procurement: Are We Shifting the Legal Discourse?’ in Willem Janssen and Roberto Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift* (1st edn, Hart Publishing 2023) 35-37;

Janssen (n 15) 18.

¹⁰⁹ Pouikli (n 12) 708.

¹¹⁰ EGD, 2-3.

¹¹¹ *ibid* ch 2.1.1.

¹¹² *ibid* ch 2.1.2.

¹¹³ *ibid* ch 2.1.3.

¹¹⁴ *ibid* ch 2.1.4.

¹¹⁵ *ibid* ch 2.1.5.

¹¹⁶ *ibid* ch 2.1.6.

Sustainability Due Diligence Directive (EU) 2024/1760, discussed below in Sections 4.2.2, 4.4.2 and 4.2.3 respectively.

Relevant in this context is also the New Industrial Strategy for Europe, which was launched in March 2020, just before the Covid-19 crisis.¹¹⁷ The Commission sees a twin transition in this regard: a transition towards climate neutrality and digital leadership in a changing world.¹¹⁸ According to the Commission, this transition 'will affect every part of our economy, society, and industry. They will require new technologies, with investment and innovation to match.'¹¹⁹ The Von der Leyen administration at the time viewed this twin transition as a unique opportunity for the EU to promote competitiveness and support the EU's self-assigned geopolitical role.¹²⁰ The Communication emphasises the EU's sovereignty, in the light of '...moving geopolitical plates which affect the nature of competition.'¹²¹ Accordingly, Europe has to 'become the accelerator and enabler of change and innovation.'¹²²

In the context of transitioning to digital leadership mentioned in the EU Industrial Strategy, the EU Data Strategy was adopted in 2020 in light of the recent transformative impact of digital technologies in the economy and society.¹²³ It constitutes part of a broader driver for digital transformation and policy, encompassing various issues related to, among others, infrastructure, competition law, data privacy, digital literacy, and geopolitical strategies.¹²⁴ Accordingly, its central 'vision' is to facilitate businesses and the public sector make better decisions using data.¹²⁵

Particularly, the EU Data Strategy aims to (i) establish 'a cross-sectoral governance framework for data access and use,'¹²⁶ (ii) invest in data and strengthen 'Europe's capabilities and infrastructures for hosting, processing and using data, interoperability,'¹²⁷ (iii) empower individuals and invest in skills and in SMEs,¹²⁸ (iv) introduce 'common European data spaces in strategic sectors and domains of public interest,'¹²⁹ and (v) 'create a framework to measure data flows

¹¹⁷ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - A New Industrial Strategy for Europe [2020] COM(2020) 102 final (EU Industrial Strategy).

¹¹⁸ EU Industrial Strategy, 1.

¹¹⁹ EU Industrial Strategy, 1.

¹²⁰ Andrea Renda, 'The EU Industrial Strategy: Towards a Post-Growth Agenda?' (2021) 56 *Intereconomics* 133, 2.

¹²¹ EU Industrial Strategy, 1.

¹²² *ibid.*

¹²³ A European strategy for data [2020] COM(2020) 66 final (EU Data Strategy), 1.

¹²⁴ Graca Carvalho and Emre Kazim, 'Themes in data strategy: thematic analysis of 'A European Strategy for Data' (EC)' (2022) 53(2) *AI and Ethics* 53 <<https://doi.org/10.1007/s43681-021-00102-y>> accessed 2 March 2025.

¹²⁵ EU Data Strategy, 4.

¹²⁶ *ibid* ch 5.A.

¹²⁷ *ibid* ch 5.B.

¹²⁸ *ibid* ch 5.C.

¹²⁹ *ibid* ch 5.D.

and estimate their economic value within Europe, as well as between Europe and the rest of the world.’¹³⁰

Public Procurement in the EU Green Deal, the EU Industrial Strategy and the EU Data Strategy

The EU Green Deal, as already noted in Section 1.3.1, underlines the exemplary role of public authorities and procurement in the green transition,¹³¹ as well as that the EU’s trade policy shall promote ‘climate-friendly public procurement.’¹³²

For this reason, the EGD Investment Plan’s proposal for sectoral minimum mandatory green public procurement criteria or targets¹³³ aims to ‘de facto’ set a common definition of ‘green purchase,’ ‘collecting comparable data from public buyers,’ and assessing the impact of green public procurement.¹³⁴ Notably, public authorities will be encouraged to apply green criteria and labels, as well as life-cycle-costing methodologies.¹³⁵

An important part of the Industrial Strategy is the prevention of market distortion and worldwide competition. A problem identified by the Commission in this aspect is the lack of reciprocal access for European firms to the home country markets of foreign, state-owned companies.¹³⁶ Whilst EU procurement markets are mostly open to businesses from these states, EU companies are allegedly discriminated against or confronted with outright market closures.¹³⁷ To address this issue, the Strategy entails the adoption of an International Procurement Instrument (Section 5.2.2). The Commission also emphasises the need for Europe’s industries to move towards a circular economy model.¹³⁸ According to the strategy, ‘public authorities, including EU institutions, should lead by example by choosing environmentally friendly goods, services and works.’¹³⁹

To promote green public procurement, the Commission adopted several policy and legislative frameworks mentioned in the strategy, like the Circular Economy Action Plan (Section 4.3.1), the Batteries Regulation (Section 4.3.4 and the EU strategy for sustainable and circular textiles.

Regarding public procurement in the EU Data Strategy, it is noted that ‘public administrations are big producers and also users of data in different areas,’ as

¹³⁰ *ibid* ch 6.

¹³¹ EGD, 8; Tunde Tátrai and Diófási-Kovács, ‘European Green Deal – the way to Circular Public Procurement’ (2021) 22 ERA Forum 523, 526 <<https://doi.org/10.1007/s12027-021-00678-2>> accessed 7 March 2025.

¹³² EGD, 21; Ezgi Uysal and Willem Janssen, ‘The European Green Deal and Public Procurement Law’ in Mar Campins Eritja and Xavier Fernández-Pons, *Deploying the European Green Deal* (1st edn, Routledge 2023) 181.

¹³³ Uysal and Janssen (n 132) 182.

¹³⁴ European Green Deal Investment Plan, 12.

¹³⁵ *ibid*.

¹³⁶ EU Industrial Strategy, 6.

¹³⁷ *ibid*.

¹³⁸ *ibid* 9.

¹³⁹ *ibid* 10.

reflected by the ‘data spaces for public administrations.’¹⁴⁰ Moreover, the EU Data Strategy highlights the importance of public procurement data in improving ‘transparency and accountability of public spending, fighting corruption and improving spending quality.’¹⁴¹ Nevertheless, public procurement’s ‘spread over several systems in the Member States,’ in different formats, hinders its use ‘for policy purposes in real-time.’¹⁴²

Therefore, the EU Data Strategy announces (i) ‘the development of common European standards and requirements for the public procurement of data processing services,’¹⁴³ (ii) actions focusing ‘on law and public procurement data and other areas of public interest such as data use for improving law enforcement in the EU in line with EU law, including the principle of proportionality and data protection rules,’¹⁴⁴ (iii) improvement of the data quality,¹⁴⁵ and (iv) elaboration of ‘a data initiative for public procurement data covering both the EU dimension (EU datasets, such as TED) and the national ones (Q4 2020),’ complemented by ‘a procurement data governance framework (Q2 2021).’¹⁴⁶

At the same time, the EU Data Strategy suggests the establishment of ‘a cloud services marketplace,’ that will provide alternative relative solutions to the public sector, which in turn will ‘support the marketplace due to its significant aggregate demand.’¹⁴⁷

4.2.2 The Deforestation Regulation

Building on the context of the European Green Deal (EGD), the Deforestation Regulation (EU) 2023/1115 (EUDR)¹⁴⁸ is part of the EU’s Farm to Fork Strategy’s objective toward supporting ‘the global transition to sustainable agri-food systems.’¹⁴⁹ It constitutes a global legal instrument to address deforestation ‘beyond its illegal logging component,’¹⁵⁰ hence extending the influence of the

¹⁴⁰ EU Data Strategy, 32.

¹⁴¹ *ibid.*

¹⁴² *ibid.*

¹⁴³ *ibid.* 18; Carvalho and Kazim (n 124) 61.

¹⁴⁴ EU Data Strategy, 32.

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.* 19.

¹⁴⁸ European Parliament and Council Regulation (EU) 2023/1115 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 [2023] OJ L 150 (EUDR).

¹⁴⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system [2020] COM(2020) 381 final, 1, 17; Roberto Caranta, ‘The impact of the Farm to Fork strategy on sustainable food and catering procurement’ in Mark Stein et al. (eds.) *Sustainable Food Procurement* (Routledge 2024) 196.

¹⁵⁰ Bruno Garcia Da Silva and Pierre-Noé Milcamps, ‘The Regulation on Deforestation-Free Products: When the EU Takes on Deforestation’s Corrupted Roots’ (2023) 32(6) European

EGD beyond the EU.¹⁵¹ Given that the Union is ‘responsible for 10% of worldwide deforestation associated with the production of goods or the provision of services,’¹⁵² the EU adopted this Regulation with the aim of minimising the impacts of its consumption.¹⁵³

In particular, the EUDR, which was adopted under Article 192(1) TFEU, aims to ‘minimise the Union’s contribution to deforestation and forest degradation worldwide, and thereby contribute to a reduction in global deforestation’¹⁵⁴ and ‘reduce the Union’s contribution to greenhouse gas emissions and global biodiversity loss.’¹⁵⁵ For this reason, the EUDR sets rules regarding ‘the placing and making available on the Union market as well as the export from the Union of relevant products’¹⁵⁶ [...] that contain, have been fed with or have been made using relevant commodities, namely cattle, cocoa, coffee, oil palm, rubber, soya and wood.’¹⁵⁷ In particular, operators¹⁵⁸ and traders¹⁵⁹ shall exercise due diligence prior to placing relevant products on the market or exporting them.¹⁶⁰ This due diligence includes (i) the collection of information, data and documents¹⁶¹ which demonstrate that the relevant products are deforestation-free and have been produced in accordance with the relevant legislation of the country of production,¹⁶² such as ‘the geolocation of all plots of land where the relevant commodities [...] were produced,’¹⁶³ (ii) a risk assessment based on the prior information regarding the risk of non-compliance¹⁶⁴ and (iii) risk mitigation measures in case the above risk assessment does not result in ‘no or only a negligible risk’ of non-compliance.¹⁶⁵

Public Procurement and the Deforestation Regulation

In general, public procurement has been referred to as a strategic means of addressing deforestation by the EU Forest Law Enforcement Governance and

Energy and Environmental Law Review 293, 300-301 <<https://doi.org/10.54648/eelr2023019>> accessed 13 February 2025.

¹⁵¹ Uysal and Janssen (n 132) 188.

¹⁵² EUDR, rec 18.

¹⁵³ Chiara Falvo and Federica Muscaritoli, ‘Towards Deforestation-Free Public Procurement?’ (2024) 19(2) European Procurement & Public Private Partnership Law Review 91, 92 <<https://doi.org/10.21552/epppl/2024/2/4>> accessed 13 February 2025.

¹⁵⁴ EUDR, art 1(1)(a).

¹⁵⁵ *ibid* art 1(1)(b).

¹⁵⁶ *ibid* Annex I.

¹⁵⁷ *ibid* art 1(1).

¹⁵⁸ *ibid* art 4(1).

¹⁵⁹ *ibid* art 5(1).

¹⁶⁰ *ibid* art 8.

¹⁶¹ *ibid*, art 9.

¹⁶² *ibid* art 3.

¹⁶³ *ibid* art 9(1)(d).

¹⁶⁴ *ibid* art 10.

¹⁶⁵ *ibid* art 11.

Trade Action Plan¹⁶⁶ and the European Parliament,¹⁶⁷ while the Commission¹⁶⁸ has explicitly highlighted the need to assess the feasibility of deforestation-free public procurement.¹⁶⁹ The Deforestation Regulation (EUDR) foresees a role for public procurement to ensure implementation, effective enforcement,¹⁷⁰ and increased accountability of operators and traders.¹⁷¹ Specifically, according to Article 25(1) EUDR, Member States shall set penalties applicable to infringements of this Regulation, such as failure to carry out due diligence,¹⁷² by operators and traders and notify the Commission accordingly.

Article 25(2) EUDR mandates that these penalties shall be 'effective, proportionate and dissuasive' and shall include, among others, 'temporary exclusion for a maximum period of 12 months from public procurement processes and from access to public funding, including tendering procedures, grants and concessions,' under subparagraph (d) of this provision.¹⁷³ The specification of the maximum duration of this exclusion and the additional banning from public funding were added by the European Parliament,¹⁷⁴ since the initial proposal referred solely to a 'temporary exclusion from public procurement processes.'¹⁷⁵ Lastly, pursuant to Article 25(3) EUDR, which was also introduced by the European Parliament,¹⁷⁶ the final judgements for infringements of EUDR and the penalties imposed shall be communicated to the Commission, which in turn shall publish on its website a list of such judgments, including '(a) the name of the legal person; (b) the date of the final judgement, (c) a summary of the activities for

¹⁶⁶ Communication from the Commission to the Council and the European Parliament - Forest Law Enforcement, Governance and Trade (FLEGT) - Proposal for an EU Action Plan [2003] COM/2003/0251 final, par 4.3.

¹⁶⁷ European Parliament resolution with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation [2020] (2020/2006(INL)) paras 107-109.

¹⁶⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Stepping up EU Action to Protect and Restore the World's Forests [2019] COM(2019) 352 final, 1, 7.

¹⁶⁹ Falvo and Muscaritoli (n 153) 93.

¹⁷⁰ EUDR, rec 74; Falvo and Muscaritoli (n 153) 98.

¹⁷¹ EUDR, rec 75.

¹⁷² Uysal and Janssen (n 132) 188.

¹⁷³ In accordance with the European Parliament resolution with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation [2020] (2020/2006(INL)), par 5.1.(a)(iv).

¹⁷⁴ 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 - Outcome of the European Parliament's first reading [2023] ST 8366 2023 INIT, art 25(2)(d).

¹⁷⁵ 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 [2021] COM(2021) 706 final, art 23(2)(d).

¹⁷⁶ 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 - Outcome of the European Parliament's first reading [2023] ST 8366 2023 INIT, art 25(3).

which the legal person was found to have infringed this Regulation; and (d), the nature and, where financial, the amount of the penalty imposed.’

Relationship with the Public Procurement Directives

The Deforestation Regulation (EUDR) makes no explicit reference to the Public Procurement Directives. Both contain exclusion grounds related to public procurement. Article 57 Directive 2014/24/EU constituted the primary provision regulating exclusion grounds in public procurement until recently. Similarly, this is relevant for Article 38 Directive 2014/23/EU and Article 80 Directive 2014/25/EU.

Apart from the mentioned exclusion ground established in Article 25(2)(d) EUDR, ‘new’ exclusion grounds can, amongst other things, also be found in:

- Article 74(3)(b) ESPR (noted as well in Section 4.3.2);
- Articles 5(3)(c) and 7(2)(c) Directive (EU) 2024/1203 on the protection of the environment through criminal law;¹⁷⁷
- Article 11(a) Directive (EU) 2019/713 on combating fraud and counterfeiting of non-cash means of payment;¹⁷⁸
- Article 7(1)(b) Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals;¹⁷⁹
- Article 9(b) Directive (EU) 2017/1371 on the fight against fraud to the Union’s financial interests by means of criminal law;¹⁸⁰
- Article 7(1) Directive (EU) 2024/1226 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive;¹⁸¹
- Article 6(2)(b) Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims;¹⁸²

¹⁷⁷ European Parliament and Council Directive (EU) 2024/1203 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC [2024] OJ L 2024 (ECD).

¹⁷⁸ European Parliament and Council Directive (EU) 2019/713 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA [2019] OJ L 123.

¹⁷⁹ European Parliament and Council Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L 168.

¹⁸⁰ European Parliament and Council Directive (EU) 2017/1371 on the fight against fraud to the Union’s financial interests by means of criminal law [2017] OJ L 198.

¹⁸¹ European Parliament and Council Directive (EU) 2024/1226 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive [2024] OJ L 2024/1226.

¹⁸² European Parliament and Council Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101.

- Article 63(3)(c) Regulation (EU) 2024/1157 on shipments of waste;¹⁸³
- Article 17(3)(c) Green Claims Directive;¹⁸⁴
- Article 15(4)(f) Proposal for a Directive on combating corruption;¹⁸⁵
- Article 6(5)(d) Proposal for a Facilitation Directive;¹⁸⁶
- Article 14(1)(b) Proposal for a Directive combating child sexual abuse.¹⁸⁷

The discussion below, which further considers the relationship between the Deforestation Regulation and the Public Procurement Directives is, thus, of similar importance to other exclusion grounds.

Comparison of the rationale and scope of the exclusion ground systems

The EUDR exclusion ground is a procedural and substantive requirement, that is enabled to 'ensure implementation and effective enforcement'¹⁸⁸ of this Regulation. It can be coined as a punitive sanction approach. It is a sanction, given that it is listed among the 'penalties' provided under EUDR. Contrarily, Article 57 Directive 2014/24/EU intends to foster the assessment of the economic operators' integrity and reliability,¹⁸⁹ rather than penalise breaches of external objectives (e.g. environmental)¹⁹⁰ or promote human rights norms.¹⁹¹ As underlined by the EU Commission, the disqualification's objective is 'primarily preventive.', but as shown by Article 57(1) it is not solely focused on only this

¹⁸³ European Parliament and Council Regulation (EU) 2024/1157 on shipments of waste, amending Regulations (EU) No 1257/2013 and (EU) 2020/1056 and repealing Regulation (EC) No 1013/2006 [2024] OJ L 2024/1157.

¹⁸⁴ Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims [2023] COM(2023) 166 final.

¹⁸⁵ Proposal for a Directive of the European Parliament and of the Council on combating corruption, replacing Council Framework Decision 2003/568/JHA and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and amending Directive (EU) 2017/1371 of the European Parliament and of the Council [2023] COM(2023) 234 final.

¹⁸⁶ Proposal for a Directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA [2023] COM(2023) 755 final.

¹⁸⁷ Proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child sexual abuse material and replacing Council Framework Decision 2004/68/JHA (recast) [2024] COM(2024) 60 final.

¹⁸⁸ EUDR, rec 74.

¹⁸⁹ Case C-395/18 *Tim SpA* [2020] EU:C:2020:58, par 41; Carina Risvig Hamer, 'Article 57 Exclusion criteria' in Michael Steinicke and Peter L. Vesterdorf (eds) *EU Public Procurement Law Brussels Commentary* (C.H. Beck, Hart, Nomos 2018) 618.

¹⁹⁰ Pedro Telles and Grith Skovgaard Ølykke, 'Sustainable Procurement: A Compliance Perspective of EU Public Procurement Law' (2017) 12(3) EPPPL 239, 246 <<https://doi.org/10.21552/epppl/2017/3/7>> accessed 17 March 2025.

¹⁹¹ Albert Sanchez-Graells, 'Public Procurement and Core Human Rights: A Sketch of the EU Legal Framework' in Claire Methven O'Brien and Olga Martin-Ortega (eds) *Public Procurement and Human Rights: Risks, Dilemmas and Opportunities for the State as a Buyer* (Edward Elgar, 2019).

objective by also enforcing other laws.¹⁹² Their rationale is, however, different in essence, making the starting point of both systems of exclusion different.

As noted, Article 25(2)(d) EUDR does not refer explicitly to Directive 2014/24/EU, thus leaving its normative relationship and scope open.¹⁹³ Furthermore, Article 57 Directive 2014/24/EU applies to ‘procurement’, which is defined in Article 1(2) Directive 2014/24/EU as ‘the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.’ Article 25(2)(d) EUDR mandates the exclusion from ‘public procurement processes,’ as well as from ‘tendering procedures’ and ‘concessions.’ The same wording is included in Article 17(3)(c) Proposal for a Green Claims Directive. However, it is unclear to what extent ‘public procurement processes’ differ from ‘tendering procedures’ and ‘concessions,’ or whether these three references in fact overlap. In addition, this legal uncertainty is further exacerbated by Articles 5(3)(c) and 7(2)(c) Directive (EU) 2024/1203, which refer solely to ‘exclusion from access to public funding, including tender procedures, grants, concessions, and licences,’ without noting ‘public procurement processes,’ thus raising an additional layer of incoherence. More problematically, Article 74(3)(b) ESPR allows Member States to impose the penalty of ‘time-limited exclusion from public procurement procedures’ in cases of ESPR infringement, adopting a more consistent approach in terms of terminology when it comes to ‘public procurement procedures’ but leaving out a clear limitation of time.

Given the absent reference to Directive 2014/24/EU, this new exclusion ground applies not only to procurement above the financial thresholds following Article 4 Directive 2014/24/EU and its subsequent regulations, meaning that the scope of the EUDR is considerably broader by also applying to procurement below these thresholds.¹⁹⁴ This could be explained by the difference in legal basis, namely Article 114 TFEU and Article 192. The latter’s focus on the internal market also explains the focus thresholds, whereas a focus on the environment could also include below threshold procurement. A more coherent framework for public procurement would introduce at the minimum a reference to the Public Procurement Directives, streamline terminology and consider aligning the exclusions in the EUDR to above-threshold public procurement.

Comparison of exclusion ground systems

Article 57 Directive 2014/24/EU includes an exhaustive list of mandatory and facultative grounds. As noted in the *La Cascina* case before the CJEU regarding the previous list of facultative exclusion grounds under Article 29 Directive

¹⁹² Disqualifications arising from criminal convictions in the European Union [2006] COM(2006) 73 final, 2.

¹⁹³ Falvo and Muscaritoli (n 153) 99.

¹⁹⁴ Falvo and Muscaritoli (n 153) 99.

92/50/EEC,¹⁹⁵ Member States ‘cannot provide for grounds of exclusion other than those mentioned therein.’¹⁹⁶ Nevertheless, Member States retain the option to adopt additional exclusion grounds to safeguard the observance of the principles of equality and transparency, as long as they comply with the principle of proportionality.¹⁹⁷ Moreover, any potential coherency concern is mitigated by the fact that the new exclusion is captured in a different legal instrument than Directive 2014/24/EU in light of different rationales, noting that the closed system does not extend beyond this directive and addresses the national, and not the European, legislator’s discretion.

What is clear is that it must be implemented as a sanction on the national level, given the reference to ‘shall’, but Article 25(2)(d) EUDR does not clarify whether this exclusion ground should be transposed in national legal orders as only a sanction, or also as a mandatory or facultative ground in national public procurement acts.¹⁹⁸ Indeed, following the *Infraestruturas de Portugal* case, according to which ‘Member States must transpose [Article 57(4) Directive 2014/24/EU] either by allowing or by requiring contracting authorities to apply the exclusion grounds laid down by the latter provision,’¹⁹⁹ Member States are required to implement Article 25(2) EUDR completely. It has been argued that these exclusion grounds should be given a ‘mandatory nature.’²⁰⁰ However, it seems more likely that the above provision is solely meant to provide a range of sanctions from which the competent authority, not necessarily the contracting authority, can subsequently choose. The sanction must therefore be implemented, whereas the application is left to the authority in a case-by-case nature.

Derogations or the notion of self-cleaning are absent regarding this new exclusion ground. As previously mentioned in Section 3.2.4, Article 57(3) Directive 2014/24/EU provides for derogations from the mandatory exclusion grounds in case of ‘overriding reasons relating to the public interest such as public health or protection of the environment.’ Furthermore, if the evidence of self-cleaning is deemed sufficient, the economic operator ‘shall not be excluded from the procurement procedure.’²⁰¹ These differences appear to be able to coexist, in principle, from a legal coherency perspective given that these systems are separately designed with different rationales. Besides, given that this new exclusion ground can also be imposed through a final judgment, it aligns with Article 57(6) Directive 2014/24/EU, which exempts operators excluded by a final judgment from the benefit of self-cleaning. Furthermore, this is relevant given its

¹⁹⁵ Council Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts [1992] OJ L 209, art 29.

¹⁹⁶ Joined Cases C-226/04 and C-228/04 *La Cascina* [2006] EU:C:2006:94, par 22.

¹⁹⁷ Case C-213/07 *Michaniki AE* [2008] EU:C:2008:731, para 43, 44, 47 and 48; Case C-538/07 *Assitur Srl* [2009] EU:C:2009:317, para 21; Case C-74/09 *Bâtiments et Ponts Construction SA* [2010] EU:C:2010:431, para 43; Case C-465/11 *Forposta SA* [2012] EU:C:2012:801, para 39.

¹⁹⁸ *ibid*, 100.

¹⁹⁹ Case C-66/22 *Infraestruturas de Portugal SA* [2023] EU:C:2023:1016, para 51.

²⁰⁰ Falvo and Muscaritoli (n 153) 100.

²⁰¹ Directive 2014/24/EU, art 57(6).

punitive nature which would otherwise be diminished if a penalty imposed by a competent authority would subsequently be shortened by a contracting authority.

The same cannot be said for the absence of normative reference to the principle of proportionality. For instance, it is unclear whether infringements regarding insignificant amounts of relevant products under the EUDR would justify the penalty of exclusion. Contrarily, under Articles 5(3)(c) and 7(2)(c) Directive (EU) 2024/1203 in conjunction with Article 3(2)(p) of it, 'the placing or making available on the Union market or the export from the Union market of relevant commodities or relevant products, in breach of the prohibition set out in Article 3 of Regulation (EU) 2023/1115,' is considered a criminal offence only when such conduct does not concern a 'negligible quantity.' Consequently, the same violation regarding a 'negligible quantity' could be sanctioned under EUDR, but not under Directive (EU) 2024/1203. Similarly, Article 17(2) Proposal for a Green Claims Directive contains a list of criteria that competent authorities need to consider before imposing a penalty, including for example 'the nature, gravity, extent and duration of the infringement' or 'the intentional or negligent character of the infringement and any action taken by the trader to mitigate or remedy the damage suffered by consumers, where applicable' thus aligning with the principle of proportionality.

Furthermore, Article 25(3) EUDR, as already noted, mandates the Commission to 'publish on its website a list of such judgments,' hence introducing a 'centralised collection' of data regarding all the legal persons that have been excluded under Article 25(2)(d) EUDR.²⁰² It seems that the natural persons should also be included here, given the definition of operators and traders, who fall under EUDR's subjective scope that may be either legal or natural persons, following Article 2(15), (17), and (20) EUDR. Additional means of proof of compliance with the EUDR could be judicial records or equivalent documents issued by judicial or administrative authorities.²⁰³ A register does not currently exist for other exclusion grounds under Directive 2014/24/EU.

A difference exists in terms of the length of exclusion between the two systems of exclusion. Article 25(2)(d) EUDR prescribes a maximum exclusion period of 12 months, whilst ensuring that the penalty is 'effective, proportionate and dissuasive'.²⁰⁴ According to Article 57(7) Directive 2014/24/EU, Member States 'shall determine the maximum period of exclusion', if this has not been set by a final judgment. Accordingly, the maximum period 'shall not exceed five years from the date of conviction by final judgment' regarding the mandatory exclusion grounds and 'three years from the date of the relevant event' in case of the facultative exclusion grounds.²⁰⁵ Assuming the penalty of exclusion under the EUDR would be considered a final judgement, the exclusion from public procurement procedures could not be longer than 12 months. However, the punitive system of the new exclusion ground would justify longer exclusion

²⁰² Falvo and Muscaritoli (n 153) 99.

²⁰³ *ibid* 101.

²⁰⁴ *ibid* 97. The same applies to Article 17(3)(c) Proposal for a Green Claims Directive.

²⁰⁵ Directive 2014/24/EU, art 57(7).

periods than those of the preventative exclusion grounds of Article 57 Directive 2014/24/EU. Accordingly, it seems possible that Article 57(4)(a) Directive 2014/24/EU can create an extension of the imposed sanction under the EUDR. A contracting authority could impose an additional three year exclusion given the separate nature of the systems. It would then be a punitive exclusion first and then subsequently a preventative exclusion. This seems likely as well given the possibility that currently exists for competition violations under Article 57(4)(f) Directive 2014/24/EU, but would still benefit from further clarification.

Finally, and comparatively, Articles 5(3)(c) and 7(2)(c) Directive (EU) 2024/1203 do not specify the time limit for exclusion for the prescribed exclusion nor refer to Article 57(7) Directive 2014/24/EU. Permanent exclusion is a clear form of disproportionality, which does not align with the system of Directive 2014/24/EU or the need for penalties to be ‘effective, proportionate and dissuasive.’ Given that the EUDR’s violations could result in exclusion under the EUDR and the Directive (EU) 2024/1203, as previously noted, the same infringement could be sanctioned by an exclusion of a maximum of 12 months and a potential indefinite exclusion, resulting in an additional layer of inconsistency.

Comparison of the enforcement of the exclusion system

The system of exclusion between the EUDR and the Directive 2014/24/EU differs in terms of enforcement. The exclusion grounds in Article 57 Directive 2014/24/EU are to be enforced in each public procurement procedure by the contracting authority in charge, and those actions are open to review by national competent review bodies under the Remedies Directives.²⁰⁶ The penalties under the EUDR are, however, imposed by ‘competent authorities’ under Article 26(2) EUDR. This means that the decision to impose an exclusion as a penalty must be appealed before the competent national review body.

Finally, in terms of monitoring, Article 25(1) EUDR mandates Member States to ‘notify the Commission’ of the implementation or amendment of the respective penalties. As noted, Article 25(3) EUDR solely prescribes that Member States ‘shall notify the Commission of final judgments against legal persons for infringements of this Regulation and the penalties imposed on them, within 30 days from the date on which the judgments become final, taking into account the relevant data protection rules.’

²⁰⁶ Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L 395; Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1992] OJ L 076.

To conclude in terms of legal coherency, this means the following:

- The Deforestation Regulation introduces a possibility to penalize non-compliance with this Regulation in the form of an exclusion ground in public procurement in Article 25(2)(d), which can be regarded as a procedural and substantive requirement. These conclusions are also relevant for the new exclusion grounds in other legislative instruments, such as those mentioned in Section 4.2.2;
- This regulation does not refer to the Public Procurement Directives, which makes it unclear how they relate to each other. There is a difference in the scope of the Deforestation Regulation, when compared to Public Procurement Directives, because it now includes above and below threshold procurement;
- This new exclusion ground interacts with Article 57 Directive 2014/24/EU. In general, the two systems of exclusion can coexist given their distinct nature (punitive vs preventative). These above conclusions are also relevant for the equivalents of Article 57, namely Article 38 Directive 2014/23/EU and Article 80 Directive 2014/25/EU;
- It remains unclear, however, whether the exclusion ground of Article 25(2)(d) Deforestation Regulation must be transposed by the Member States as only a sanction, or also as either a mandatory or facultative exclusion ground in national public procurement acts. Furthermore, if this new exclusion ground is transposed as mandatory, Article 25(2)(d) Deforestation Regulation does not provide for derogations or self-cleaning;
- The relationship between Article 25(2)(d) Deforestation Regulation as a sanction and exclusion based on Article 57(4)(a) due to a violation of the Deforestation Regulation is unclear;
- Article 25(3) Deforestation Regulation contains a reporting obligation of penalties imposed.

Based on the above legal coherency discussion, the following recommendations are made:

- The exclusion ground in Article 25(2)(d) Deforestation Regulation could be improved by referring to ‘temporary exclusion for a maximum period of 12 months from public procurement procedures under Directives 2014/24/EU, 2014/23/EU and 2014/25/EU.’ The wording related to public funding, falling outside the scope of this Study, could, nonetheless, be enhanced by referring to ‘access to public funding, including grants and subsidies’;
- It is more coherent to have all the new exclusion grounds apply to above threshold procurement, instead of extending the Deforestation Regulation to below threshold procurement as well;
- It could be clarified if this exclusion ground is indeed also a mandatory or facultative exclusion ground which needs to be implemented, and that the application of Article 57(4)(a) indeed extends the exclusion period in addition to the imposed sanction;
- Implementation of Article 25(2)(d) in national public procurement acts has the benefit of creating awareness for contracting authorities, but does create inconsistency in the system of Article 57 Directive 2014/24/EU due to the unavailability of self-cleaning and derogations. Alternatively, it could be considered to keep exclusion grounds solely in the remit of the Public Procurement Directives by making Deforestation Regulation enforcement a mandatory exclusion ground instead of including it as a sanctions well;
- On a side note, the indefinite exclusion established in Articles 5(3)(c) and 7(2)(c) Directive (EU) 2024/1203 concerns a disproportionate penalty. Instead, a time-limited approach, such as the 12-month limit of the Deforestation Regulation, should be considered for this exclusion ground too;
- The use of delegated law-making is discussed further in Section 6.

4.2.3 The Corporate Sustainability Due Diligence Directive

The Corporate Sustainability Due Diligence Directive (EU) 2024/1760 (CSDDD)²⁰⁷ is part of the EU’s initiative on sustainable corporate governance²⁰⁸

²⁰⁷ European Parliament and Council Directive (EU) 2024/1760 of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L 2024 (CSDDD).

²⁰⁸ Commission Staff Working Document Impact Assessment Report -Accompanying the document Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 [2022] SWD(2022) 42 final, par 1.1.

and aims to ‘reinforce sustainability in corporate governance and management systems,’ especially by mitigating their external human rights and environmental impacts.²⁰⁹ The CSDDD, adopted under Articles 50(1), 50(2)(g), and 114 TFEU, aims to transform soft law standards, such as the UN Guiding Principles on Business and Human Rights (UNGPs)²¹⁰ and the OECD (Organisation for Economic Co-operation and Development) Due Diligence Guidance for Responsible Business Conduct,²¹¹ into ‘mandatory legal obligations.’²¹² Building on the Corporate Sustainability Reporting Directive’s ‘disclosure’ obligations²¹³ regarding the sustainability-related business models, strategies, targets, administrative structures, policies, schemes, risks, and indicators,²¹⁴ the CSDDD aims to ensure that large companies falling into its scope, namely those with more than 1,000 employees on average and a net worldwide turnover of more than 450,000,000 euros,²¹⁵ conduct due diligence research in their supply chains.²¹⁶

Specifically, according to Article 1 CSDDD, this Directive sets down rules for ‘obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts with respect to their own operations, the operations of their subsidiaries, and the operations carried out by their business partners in the chains of activities of those companies,’ ‘liability for violations of the above obligations’ and ‘the obligation for companies to adopt and put into effect a transition plan for climate change mitigation.’ For this reason, the CSDDD provides that ‘Member States shall ensure that companies conduct risk-based human rights and environmental due diligence’²¹⁷ by ‘integrating due diligence into company policies and risk management systems,’²¹⁸ ‘identifying

²⁰⁹ Commission Staff Working Document Impact Assessment Report -Accompanying the document Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 [2022] SWD(2022) 42 final, par 2.1.1; Laura Treviño-Lozano and Ezgi Uysal, ‘Bridging the gap between corporate sustainability due diligence and EU public procurement’ (2023) 30(5) Maastricht Journal of European and Comparative Law 554, 556.

²¹⁰ CSDDD, rec 5.

²¹¹ CSDDD, rec 6.

²¹² David Ramos Muñoz, ‘The Corporate Sustainability Due Diligence Directive (CSDDD). Everything, everywhere, all at once?’ (2025) EUSFiL Research Working Paper Series 1, 12 <www.papers.ssrn.com> accessed 14 February 2025.

²¹³ *ibid* 6.

²¹⁴ European Parliament and Council Directive (EU) 2022/2464 of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] OJ L 322, art 1 amending replacing Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC [2013] OJ L 182, art 19a.

²¹⁵ CSDDD, art 2(1)(a).

²¹⁶ Nicolas Bueno, ‘The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise’ (2024) 9(2) Business and Human Rights Journal 294, 296 <<https://doi.org/10.1017/bhj.2024.10>> accessed 14 February 2025.

²¹⁷ CSDDD, art 5(1).

²¹⁸ CSDDD, art 7.

and assessing actual and potential adverse impacts,’²¹⁹ ‘preventing potential adverse impacts,’²²⁰ ‘bringing actual adverse impacts to an end,’²²¹ providing remediation for actual adverse impacts,²²² and meaningfully engaging with stakeholders.²²³

Public Procurement and the Corporate Sustainability Due Diligence Directive

Although the initial Commission’s proposal did not include any procurement-related provisions, the final text adopted the European Parliament’s suggestions on integrating a public procurement means into the Corporate Sustainability Due Diligence Directive (CSDDD).²²⁴ In particular, under Article 31 CSDDD, ‘Member States shall ensure that compliance with the obligations resulting from the provisions of national law transposing this Directive, or their voluntary implementation, qualifies as an environmental or social aspect that contracting authorities may, in accordance with Directives 2014/23/EU, 2014/24/EU and 2014/25/EU, take into account as part of the award criteria for public and concession contracts, and as an environmental or social condition that contracting authorities may, in accordance with those Directives, lay down in relation to the performance of public and concession contracts.’

Moreover, Recital 92 CSDDD underlines that contracting authorities and entities ‘may exclude or may be required by Member States to exclude from participation in a procurement procedure [...] any economic operator, where they can demonstrate by any appropriate means a violation of applicable obligations in the fields of environmental, social and labour law, [...] or that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable.’ Lastly, in light of ensuring consistency and implementation of the EU law, the same Recital provides that the Commission ‘should consider whether it is relevant to update any of the Directives 2014/23/EU, 2014/24/EU, 2014/25/EU, in particular with regard to the requirements and measures Member States are to adopt to ensure compliance with the sustainability and due diligence obligations throughout procurement and concession processes.’²²⁵

²¹⁹ CSDDD, art 8.

²²⁰ CSDDD, art 10.

²²¹ CSDDD, art 11.

²²² CSDDD, art 12.

²²³ CSDDD, art 13.

²²⁴ Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - Letter to the Chair of the JURI Committee of the European Parliament [2024] ST 6145 2024 INIT, rec 63, art 24; Uysal and Janssen (n 132) 187.

²²⁵ The proposed temporary or indefinite exclusion of undertakings from public procurement by competent national authorities in the event of an infringement of the CSDDD was not adopted. European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability [2021] (2020/2129(INL)), art 18(2); Treviño-Lozano and Uysal (n 209) 562.

Relationship with the Public Procurement Directives

In general, Article 31 Corporate Sustainability Due Diligence Directive (CSDDD) can be categorised as a procedural (contract performance condition and award criteria) and a substantive (compliance with the CSDDD) requirement. Member States are required to ensure that contracting authorities ‘may’ require compliance with the CSDDD or their voluntary implementation in their public procurement procedures as an award criterion or a contract performance condition. This provision underlines that the integration of the described sustainability requirements shall be made ‘in accordance with Directives 2014/23/EU, 2014/24/EU and 2014/25/EU.’

Apart from that, in light of the need to ensure consistency, as explicitly mentioned in Recital 92 CSDDD, the proportionality principle, and especially its aspect as the condition of the ‘link to the subject-matter’, as included in Directive 2014/24/EU, should be considered.

Particularly, in the *Concordia Bus* case²²⁶, the CJEU clarified the possibility for contracting authorities to take environmental considerations into account when awarding public contracts, thereby opening the door for green award criteria.²²⁷ The Court developed the above concept of ‘link to the subject-matter’ of the contract (LtSM) in this case. Accordingly, a contracting authority can take ecological considerations into account ‘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.’²²⁸

Since then, the LtSM is integrated in several Articles in Directive 2014/24/EU: technical specifications (Article 42), variants (Article 45), award criteria (Article 67), and contract performance conditions (Article 70). It is also made explicit in Recital 97 Directive 2014/24/EU that there is a ban on including general corporate social or environmental responsibility (CSR) policies: ‘However, the condition of a link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy, which 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.’

Yet, Article 31 CSDDD stipulates that Member States ‘shall ensure’ that contracting authorities ‘may’ use compliance with the CSDDD or its voluntary implementation into account as an award criterion in the sense of Article 67

²²⁶ Case C-513/99 *Concordia Bus* [2002] EU:C:2002:495.

²²⁷ *Ibid* para 2.

²²⁸ *Concordia Bus* (n 226) para. 69.

Directive 2014/24/EU or a contract performance criterion in the sense of Article 70 Directive 2014/24/EU.

Before the implementation of the CSDDD, the importance of human rights due diligence was recognized in soft law through the UN Guiding Principles (UNGP).²²⁹ The UNGPs establish a three pillar framework combining the states' duty to protect human rights, the responsibility for corporations to respect human rights within their value chains, and access to remedy.²³⁰

The OECD provided further guidance on Human Rights Environmental Due Diligence (HREDD) with an additional focus on the environment. In the Guidelines for Multinational Enterprises on Responsible Business Conduct, the OECD sets out a due diligence framework that outlines six measures:²³¹

1. Corporations should embed responsible business conduct into policies and management systems;
2. Actual and potential adverse impacts associated with the enterprise should be identified and assessed;
3. These adverse impacts should be ceased, prevented and mitigated;
4. Implementation and results should be tracked;
5. How impacts are addressed should be communicated;
6. When appropriate, corporations should provide for or co-operate in remediation.

As mentioned before, the CSDDD aims to implement both the UNGPs and the OECD framework. Step 1 of the OECD framework is embedded in Article 7, which stipulates that 'Member States shall ensure that companies integrate due diligence into all their relevant policies and risk management'. Step 2 is integrated in Article 8, which specifically mentions not only adverse impacts within the companies' own operations, but also those of subsidiaries, and business partners if this is related to the chain of activities of the company. Step 3 is integrated in Article 11 (ceasing the adverse impacts) and Article 10 (preventing and mitigating potential adverse impacts). Article 15 implements the monitoring measure of step 4, and Article 16 embeds the communication measure of step 5. Lastly, the remediation of actual adverse impacts of step 6 is embedded in Article 12.

According to Article 67(3) Directive 2014/24/EU as mentioned in Section 3.2.5, award criteria are linked to the subject-matter of the public contract 'where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in: a) the specific process of production, provision or trading of those works, supplies or services; or b) a specific process for another stage of their life cycle. Notably, this is the case 'even where such factors do not form part of their material substance.'

²²⁹ United Nations, 'Guiding Principles on Business and Human Rights' (2011)

²³⁰ Treviño-Lozano and Uysal (n 209) 558.

²³¹ OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD 2023) 17 <https://www.oecd.org/en/publications/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en.html> accessed 8 April 2025.

This definition of LtSM also applies to contract performance conditions under Article 70 Directive 2014/24/EU.²³²

The inclusion of compliance with due diligence requirements in the CSDDD appears to create a legal incoherency issue with the LtSM under Directive 2014/24/EU and its equivalents under Directives 2014/23/EU and 2014/25/EU. To use human rights and environmental due diligence criteria as award criteria or contract performance criteria, contracting authorities and entities have to still meet the requirement of the link to the subject-matter of the contract.²³³

Amongst various issues, there are two major legal coherency issues with using CSDDD compliance in award criteria or contract performance clauses. Firstly, the use of an economic operator's general policies on human rights and environment, relating to step 1 in the OECD guidelines and Article 7 CSDDD, appears incompatible with Recital 97 Directive 2014/24/EU, which explicitly rules out using criteria in public contracts related to general policies. The conditions could still meet the LtSM, if these policies are limited to the contractor's commitments specifically applicable to the type of tendered product, work, or supply.²³⁴ Secondly, steps 2-5 of the OECD guidelines, regarding adverse impacts in the supply chain also pose similar issues in this regard.²³⁵ The conditions in the public contract can only be linked to the specific product or service that is being tendered, while requiring CSDDD compliance under Article 31 would mean that adverse impacts in all value chains of the economic operator are to be identified, assessed and where relevant ceased, prevented or mitigated. To enable such compliance and to not make Article 31 a dead letter law possibility, the above proportionality requirement under Directive 2014/24/EU would need to be loosened.²³⁶ Furthermore, it is unclear how Recital 92 and Article 31 CSDDD relate to Article 18(2) Directive 2014/24/EU which also refers to compliance with EU environmental and social law under which the CSDDD can be categorised. If implemented in national law, Article 18(2) as discussed under Section 3.2.2, mandates compliance already with the CSDDD during the performance of the contract. This raises similar issues as discussed before under Article 31 above, and also generally adds to the unclarity related to Article 18(2).

Finally, it is clear that based on Article 31 CSDDD a difference would be created between economic operators that fall under the scope of this directive and those that do not fall under its scope. Using compliance with the CSDDD as, for instance, an award criterion would, as a consequence, not only lead to an expansion of its scope but also to a disbalanced level playing field between those that already comply and those that do not, which could influence competition in a public procurement procedure.

²³² See Article 70 of Directive 2014/24/EU.

²³³ Treviño-Lozano and Uysal (n 209) 556.

²³⁴ Treviño-Lozano and Uysal (n 209) 567-568.

²³⁵ *ibid.*

²³⁶ Andhov et al. (n 78) 58-59.

To conclude in terms of legal coherency, this means the following:

- Article 31 of the Corporate Sustainability Due Diligence Directive contains a procedural and substantive requirement to use compliance with this directive as a contract performance condition or as award criteria;
- Using Corporate Sustainability Due Diligence Directive compliance as a contract performance condition or award criteria is at odds with the proportionality requirement of Article 18(1), 67(3) and 70 Directive 2014/24/EU and their equivalents under Directive 2014/23/EU and Directive 201/25/EU. More specifically, these issues concern the use of an economic operator's general policies on human rights and environment, relating to step 1 in the OECD guidelines and Article 7 Corporate Sustainability Due Diligence Directive, appears incompatible with Recital 97 Directive 2014/24/EU, which explicitly rules out using criteria in public contracts related to general policies. Similarly, steps 2-5 of the OECD guidelines, regarding adverse impacts in the supply chain also pose similar issues in this regard also pose incoherency issues in this regard;
- The need for scrutiny of this legal incoherence is noted in the recitals of the Corporate Sustainability Due Diligence Directive as well.

Based on the above legal coherency discussion, the following recommendations are made:

- As a means to further allow green and social public procurement, the link to the subject-matter (LtSM) requirement could be removed from the Public Procurement Directives, an explicit carve-out provision for the Corporate Sustainability Due Diligence Directive could be introduced in these Directives, or a provision could be introduced in the same Directives to accommodate such corporate policies in general.

4.3 Circular economy and Public Procurement

4.3.1. The Circular Economy Action Plan

The new Circular Economy Action Plan (CEAP) was adopted in 2020, to complement the European Green Deal, in accelerating the green transition, and

the 2015 Action Plan for the Circular Economy.²³⁷ The CEAP highlights the need of ‘a regenerative growth model that gives back to the planet more than it takes,’ ‘keeping (the EU’s) resource consumption within planet,’ reducing its ‘consumption footprint,’ and doubling ‘its circular material use rate.’²³⁸

Accordingly, it introduces a ‘Sustainable Product Policy Framework,’ focusing on (i) ‘designing sustainable products,’ particularly through the amendment of the Ecodesign Directive, (ii) ‘empowering consumers and public buyers,’ and (iii) integrating ‘circularity in production processes.’²³⁹ Furthermore, it aims to foster sustainability in ‘Key Product Value Chains,’ including electronics, ICT, batteries, vehicles, packaging, plastics, textiles, food, water, and nutrients.²⁴⁰ Lastly, it promotes the policy ‘less waste, more value,’ by enhancing the waste policy ‘in support of waste prevention and circularity,’ ‘creating a well-functioning EU market for secondary raw materials,’ and ‘addressing waste exports from the EU.’²⁴¹

Public Procurement and Circular Economy Action Plan

Regarding public procurement, the CEAP underlines the ‘reduced impact’ of the EU Green Public Procurement Criteria due to their voluntary character despite their broad scope.²⁴² Therefore, given public authorities’ significant purchasing power, it is noted that ‘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 unjustified administrative burdens for public buyers,’²⁴³ as of 2021.²⁴⁴ Similarly, the Commission aims 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.’²⁴⁵ Lastly, particularly regarding the construction and building sector, the CEAP suggests

²³⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A new Circular Economy Action Plan – For a cleaner and more competitive Europe [2020] COM(2020) 98 final (Circular Economy Action Plan), 2-3.

²³⁸ Circular Economy Action Plan, 2; Chris Backes and Marlon Boeve, ‘Regulating the Producer Instead of the Procurer – The EU Sustainable Products Initiative and Extended Producer Responsibility as Ways to Foster the Transition to a Circular Economy’ in Willem Janssen and Roberto Caranta (eds.) *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift* (Hart Publishing 2023) 95; Chris Backes and Marlon Boeve, ‘Envisioning the Future of the Circular Economy: A Legal Perspective’ (2022) 52(3-4) *Environmental Policy and Law* 253, 256 <<https://doi.org/10.3233/EPL-219034>> accessed 2 March 2025.

²³⁹ Circular Economy Action Plan, ch 2.

²⁴⁰ Circular Economy Action Plan, ch 3.

²⁴¹ Circular Economy Action Plan, ch 4.

²⁴² Circular Economy Action Plan, 3.

²⁴³ Circular Economy Action Plan, 5; Tátrai and Diófási-Kovács (n 131) 526.

²⁴⁴ Circular Economy Action Plan, Annex, 1.

²⁴⁵ Circular Economy Action Plan, 6; Tátrai and Diófási-Kovács (n 131) 526.

the launch of ‘a new comprehensive Strategy for Sustainable Built Environment,’ that will ensure ‘coherence across the relevant policy areas such as climate, energy and resource efficiency, management of construction and demolition, waste, accessibility, digitalisation and skill.’²⁴⁶ Part of this Strategy will be the use of Level(s), namely a reporting tool providing a common language for sustainability performance assessments,²⁴⁷ ‘to integrate life cycle assessment in public procurement.’²⁴⁸

Accordingly, the Batteries Regulation (EU) 2023/1542, the Ecodesign Regulation (EU) 2024/1781, and the Construction Products Regulation (EU) 2024/3110, which will be discussed further, all derive from the CEAP and its objective of transitioning to a circular economy growth model.

4.3.2 The Ecodesign for Sustainable Products Regulation

Noted in the above described Circular Economy Action Plan, ‘up to 80% of products’ environmental impacts are determined at the design phase.’²⁴⁹ The first Ecodesign Directive 2005/32/EC only covered the ‘ecodesign requirements for energy-using products’²⁵⁰ and aimed to ensure the free movement of those products²⁵¹ and improve energy efficiency, environmental protection, and energy supply.²⁵² This scope expanded to ‘energy-related products’, with the second Ecodesign Directive 2009/125/EC,²⁵³ thus combining ‘energy-using’ products, namely those using, generating, transferring, or measuring energy (e.g. computers) and ‘energy-impacting’ products, namely those affecting energy consumption (e.g. insulation).²⁵⁴

²⁴⁶ Circular Economy Action Plan, 11.

²⁴⁷ European Commission – Level(s): Putting circularity in practice No. 1 [2021] Publications Office of the European Union <<https://data.europa.eu/doi/10.2779/79139>> accessed 2 March 2025.

²⁴⁸ *ibid.*

²⁴⁹ Circular Economy Action Plan, par 2.2.1; Backes and Boeve 2023 (n 238) 100.

²⁵⁰ European Parliament and Council Directive 2005/32/EC establishing a framework for the setting of eco-design requirements for energy-using products and amending Council Directive 92/42/EEC and Directives 96/57/EC and 2000/55/EC of the European Parliament and of the Council [2005] OJ L 191 (Ecodesign Directive 2005), art 1(1).

²⁵¹ *ibid.*

²⁵² Ecodesign Directive 2005, art 1(2); Rosalind Malcolm, ‘Ecodesign Laws and the Environmental Impact of our Consumption of Products’ (2011) 23(3) *Journal of Environmental Law* 487 <<https://www.jstor.org/stable/44248790>> accessed 5 February 2025.

²⁵³ Directive of the European Parliament and of the Council 2005/32/EC establishing a framework for the setting of eco-design requirements for energy-using products and amending Council Directive 92/42/EEC and Directives 96/57/EC and 2000/55/EC of the European Parliament and of the Council, art 1(1).

²⁵⁴ Liesbet Van Acker, ‘The new Ecodesign Package: an important step towards a circular economy’ (2020) *Ars Aequi Juridische uitgeverij* 793, 794 <www.arsaequi.nl> accessed 5 February 2025.

The current Ecodesign Regulation (EU) 2024/1781 (ESPR),²⁵⁵ adopted under Article 114 TFEU, is devoted to promoting circular economy, with the objective of energy efficiency constituting only a part of the sustainable products' parameters.²⁵⁶ Therefore, with noted exclusions, it covers 'any physical goods that are placed on the market or put into services, including components and intermediate products'.²⁵⁷

Furthermore, the aim of the ESPR is to improve the 'environmental sustainability of products in order to make sustainable products the norm and to reduce the overall carbon and environmental footprint of products over their life cycle' and to safeguard the 'free movement of sustainable products.'²⁵⁸ For this reason, it empowers the Commission to set ecodesign requirements by means of delegated acts in accordance with the product parameters of Annex I, the specific ecodesign requirements of Article 5, the performance requirements of Article 6, and the information requirements of Article 8.²⁵⁹ Particularly, the ecodesign requirements shall cover the whole products' life cycle by addressing durability, reliability, reusability, upgradability, repairability, maintenance, refurbishment, substances of concern, energy, water and resource use and efficiency, recycled content, remanufacturing, recyclability, recovery, environmental impacts, and expected generation of waste.²⁶⁰ Moreover, it establishes a digital product passport,²⁶¹ enables self-regulation measures regarding ecodesign requirements,²⁶² prohibits the destruction of certain unsold consumer goods,²⁶³ and lays down green public procurement requirements.²⁶⁴

Public Procurement and the Ecodesign For Sustainable Products Regulation

The Ecodesign Regulation (ESPR) notes that the assurance of 'sufficient demand for more environmentally sustainable products' by means of public procurement will contribute to 'reaching climate neutrality, improving energy and resource efficiency and transitioning to a circular economy that protects public health and biodiversity' given the high share of public procurement in the EU's GDP.²⁶⁵ As a

²⁵⁵ European Parliament and Council Regulation (EU) 2024/1781 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC [2024] OJ L (ESPR).

²⁵⁶ Ludwig Krämer, 'EU Ecodesign and Product Policy: from Energy Efficiency to Circular Economy' (2024) 21 Journal for European Environmental & Planning Law 343, 358 <<https://doi.org/10.1163/18760104-21030009>> accessed 5 February 2025.

²⁵⁷ ESPR, art 1(2).

²⁵⁸ ESPR, art 1(1).

²⁵⁹ ESPR, art 4.

²⁶⁰ ESPR, art 5(1).

²⁶¹ ESPR, chapter III.

²⁶² ESPR, art 21.

²⁶³ ESPR, art 25.

²⁶⁴ ESPR, art 65.

²⁶⁵ ESPR, rec 100.

consequence, the ESPR introduces minimum mandatory green public procurement requirements.²⁶⁶

Firstly, Article 5 ESPR sets out the 'ecodesign requirements', such as durability, reliability, and reusability, which need to be considered by the Commission when adopting the delegated acts under Article 4 ESPR. These requirements aim to be consistent with EU law, including 'green public procurement criteria'²⁶⁷ and consider safety, affordability, competitiveness, and technological and administrative burdens,²⁶⁸ thus avoiding double standards for the same product group, time consumption, and market distortions.²⁶⁹

Moreover, Article 65(1) ESPR mandates contracting authorities and entities to 'award public contracts' in accordance with 'minimum requirements' when procuring products covered by delegated acts pursuant to Article 4 regarding 'ecodesign requirements' or used for activities constituting the subject matter of public works or services contracts. Article 65(2) ESPR then clarifies that these 'minimum requirements' shall be set 'where appropriate' with the aim of encouraging 'the supply of and demand for environmentally sustainable products' that fall into the scope of the delegated acts under Article 4 of this Regulation. These delegated acts must be introduced by taking into account 1) the value and volume of public contracts awarded for the relevant product groups and 2) the economic feasibility for contracting authorities and contracting entities to buy more environmentally sustainable products without entailing disproportionate costs.

Under Article 65(3) ESPR, implementing acts by the Commission can specify these 'minimum requirements' into 'technical specifications, award criteria, contract performance conditions or targets'. These requirements shall relate to the products' aspects covered by the delegated acts of Article 4 of this Regulation and must be based on 'the two highest performance classes, the highest scores or, when not available, on the best possible performance levels' in accordance with the relevant delegated acts.²⁷⁰ During this process, the Commission should consider 'the best possible environmental products and solutions available on the market, the effects of the requirements on competition and the fact that different contracting authorities and entities in different Member States might have different budgetary capacities or other constraints', for instance, climate conditions or network infrastructure.²⁷¹

For instance, should the implementing acts by the Commission be used, it could be mandatory for contracting authorities and entities to require that the economic

²⁶⁶ ESPR, rec 11.

²⁶⁷ ESPR, art 5(10)(c) and Annex II.

²⁶⁸ ESPR, art 5(11).

²⁶⁹ Inken Böttge et al., 'From Green Vision to Legal Obligation: The Case for Making Green Public Procurement Mandatory' (2023) 19 CYELP 249, 267

<<https://doi.org/10.3935/cyelp.19.2023.519>> accessed 18 January 2025.

²⁷⁰ ESPR, art 65(3).

²⁷¹ ESPR, rec 100.

operator's products align with specific carbon footprint requirements.²⁷² In the case of the 'award criteria,' these, where appropriate, shall have a 'minimum weighting of between 15% and 30%' in the respective procedure.²⁷³ This weighting was chosen to significantly encourage the choice of environmentally sustainable products.²⁷⁴ Moreover, award criteria should be preferred to technical specifications in case of 'uncertainties about the availability or cost of the best performing products' in the EU market.²⁷⁵ In terms of 'targets', these shall require 'a minimum percentage of 50% of procurement conducted of the most environmentally sustainable products' both on an annual or multiannual basis, and at the level of contracting authorities or entities, or at aggregated national level.²⁷⁶ For instance, contracting authorities or entities would need to award at least 50% of their annual procurement of certain products to those with more than 70% recyclable material.²⁷⁷ The ESPR highlights that the requirements constitute minimum harmonisation,²⁷⁸ thus not precluding national legislators from introducing or maintaining national measures regarding product groups that have not yet been addressed under the ESPR or from establishing stricter national requirements.²⁷⁹ Similarly, contracting authorities and entities can, if an implementing act requires them to give the recycled content of the relevant products a minimum weighting between 20% and 30%, assign a weight higher than 30%.²⁸⁰ Moreover, it is underlined that contracting authorities and entities can still rely on derogations or exemptions under the Directives 2014/24/EU and 2014/25/EU.²⁸¹

Lastly, according to Article 74(3)(b), which was introduced following the European Parliament's amendments,²⁸² Member States shall be able to impose the penalty of 'time-limited exclusion from public procurement procedures' in cases of ESPR infringement.

Relationship with the Public Procurement Directives

The Ecodesign Regulation (ESPR) contains different types of delegated law-making alternatives, including technical specifications, award criteria including a weighting, contract performance conditions, exclusion grounds, and targets

²⁷² *ibid.*

²⁷³ ESPR, art 65(3).

²⁷⁴ ESPR, rec 100 and art 65(3).

²⁷⁵ ESPR, rec 100.

²⁷⁶ ESPR, art 65(3).

²⁷⁷ ESPR, rec 100.

²⁷⁸ *ibid.*

²⁷⁹ ESPR, rec 101.

²⁸⁰ ESPR, rec 100.

²⁸¹ *ibid.*

²⁸² Amendments adopted by the European Parliament on the proposal for a regulation of the European Parliament and of the Council establishing a framework for setting eco-design requirements for sustainable products and repealing Directive 2009/125/EC [2023] COM(2022)0142, art 68(1)(b).

including a minimum level. These criteria would, therefore, be procedural and substantive. The ESPR refers to the definitions of contracting authorities and entities of Article 2(1), point (1), Directive 2014/24/EU and Article 4(1) Directive 2014/25/EU.²⁸³ Furthermore, it clarifies that ‘public contracts’ refer to contracts covered by these Directives. It is unclear why Directive 2014/23/EU is excluded from its scope;

The ESPR relies heavily on delegated law-making, meaning that the relationship between Directive 2014/24/EU and the ESPR is not clear yet as it would require the Commission to adopt them first. What is clear is that these delegated acts must be introduced by taking into account 1) the value and volume of public contracts awarded for the relevant product groups and 2) the economic feasibility for contracting authorities and contracting entities to buy more environmentally sustainable products without entailing disproportionate costs.

In addition to the conditions of the delegated acts, the delegated acts must be compliant with the Public Procurement Directives to ensure they can be applied in the future as well. Under Article 65(3) ESPR, the Commission can relate them to ‘technical specifications, award criteria, contract performance conditions or targets’. This broad scope means that Articles 42, 67-68 and 70 Directive 2014/24/EU provide the boundaries for their coherent application. Delegated acts that violate these provisions, stemming from the public procurement principles, would contribute to an incoherent system for public procurement. Accordingly, Article 65(1) ESPR underlines this position as well. Lastly, Recital 100 ESPR provides that these requirements do not preclude the possibility for contracting authorities and entities to enable ‘derogations or exemptions regarding public contracts set out in Union law, in particular Directives 2014/24/EU and 2014/25/EU.’

The ‘time-limited exclusion from public procurement procedures’ according to Article 74(3)(b) relates to the system of Article 57 Directive 2014/24/EU, which was extensively discussed under Section 3.2.4 and the relevant recommendations are repeated below as well.

²⁸³ ESPR, art 2.

To conclude in terms of legal coherency, this means the following:

- The Ecodesign Regulation contains, amongst other things, various options for delegated law-making under Article 65, meaning that the exact impact on public procurement is still unclear. In addition to the foreseen exclusion ground in Article 74(3)(b), the delegated acts can introduce substantive or procedural requirements or targets;
- The Ecodesign Regulation refers to Directive 2014/25/EU and Directive 2014/24/EU for its scope and derogations. It is unclear why Directive 2014/23/EU is excluded from its scope;
- Notably, the Ecodesign Regulation defines 'life-cycle' in Article 2 distinctly from the definition in Article 2(20) Directive 2014/24/EU. This difference in terminology could hinder the application of both provisions in practice;
- Furthermore, under the Ecodesign Regulation delegated acts must be introduced by taking into account 1) the value and volume of public contracts awarded for the relevant product groups and 2) the economic feasibility for contracting authorities and contracting entities to buy more environmentally sustainable products without entailing disproportionate costs. Yet, the conditions of the delegated law-making differs significantly amongst the discussed legislative instruments;
- When it comes to the new exclusion ground, the conclusions noted under Section 4.2.2 in light of the Deforestation Regulation similarly apply as well to the Ecodesign Regulation;
- The Ecodesign Regulation does not establish a reporting obligation regarding its public procurement requirements.

Based on the above legal coherency discussion, the following recommendations are made:

- The delegated law-making under the Ecodesign Regulation must be compliant with the conditions of the Public Procurement Directives, including Articles 42, 67-68 and 70, depending on whether technical specifications, award criteria or contract performance conditions are chosen, to avoid legal incoherencies in the future. Explicitly including these requirements in the legislative instrument itself can be useful from a compliance perspective, as is the approach under the Construction Products Regulation, which will be discussed in Section 4.3.3;
- The conditions of the delegated law-making should be streamlined across the legislative instruments to ensure that all of them are introduced with the same pre-conditions in mind. The Construction Products Regulation approach to delegated law-making appears the most extensive and can be used as a starting point, as noted in Section 4.3.3.
- When it comes to the new exclusion ground, the recommendations noted under Section 4.2.2 in light of the Deforestation Regulation similarly apply as well to the Ecodesign Regulation;
- The use of delegated law-making and monitoring is discussed further in Section 6.

4.3.3 The Construction Products Regulation

As the new Circular Economy Action Plan highlights, the built environment significantly affects many sectors, including the economy, local jobs, and quality of life.²⁸⁴ Moreover, the construction sector accounts for 50% of all extracted materials and is responsible for more than 35% of the EU's total waste generation and for 5-12% of total national greenhouse gas (GHG) emissions.²⁸⁵ Therefore, following this Circular Economy Action Plan, the Sustainable Products Innovation, and the ESPR framework, the Construction Products Regulation (EU) 2024/3110 (CPR)²⁸⁶ specifically addresses the 'sustainability performance of construction products,' focusing on the potential introduction of relevant recycled

²⁸⁴ Circular Economy Action Plan, par 3.3.6.

²⁸⁵ *ibid.*

²⁸⁶ European Parliament and Council Regulation (EU) 2024/3110 laying down harmonised rules for the marketing of construction products and repealing Regulation (EU) No 305/2011 [2024] OJ L (CPR).

content requirements.²⁸⁷ As a result, environmental sustainability in this sector covers all relevant life-cycle stages, ‘from the procurement of the raw material to its disposal,’ encompassing many economic operators (e.g. manufacturers, distributors, suppliers).²⁸⁸

In general, CPR aims to ensure the ‘free movement of safe and sustainable construction products’ and encourage a ‘green and digital transition’ by avoiding and decreasing the environmental, health, and safety impacts of these products.²⁸⁹ For these reasons, it sets down ‘harmonised rules on how to express the environmental and safety performance of construction products in relation to their essential characteristics, including life cycle assessment’ and ‘environmental, functional and safety construction products requirements.’²⁹⁰ In particular, it establishes performance harmonised standards by means of implementing acts²⁹¹ and product requirements by means of delegated acts,²⁹² integrates circularity aspects into product requirements,²⁹³ introduces a declaration of performance and conformity²⁹⁴ that includes the products’ environmental sustainability performance,²⁹⁵ and sets up a construction digital product passport.²⁹⁶

Public Procurement and the Construction Products Regulation

The Construction Products Regulation (CPR) notes that the encouragement of the ‘use of sustainable construction products’ by means of public procurement will contribute to ‘reaching climate neutrality, improving energy and resource efficiency and transitioning to a circular economy that protects public health and biodiversity’ given the high share of public procurement in the EU’s GDP.²⁹⁷ Therefore, CPR establishes ‘minimum mandatory performance requirements on environmental sustainability’ for construction products, that will be laid down by delegated acts.²⁹⁸

²⁸⁷ Circular Economy Action Plan, par 3.3.6; Roberto Caranta, ‘Towards mandatory SPP for buildings/works’ (2022) 4(1) European Journal of Public Procurement Markets 9, 16 <<https://www.doi.org/10.54611/OYAN5022>> accessed 29 January 2025.

²⁸⁸ Uysal and Janssen (n 132) 185-186.

²⁸⁹ CPR, art 1(3); Dorothy Gruyaert and Veerle Pissierssens, ‘Transforming the Construction Sector Through Minimum Requirements’ in Willem Janssen and Roberto Caranta (eds.) *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift* (Hart Publishing 2023) 180.

²⁹⁰ CPR, art 1(1).

²⁹¹ CPR, art 5 and 6.

²⁹² CPR, art 7.

²⁹³ CPR, Annex III, par 3.

²⁹⁴ CPR, art 13.

²⁹⁵ CPR, art 15(2).

²⁹⁶ CPR, art 76.

²⁹⁷ CPR, rec 98; Alexander Buftic, ‘Directive 2023/1791 EED: a step closer to mandatory green public procurement criteria through sectoral legislation’ (2023) 5(3) European Journal of Public Procurement Markets 46, 57 <<https://www.doi.org/10.54611/GDGO2591>> accessed 28 January 2025.

²⁹⁸ *ibid.*

The final version of Article 83 CPR regarding green public procurement was mostly formed by the European Parliament and the Council,²⁹⁹ since the initial proposal included only the delegation procedure, in which the Commission would only need to consider ‘the value and volume of public contracts awarded for that given product,’ ‘the need to ensure sufficient demand for more environmentally sustainable products’ and ‘the economic feasibility for contracting authorities and entities.’³⁰⁰

Particularly, under Article 83(1) CPR, the Commission shall specify ‘mandatory minimum environmental sustainability requirements’ by means of delegated acts. These requirements may - but do not need to -³⁰¹ take the form of technical specifications, selection criteria, conditions for performance of contracts, or contract award criteria depending on the product family or product category concerned.³⁰²

During the establishment of the delegated acts, the Commission shall consult experts from each Member State and relevant stakeholders, as well as conduct an impact assessment considering at least (i) the value and volume of public contracts awarded for the relevant products, (ii) the environmental advantages stemming from the uptake of products in the highest two classes of performance, (iii) the need to safeguard sufficient demand for more environmentally sustainable products, (iv) the economic feasibility of procuring such products without entailing disproportionate costs, and the availability of those products on the market, (v) the respective market situation at EU level, (vi) the impacts on the competition, (vii) the effects on small and medium-sized enterprises, and (viii) the different regulatory needs and climate conditions of each Member State.³⁰³ This ensures greater flexibility than the initially proposed ‘one size fits all’ approach.³⁰⁴

Contracting authorities and entities shall apply these requirements in procurement procedures ‘where contracts require minimum environmental sustainability performance for construction products as regards their essential characteristics covered by harmonised technical specifications.’³⁰⁵ Nevertheless, given the applied form of minimum harmonisation, Article 83(2) CPR underlines that contracting authorities and entities can introduce more ambitious environmental sustainability requirements regarding the essential characteristics

²⁹⁹ Proposal for a Regulation of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products, amending Regulation (EU) 2019/1020 and repealing Regulation (EU) 305/2011 - Letter to the Chair of the European Parliament IMCO Committee [2024] ST 6127 2024 INIT, art 84.

³⁰⁰ Proposal for a Regulation of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products, amending Regulation (EU) 2019/1020 and repealing Regulation (EU) 305/2011 [2022] COM(2022) 144 final, art 84.

³⁰¹ Caranta (n 287).

³⁰² CPR, art 83(4).

³⁰³ CPR, art 83(5).

³⁰⁴ Caranta R, ‘The more recent way of mandatory public procurement rules: sustainability rhymes with resilience’ (2024) 5(4) *European Journal of Public Procurement Markets* 71, 75 <<https://www.doi.org/10.54611/LLJZ2561>> accessed 5 February 2025.

³⁰⁵ CPR, art 83(2).

covered by harmonised technical specifications or additional ones regarding other essential characteristics. Notably, the minimum harmonisation approach replaced the initial maximum one,³⁰⁶ following the scholars' opposition.³⁰⁷

On the other hand, contracting authorities and entities are allowed, 'on an exceptional basis', to not apply these requirements in cases where, after preliminary market consultation under Article 40 Directive 2014/24/EU and Article 58 Directive 2014/25/EU, is found that: (i) the needed construction product is supplied only by a specific economic operator, and 'no reasonable alternative or substitute exists,' (ii) no appropriate tenders or requests to participate have been submitted to a previous public procurement process, or (iii) the application of these requirements or the incorporation of the relevant construction product in construction works would impose a disproportionate financial burden on contracting authorities and entities, or would lead to incompatibility or technical infeasibilities.³⁰⁸ For this reason, 'estimated value differences above 10%, based on objective and transparent data' may be presumed as disproportionate.³⁰⁹ The application of this derogation excludes the relevant procedure from being considered environmentally sustainable in relation to the construction products to which the exceptions have been applied.³¹⁰ Nevertheless, the above derogation does not preclude also the exclusion of abnormally low tenders in accordance with Article 69 Directive 2014/24/EU and Article 84 Directive 2014/25/EU.³¹¹

Lastly, Article 83(3) CPR mandates Member States and the Commission to 'provide technical assistance and advice' to contracting authorities and entities on how to comply with these mandatory requirements. For instance, 'the EU Ecolabel and other national or regional EN ISO 14024 type I ecolabelling schemes officially recognised' can be capitalised to prove compliance with these requirements,³¹² where such label abides by the conditions set down for the validity of markings other than CE markings.³¹³

Relationship with the Public Procurement Directives

The Construction Products Regulation (CPR) contains delegated law-making alternatives with the potential introduction of minimum environmental sustainability performance for construction products, technical specifications,

³⁰⁶ See Proposal for a Regulation of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products, amending Regulation (EU) 2019/1020 and repealing Regulation (EU) 305/2011 [2022] COM(2022) 144 final, art 7(4), according to which, the Member States should, regarding, among others, public procurement, 'respect the harmonised zone in their national law, other rules or administrative action and ... not set additional requirements for products covered by it'; Caranta (n 304) 75.

³⁰⁷ Andhov et al. (n 78) 30.

³⁰⁸ CPR, art 83(6).

³⁰⁹ *ibid.*

³¹⁰ *ibid.*

³¹¹ *ibid.*

³¹² CPR, art 83(7).

³¹³ CPR, art 19.

selection criteria, conditions for performance of contracts, and contract award criteria. These criteria would, therefore, be procedural and substantive.

Article 83(2) CPR clarifies that the described sustainability requirements cover procurement procedures ‘falling within the scope of Directives 2014/24/EU or 2014/25/EU.’ Moreover, Article 83(4) CPR refers for ‘technical specifications’ to Article 42 Directive 2014/24/EU and Article 60 Directive 2014/25/EU, for ‘selection criteria’ to Article 58 Directive 2014/24/EU and Article 80 Directive 2014/25/EU, for ‘conditions for performance of contracts’ to Article 70 Directive 2014/24/EU and Article 87 Directive 2014/25/EU, and for ‘contract award criteria’ to Article 67 Directive 2014/24/EU and Article 82 Directive 2014/25/EU. Regarding the prior ‘preliminary market consultation’ for enabling the derogation of Article 83(6) CPR, the latter refers to Article 40 Directive 2014/24/EU and Article 58 Directive 2014/25/EU.

Furthermore, Article 83(6) CPR underlines also that ‘(e)very three years, Member States shall report to the Commission about the use of this paragraph, in accordance with Article 83 of Directive 2014/24/EU.’ Lastly, under the same provision, the enabling of the respective derogation does not preclude the application of Articles 69 Directive 2014/24/EU and 84 Directive 2014/25/EU on abnormally low tenders.

To conclude in terms of legal coherency, this means the following:

- The Construction Products Regulation includes various options for delegated law-making including Article 83, meaning that the exact legislative impact on public procurement is still uncertain. Delegated acts can contain substantive or procedural requirements, including minimum environmental sustainability performance for construction products, technical specifications, selection criteria, conditions for performance of contracts, and contract award criteria;
- There are various cross-references to provisions of the Public Procurement Directives in the Construction Products Regulation;
- Under the Construction Products Regulation, delegated acts must consider: (i) the value and volume of public contracts awarded for the relevant products, (ii) the environmental advantages stemming from the uptake of products in the highest two classes of performance, (iii) the need to safeguard sufficient demand for more environmentally sustainable products, (iv) the economic feasibility of procuring such products without entailing disproportionate costs, and the availability of those products on the market, (v) the respective market situation at EU level, (vi) the impacts on the competition, (vii) the effects on small and medium-sized enterprises, and (viii) the different regulatory needs and climate conditions of each Member State. As already noted, the

conditions of the delegated law-making differ amongst the legislative instruments;

- In terms of monitoring, Article 83(6) Construction Products Regulation mandates Member States to 'report to the Commission' every three years solely about the enactment of the derogation of the same paragraph in accordance with Article 83 Directive 2014/24/EU.

Based on the above legal coherency discussion, the following recommendations are made:

- The delegated law-making under the Construction Products Regulation must comply with the conditions of the Public Procurement Directives, including Articles 42, 58, 67, and 70 depending on if the above 'minimum environmental sustainability requirements' are embedded in technical specifications, selection criteria, award criteria, and performance conditions, respectively. This broad scope means that Articles 42, 58, 67, and 70 Directive 2014/24/EU provide the boundaries for the coherent application of the above delegated acts. Consequently, delegated acts that violate these provisions, stemming from the public procurement principles, would contribute to an incoherent system for public procurement, which must be streamlined across the legislative instruments;
- Given that the Construction Products Regulation is the most extensive when compared to the other instruments, regarding the delegation requirements, it should be considered as a starting point to streamline this approach across the legislative instruments to ensure that all of them are introduced with the same pre-conditions in mind.
- The use of delegated law-making and monitoring is discussed further in Section 6.

4.3.4 The Batteries Regulation

The transition to a low-carbon economy and electric mobility intensified the dependence on batteries for transport, thus putting in place new environmental, social, and financial risks,³¹⁴ such as the extraction and undertaking of the

³¹⁴ Abby Semple, 'Charge of the Light Brigade? The Clean Vehicles Directive and the Batteries Regulation' in Willem Janssen and Roberto Caranta (eds.) *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift* (Hart Publishing 2023) 115; Vivienne Halleux, 'New EU regulatory framework for batteries - Setting sustainability requirements' (2024) EPRS 1, 2 <www.europarl.europa.eu> accessed 18 January 2025.

relevant critical raw materials.³¹⁵ In this light, the Batteries Regulation (EU) 2023/1542³¹⁶ was adopted under Article 114 TFEU and replaced the previous Batteries Directive 2006/66/EC. The instrument of a Regulation was chosen over a Directive to increase harmonisation, legal certainty, and enforcement.³¹⁷ At the time, the Batteries Directive solely covered the end-of-life stage of batteries by decreasing the use of hazardous substances and guaranteeing the appropriate management of waste batteries. In contrast, the Regulation, following the Strategic Action Plan on Batteries' focus on the 'whole value chain',³¹⁸ adopts a life-cycle approach, hence aligning with the Circular Economy Action Plan.³¹⁹

In general, the objectives of the Regulation are 'to contribute to the efficient functioning of the internal market' and to prevent and reduce 'the adverse impacts of batteries on the environment, and to protect the environment and human health by preventing and reducing the adverse impacts of the generation and management of waste batteries'.³²⁰ For these reasons, the Regulation prescribes 'sustainability, safety, labelling and information requirements,' 'minimum requirements for extended producer responsibility, the collection and treatment of waste batteries and for reporting,' 'due diligence obligations on the [involved] economic operators' and 'requirements for green public procurement.'³²¹ Specifically, these mandates are mirrored in the carbon footprint declaration requirement,³²² the recycled content documentation requirement³²³ and the respective mandatory minimum levels of recycled content,³²⁴ the minimum electrochemical performance and durability requirements,³²⁵ the obligation of battery replaceability,³²⁶ the supply chain due diligence obligations,³²⁷ the

³¹⁵ Topi Turunen and Johanna Suikkanen, 'EU and Recycling of Critical Raw Materials: Stuck in Legal Limbo?' (2024) 33(3) European Energy and Environmental Law Review 139, 142-143 <<https://doi.org/10.54648/eelr2024009>> accessed 29 January 2025.

³¹⁶ European Parliament and Council Regulation (EU) 2023/1542 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/E [2023] OJ L191 (Batteries Regulation).

³¹⁷ 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 [2020] COM(2020) 798 final, 1, 5.

³¹⁸ Annex 2 - Strategic Action Plan on Batteries to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions; Europe on the Move - Sustainable Mobility for Europe: safe, connected and clean [2018] COM(2018) 293 final, par 1.

³¹⁹ Pouikli K, 'The role of Green Public Procurement (GPP) under the EU Green Deal as a key level of the transition to a circular and climate neutral Europe' in Christiane Trüe and Lydia Scholz (eds.) *The EU Green Deal and its Implementation* (Nomos 2023) 266.

³²⁰ Batteries Regulation, art 2.

³²¹ Batteries Regulation, art 1(2).

³²² Batteries Regulation, art 7(1).

³²³ Batteries Regulation, art 8(1).

³²⁴ Batteries Regulation, art 8(2-3).

³²⁵ Batteries Regulation, art 9.

³²⁶ Batteries Regulation, art 11.

³²⁷ Batteries Regulation, art 48.

collection rate³²⁸ and recycling efficiency targets,³²⁹ the battery passport,³³⁰ and the mandatory green public procurement requirements.³³¹

Public Procurement and the Batteries Regulation

When it comes to public procurement, batteries are explicitly recognised as an important means of promoting and stimulating the market for ‘clean and energy-efficient mobility and energy-storage’ and contributing to the EU’s objectives for the environment, climate change, and energy.³³² Given contracting authorities’ high share of the bus and coach market (75%), their share in battery waste collection, and their estimated substantial footprint from portable batteries (e.g., laptops and computers), it is noted that public procurement can drive sustainable production, consumption, and innovation.³³³

According to Article 85(1) Batteries Regulation, contracting authorities and entities ‘[...] shall, when procuring batteries or products containing batteries [...] take account of the environmental impacts of those batteries over their life cycle with a view to ensuring that such impacts are kept to a minimum.’ During the legislative procedure, the European Parliament attempted to reinforce the contracting authorities and entities’ relevant obligation by inserting explicitly that they shall ‘give preference to the most environmentally friendly batteries’ instead of just ‘taking into account’ their environmental performance, but this was eventually not adopted.³³⁴

Contracting authorities and entities ‘shall’ integrate the technical specifications prescribed by Articles 7 to 10 into their public procurement procedures for batteries or products containing batteries based on Article 85 Batteries Regulation. These technical specifications consist of carbon footprint performance classes, recycled content, electrochemical performance, durability, and award criteria, which will be published by the Commission by means of delegated law-making. The aim is to ensure that they are purchased with ‘significantly lower environmental impacts over their life cycle.’³³⁵

Under Article 85(3) Batteries Regulation, there are two ways in which public procurement is affected: delegated acts regarding technical specifications mentioned before and award criteria. The exercise of the delegation regarding the award criteria shall launch twelve months after the adoption of the latest of

³²⁸ Batteries Regulation, art 59-61 and 69.

³²⁹ Batteries Regulation, art 71.

³³⁰ Batteries Regulation, art 77.

³³¹ Batteries Regulation, art 85.

³³² Batteries Regulation, rec 133.

³³³ Impact Assessment Report accompanying the 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 [2020] SWD(2020) 335 final, 1, 315.

³³⁴ 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 - Delegations [2023] ST 6410 2023 INIT, art 70(1).

³³⁵ Batteries Regulation, art 85(2).

the delegated acts referred to in: (i) Article 7(2), fourth subparagraph, point (a) on the carbon footprint performance classes of electric vehicle batteries, rechargeable industrial batteries, and LMT batteries, (ii) Article 8(1) on the recycled content in industrial batteries, electric vehicle batteries, SLI batteries, and LMT batteries, (iii) Article 9(2) on the minimum values for the electrochemical performance and durability parameters for portable batteries of general users, and (iv) Article 10(5) on the electrochemical performance and durability parameters for rechargeable industrial batteries with a capacity greater than 2kWh and LMT batteries. These technical requirements can take shape as maximum harmonisation [e.g., regarding the carbon footprint performance thresholds of Article 7(2)] or as minimum harmonisation [e.g., regarding the values for the electrochemical performance and durability parameters laid down in Article 9(2)].³³⁶

The adopted provision eliminated the proposed delegation to establish ‘minimum mandatory green procurement criteria or targets.’³³⁷ In particular, the Council raised objections concerning the adoption of minimum targets³³⁸ and the European Parliament specified the minimum mandatory green procurement criteria to refer explicitly to award criteria in conjunction with the technical specifications of Articles 7 to 10.³³⁹ Accordingly, the final text of Article 85(3) Batteries Regulation adopted the delegation procedure solely for the ‘technical specifications’ and ‘award criteria.’

Lastly, under Article 85(2) Batteries Regulation, after twelve months of the implementation of the first of the above delegated acts, the respective obligation of the contracting authorities and entities shall be fulfilled by integrating the technical specifications of Articles 7 to 10 and - cumulatively -³⁴⁰ the delegated award criteria into their procurement procedures, to safeguard that the procured batteries, or products containing batteries, have ‘significantly lower environmental impacts over their life cycle.’ Consequently, the Commission’s delegation and the precise manner of integrating these sustainability requirements into the procurement procedures leave less room for discretion to contracting authorities and entities.³⁴¹

³³⁶ Böttge et al. (n 269) 266.

³³⁷ 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 - Delegations [2023] ST 6410 2023 INIT, art 70(3).

³³⁸ 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 - General approach [2022] ST 7103 2022 REV 1, art 70(3).

³³⁹ 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 - Outcome of the European Parliament’s first reading [2023] ST 10488 2023 INIT, art 85(3).

³⁴⁰ Böttge et al. (n 269) 265.

³⁴¹ *ibid* 266.

Relationship with the Public Procurement Directives

The Batteries Regulation contains delegated law-making alternatives when it comes to award criteria and technical specifications. These criteria would, therefore, be both procedural and substantive. Article 85(1) Batteries Regulation refers explicitly to ‘contracting authorities as defined in Article 2(1), point (1), of Directive 2014/24/EU or Article 3(1) of Directive 2014/23/EU, or contracting entities, as defined in Article 4(1) of Directive 2014/25/EU.’ The adoption of award criteria shall follow the delegated acts referred to in Article 85(3) Batteries Regulation.

To conclude in terms of legal coherency, this means the following:

- Delegated acts are to be adopted under the Batteries Regulation, which can contain procedural or substantive requirements on technical specifications and award criteria, meaning that the exact legislative impact on public procurement is still uncertain;
- There is an explicit reference to the Public Procurement Directives in the Batteries Regulation for its scope;
- There are no specific pre-conditions mentioned for the delegated law-making possibilities;
- The Batteries Regulation does not contain a reference to the provisions of the Public Procurement Directives, other than its mentioned scope;
- The Batteries Regulation does not impose any reporting obligation regarding its public procurement requirements.

Based on the above legal coherency discussion, the following recommendations are made:

- The conditions of the delegated law-making possibilities should be streamlined across the legislative instruments to ensure that all of them are introduced with the same pre-conditions in mind. The Construction Products Regulation approach to delegated law-making appears the most extensive and a suitable starting point, noted in Section 4.3.3;
- The introduced acts must comply with the conditions of Public Procurement Directives, including for instance Articles 42 and 67-68. Consequently, delegated acts that violate these provisions, stemming from the public procurement principles, would contribute to an incoherent system for public procurement, which must be streamlined across the legislative instruments;
- The use of delegated law-making and monitoring is discussed further in Section 6.

4.4 Energy Consumption and Public Procurement

4.4.1 The Renovation Wave

In 2020, the Commission adopted the Renovation Wave for Europe.³⁴² As stated in a 2019 report by the Joint Research Centre (JRC) of the European Commission, 40% of buildings in the EU was built before 1960, and 90% before 1990.³⁴³ 75% of the building stock is energy inefficient, according to current building standards.³⁴⁴ Buildings are responsible for 40% of the total EU's energy consumption, with fossil fuels mainly responsible for heating and cooling.³⁴⁵ Renovation offers a unique opportunity to rethink, redesign and modernise our buildings to make them fit for a greener and digital society and sustain economic recovery.³⁴⁶ However, only 11% of the existing building stock within the EU undergoes some level of renovation each year. This does often not address energy renovation for which the annual energy renovation rate is some 1%.³⁴⁷ Deep energy renovations, reducing the energy consumption by at least 60%, are only carried out annually in 0.2% of buildings.³⁴⁸

Because of these problems, the Commission wants to trigger a Renovation Wave for Europe by 'breaking down long-standing barriers to energy and resource-efficient renovation, supporting fresh investment over a sustained period starting from public and less efficient buildings, spurring digitalisation and creating employment and growth opportunities across the renovation supply chain.'³⁴⁹ The overall objective is to double the annual energy renovation rate of residential and non-residential buildings by 2030 and foster deep energy renovations.³⁵⁰

Public Procurement and the Renovation Wave

In the Renovation wave, public procurement plays a role. Firstly, the Commission wants to promote the use of Building Information Modelling (BIM) in public

³⁴² Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - A Renovation Wave for Europe - greening our buildings, creating jobs, improving lives (COM(2020) 662 final).

³⁴³ Faidra Filippidou and Juan Pablo Jimenez Navarro, *Achieving the Cost-Effective Energy Transformation of Europe's Buildings: Combinations of Insulation and Heating & Cooling Technologies Renovations: Methods and Data* (Publications Office of the European Union 2019) 5.

³⁴⁴ *ibid* 6.

³⁴⁵ Renovation Wave, 1.

³⁴⁶ *ibid*.

³⁴⁷ *ibid* 2.

³⁴⁸ *ibid*.

³⁴⁹ Renovation Wave, 3.

³⁵⁰ *ibid*.

procurement for construction.³⁵¹ This modelling system for the built environment ‘improves transparency and reduces costs and resource use’ and can be used in public procurement for cost-benefit analysis in tenders.³⁵² Secondly, the Commission wants ‘public and privately-owned social infrastructure, public administrative buildings, social housing, cultural institutions, hospitals and healthcare facilities to spearhead the renovation wave and serve as a role model and reference point for construction’.³⁵³ To assist public authorities in taking into account costs and wider benefits of investing in the built environment, the Commission issued guidance on the energy efficiency first principle (published in 2021).³⁵⁴ This goal is also emphasised in the Energy Efficiency Directive (EU) 2023/1791 (EED), by widening the scope of buildings to be renovated to all buildings ‘owned by public bodies’.³⁵⁵ Moreover, the Commission has looked at the possibility to develop voluntary green public procurement criteria for public buildings; the last working document was published in 2016, and it is now under revision.³⁵⁶ The Energy Efficiency Directive is the main procurement-related legal instrument adopted under the Renovation Wave.

4.4.2 The Energy Efficiency Directive

The Energy Efficiency Directive (EU) 2023/1791 (EED)³⁵⁷ constitutes part of the ‘Fit for 55’ package and aims to contribute to the EU objective of at least a 55% reduction in GHG emissions by 2030.³⁵⁸ Moreover, this Directive, which was last revised in 2023, emerged also as a response to the recent external energy security challenges that the EU faces.³⁵⁹ Adopted under Article 194(2) TFEU, the Directive sets ‘higher and more binding targets’ for both the EU and the Member States, given the insufficiencies of the previous framework, especially regarding its timely transposition.³⁶⁰ One of the main changes introduced by the Directive includes the convergence of the energy efficiency goals with public procurement by emphasising the role of the public sector in achieving energy efficiency.³⁶¹

³⁵¹ *ibid* 16.

³⁵² *ibid*.

³⁵³ *ibid* 23.

³⁵⁴ *ibid*.

³⁵⁵ European Parliament and Council Directive (EU) 2023/1791 on energy efficiency and amending Regulation (EU) 2023/955 (recast) [2023] OJ L231 (EED), rec 40 and art 6; Renovation Wave, 23.

³⁵⁶ Commission Staff Working Document - EU GPP Criteria for Office Building Design, Construction and Management, SWD(2016) 180 final.

³⁵⁷ European Parliament and Council Directive (EU) 2023/1791 on energy efficiency and amending Regulation (EU) 2023/955 (recast) [2023] OJ L231 (EED).

³⁵⁸ Katharina Eisele, ‘Fit for 55 package: Recasting the Energy Efficiency Directive’ (2021) EPRS 1 <www.europarl.europa.eu> accessed 29 January 2025.

³⁵⁹ Buftic (n 297) 50.

³⁶⁰ Monika Dulian, ‘Revising the Energy Efficiency Directive: ‘Fit for 55’ package’ (2023) EPRS 1, 2 <www.europarl.europa.eu> accessed 29 January 2025.

³⁶¹ Caranta (n 287) 17-18.

In general, the objectives of the Directive are to ‘promote energy efficiency within the Union’ and contribute to achieving climate neutrality, ‘security of energy supply,’ and an ‘inclusive, fair and prosperous society with a modern, resource-efficient and competitive economy’ by establishing ‘energy efficiency as a priority across all sectors,’ removing ‘barriers in the energy market,’ overcoming ‘market failures that impede efficiency in the supply, transmission, storage and use of energy’ and introducing ‘indicative national energy efficiency contributions for 2030.’³⁶² For these reasons, it establishes the energy efficiency first principle,³⁶³ which constitutes a mandatory preference for energy efficiency solutions.³⁶⁴ Furthermore, it introduces a collective EU energy efficiency target of at least 11.7% in 2030 compared to 2020,³⁶⁵ and requires that Member States set an indicative national energy efficiency contribution,³⁶⁶ thus affording them the needed flexibility to cooperate with the citizens’ energy communities and foster the energy sector’s democratisation.³⁶⁷ In addition, it increases the annual energy savings by an average of 1.49% for the period 2024-2030,³⁶⁸ sets a minimum target of a 1.9% annual reduction to the total final energy consumption of all public bodies,³⁶⁹ and extends the annual 3% building renovation rate to all public bodies.³⁷⁰ Lastly, it introduces energy efficiency requirements in public procurement.³⁷¹

Public Procurement and the Energy Efficiency Directive

As already mentioned, the Energy Efficiency Directive (EED) attributes an exemplary role to all public entities,³⁷² given the fact that they are responsible for around 5-10% of the total EU final energy consumption.³⁷³ It is noted that the public sector should capitalise on its purchasing power to contribute to the Directive’s objectives following the trajectory of circular economy and decarbonisation.³⁷⁴ Therefore, Article 7 EED mandates contracting authorities and entities to procure products, buildings, works, and services with the highest energy efficiency performance and encourages them to consider green public procurement criteria when appropriate.³⁷⁵

³⁶² EED, art 1(1).

³⁶³ *ibid* art 3.

³⁶⁴ Buftic (n 297) 59.

³⁶⁵ EED, art 4(1).

³⁶⁶ *ibid* art 4(2-6).

³⁶⁷ Buftic (n 297) 60.

³⁶⁸ *ibid* art 8.

³⁶⁹ *ibid* art 5.

³⁷⁰ EED, art 6.

³⁷¹ *ibid* art. 7.

³⁷² *ibid* rec 50.

³⁷³ Proposal for a Directive of the European Parliament and of the Council on energy efficiency (recast) [2021] COM(2021) 558 final, 1, 3.

³⁷⁴ *ibid* rec 53.

³⁷⁵ *ibid* art 1(2); Caranta (n 287) 17.

According to Article 7(1) EED, the above obligation shall be fulfilled in accordance with the requirements referred to in Annex IV of this Directive, unless it is technically impractical, 'undermines public security',³⁷⁶ 'impedes the response to public health emergencies',³⁷⁷ or does not align with the 'nature and primary aim of the activities of the armed forces.'³⁷⁸ Particularly, the exclusion clause of technical infeasibility was suggested by the European Parliament³⁷⁹ after the Commission's rejection³⁸⁰ of the proposals of the European Committee of the Regions³⁸¹ and the European Economic and Social Committee³⁸² to integrate a respective exclusion clause based on cost-effectiveness and economic viability criteria.

Moreover, under the same provision, contracting authorities and entities shall apply the energy efficiency first principle when concluding public contracts and concessions. Regarding 'contracts with significant energy content,' such as the renovation of large public buildings under Article 29(4) of this Directive, Member States shall guarantee that contracting authorities and entities evaluate the viability of 'concluding long-term energy performance contracts that provide long-term energy savings.'³⁸³

Regarding Annex IV EED, this mandates contracting authorities and entities to procure products that comply with the energy efficiency criteria set down by the ecodesign and energy labelling framework, including Regulation (EU) 2020/740, Regulation (EU) 2017/1369, Directive 2010/30/EU, Directive 2009/125/EC, and any respective delegated or implementing act.³⁸⁴ On the contrary, in case a product is solely covered by energy efficiency-related green public procurement criteria, such as data centres, server rooms, cloud services, road lighting and traffic lights, computers, monitors, tablets, and smartphones, contracting authorities or entities should 'make best efforts to purchase only products and services that respect at least the technical specifications set at core level.'³⁸⁵ Furthermore, Annex IV requires that contracting authorities and entities include in their tenders for service contracts that service providers use only products that comply with the above requirements.³⁸⁶ As far as the purchase or rental of buildings is concerned, this should comply at least with a nearly zero-energy

³⁷⁶ EED, art 7(2).

³⁷⁷ *ibid.*

³⁷⁸ *ibid.*

³⁷⁹ Proposal for a Directive of the European Parliament and of the Council on energy efficiency (recast) - Outcome of the European Parliament's first reading [2023] ST 11456 2023 INIT, art 7.

³⁸⁰ Proposal for a Directive of the European Parliament and of the Council on energy efficiency (recast) [2021] COM(2021) 558 final, 1, 84-85.

³⁸¹ Opinion of the European Committee of the Regions - Amending the Energy Efficiency Directive to meet the new 2030 climate targets [2022] OJ C 301, art 7.

³⁸² Opinion of the European Economic and Social Committee on 'Proposal for a Directive of the European Parliament and of the Council on energy efficiency (recast) [2021] COM(2021) 558 final, par 3.8.

³⁸³ EED, art 7(3).

³⁸⁴ *ibid* Annex IV (a), (b) and (d).

³⁸⁵ *ibid* Annex IV(c).

³⁸⁶ *ibid* Annex IV (e).

level, unless the procurement regards deep renovation or demolition, re-selling, or a building with special architectural or historical significance.³⁸⁷

Apart from the above mandates, Article 7 EED provides further discretion to Member States for integrating sustainable requirements in the relevant contracts or concessions. Firstly, regarding the procurement of product packages fully covered by a delegated act in accordance with Regulation (EU) 2017/1369 for energy labelling, contracting authorities and entities may demand that the 'aggregate energy efficiency' prevails over the individual products' energy efficiency.³⁸⁸ Additionally, these authorities may consider broader 'sustainability, social, environmental and circular economy' perspectives in light of achieving the EU's decarbonisation and zero-pollution targets.³⁸⁹ If appropriate, also it is possible to consider green public procurement criteria,³⁹⁰ especially with the aid of potential future Commission guidelines.³⁹¹ Lastly, authorities may require that tenders include data on the 'life cycle global warming potential, the use of low carbon materials and the circularity materials used' and publish this information, especially for 'new buildings having a floor area larger than 2,000 m²,'³⁹² to address the buildings' embodied carbon over their life cycle.³⁹³

To enhance the application of the energy efficiency requirements, Article 7(5) EED provides that contracting authorities and entities shall publish 'information on the energy efficiency impact of contracts' through the respective notices on Tenders Electronic Daily. This obligation embodies transparency requirements and aims to foster stakeholders and citizens to evaluate the role of the public sector in guaranteeing the principle of energy efficiency first in public procurement.³⁹⁴ Similarly, under the same provision, Member States shall provide guidelines, including methodologies on the assessment of life cycle costs, set up support centres, encourage cooperation between contracting authorities and entities, and remove financial and (non-) regulatory barriers to energy efficiency.³⁹⁵

Relationship with the Public Procurement Directives

The Energy Efficiency Directive (EED) contains a variety of requirements, including targets, technical requirements and voluntary green public procurement criteria or available equivalent national criteria. These can be qualified as procedural and substantive.

³⁸⁷ *ibid* Annex IV(f).

³⁸⁸ *ibid* art 7(4).

³⁸⁹ EED, art 7(5).

³⁹⁰ *ibid*.

³⁹¹ *ibid* art 7(6).

³⁹² *ibid*.

³⁹³ *ibid* rec 55.

³⁹⁴ *ibid* rec 51.

³⁹⁵ *ibid* art 7(7-8).

Recital 48 EED highlights that all the principles of Directives 2014/23/EU, 2014/24/EU, and 2014/25/EU ‘remain fully applicable within the framework of this Directive.’ Furthermore, Article 2(14) EED refers to the definitions of contracting authorities and entities of Article 6(1) Directive 2014/23/EU, Article 2(1), point (1), Directive 2014/24/EU, and Article 3(1) Directive 2014/25/EU.³⁹⁶ Moreover, Article 7(1) EED refers explicitly to the value thresholds laid down in Article 8 Directive 2014/23/EU, Article 4 Directive 2014/24/EU, and Article 15 Directive 2014/25/EU. Lastly, Article 7(5) EED provides that the obligation to make publicly available information on the energy efficiency impact of contracts shall be fulfilled ‘by publishing that information in the respective notices on Tenders Electronic Daily (TED), in accordance with Directives 2014/23/EU, 2014/24/EU and 2014/25/EU, and Commission Implementing Regulation (EU) 2019/1780.’

Lastly, the interrelation between the ‘energy efficiency first principle’ and public procurement is relevant. As noted before, Member States shall ensure under Article 7(1) EED that ‘contracting authorities and entities apply the energy efficiency first principle in accordance with Article 3.’

Generally, ‘energy efficiency first’ is defined as ‘taking utmost account in energy planning, and in policy and investment decisions, of alternative cost-efficient energy efficiency measures to make energy demand and energy supply more efficient, in particular by means of cost-effective end-use energy savings, demand response initiatives and more efficient conversion, transmission and distribution of energy, whilst still achieving the objectives of those decisions.’³⁹⁷

Furthermore, Article 3(1) EED underlines that ‘Member States shall ensure that energy efficiency solutions, including demand-side resources and system flexibilities, are assessed in planning, policy and major investment decisions of a value of more than EUR 100 000 000 each or EUR 175 000 000 for transport infrastructure projects, relating to the following sectors: (a), energy systems; and (b), non-energy sectors, where those sectors have an impact on energy consumption and energy efficiency such as buildings, transport, water, information and communications technology (ICT), agriculture and financial sectors.’

Moreover, under Article 3(5) EED, Member States shall, when applying this principle, (i) promote, ensure, and make publicly available ‘cost-benefit methodologies,’ (ii) ‘address the impact of energy poverty,’ (iii) qualify an entity ‘responsible for monitoring the application’ of it, (iv) report to the Commission ‘on how the energy efficiency first principle’ was considered, as part of their

³⁹⁶ ESPR, art 2.

³⁹⁷ EED, art 2(2) and European Parliament and Council Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council [2018] OJ L 328, art 2(18).

integrated national energy and climate progress reports submitted following Article 17 Regulation (EU) 2018/1999.

As noted explicitly in Article 3(3) EED, the Commission Recommendation (EU) 2021/1749 can contribute to understanding the application of this principle. According to this Recommendation, this principle ‘does not mean that energy efficiency is always a preferred option.’³⁹⁸ Instead, this principle aims primarily ‘to consider actions in energy efficiency and energy demand management on an equal footing with alternative actions to respond to a specific need or objective, in particular when energy supply or energy infrastructure investments are at stake.’³⁹⁹ Accordingly, this principle ‘is expected to lead to identification and implementation of cost-effective energy-efficient solutions, while achieving the intended objective.’⁴⁰⁰ Therefore, the energy efficiency first principle is considered an ‘overarching’ principle rather than ‘an ultimate goal’⁴⁰¹ and, hence, it shall ‘be applied in a proportional way depending on the context, objectives and impacts of the decision concerned.’⁴⁰²

Regarding public procurement specifically, it has been noted that Article 7(1) EED underlines ‘an integrative policy alignment that is both clear and progressive’ between the energy efficiency first principle and public procurement.⁴⁰³ Accordingly, the above Recommendation notes that ‘in line with the EE1st principle, energy performance criteria should become widespread in public tenders and have substantial weight in the assessment and selection of offers.’⁴⁰⁴ For this reason, it is necessary ‘to use energy performance not as one of the auxiliary criteria, but as a central condition and/or award criteria in public tenders.’⁴⁰⁵ Relevantly, contracting authorities and entities ‘should assess how the desirable performance of tendered products can be reached in line with energy performance objectives.’⁴⁰⁶ Lastly, it is underlined that public procurement tools ‘to require or encourage the procurement of energy-efficient goods and services (with demand response capacities where relevant) in the

³⁹⁸ Commission Recommendation (EU) 2021/1749 on Energy Efficiency First: from principles to practice — Guidelines and examples for its implementation in decision-making in the energy sector and beyond [2021] OJ L 350/9, rec 11.

³⁹⁹ *ibid.*

⁴⁰⁰ *ibid.*

⁴⁰¹ *ibid* (2).

⁴⁰² *ibid* (1); Paola Jimenez Casanova and Jaqueline Pinto, ‘Interpreting the Energy Efficiency First Principle: Help or Hindrance for the Hydrogen Economy?’ (2024) 33(6) *European Energy and Environmental Law Review* 274 <<https://doi.org/10.54648/eeelr2024022>> accessed 28 May 2025.

⁴⁰³ Buftic (n 297) 62.

⁴⁰⁴ Commission Recommendation (EU) 2021/1749 on Energy Efficiency First: from principles to practice — Guidelines and examples for its implementation in decision-making in the energy sector and beyond [2021] OJ L 350/9, ch 3.5.7.(b).

⁴⁰⁵ *ibid.*

⁴⁰⁶ *ibid.*

public sector, based on integrated cost-benefit assessments and life-cycle analysis of efficiency of materials' are looked for.⁴⁰⁷

The EU Commission in its interpretative Recommendation (EU) 2024/1716 has noted that this principle means 'to thoroughly analyse the available alternatives and options for a procurement and assess these options not only but also in relation to energy efficiency.'⁴⁰⁸ Specifically, '[b]efore the authority or entity decides to procure all solutions and alternatives should be analysed, where required including a cost benefit analyses from a societal perspective taking into account the wider benefits of energy efficiency.'⁴⁰⁹ Additionally, the buyer 'can rely on relevant analysis (for comparable purchases, not outdated, etc.) made before in analogous situations, for example by a regional or national entity responsible for policy in the field or a central purchasing body.'⁴¹⁰ Moreover, this principle 'has to be considered as a basic principle when deciding on the way of designing a project and later on, on the products, works, services and buildings that are going to be tendered' and 'might be considered in the award criteria or in the technical specification.'⁴¹¹ The documentation of its application 'can be done for example in the buyers' files.'⁴¹²

As noted, the energy efficiency first principle constitutes an overarching principle that introduces an obligation of conduct and best effort regarding the utmost consideration of energy efficiency measures in policy and investment decisions. However, its application in public procurement procedures, notably for major transport infrastructure projects, is not clear-cut and would benefit from more legal certainty.

For now, given that it must be applied proportionally, it appears, however, that it is not an ultimate goal that must be achieved by all means at the expense of other objectives in a public procurement procedure, thereby meaning that energy efficiency criteria do not trump other criteria. Similarly, it is a procedural requirement that can coexist alongside the public procurement principles in the Public Procurement Directives. The energy efficiency first principle mandates the need for contracting authorities to consider energy efficiency in their decision-making when it comes to public procurement, including for instance in their procurement policies. Similarly, it mandates them to consider using, for example, technical requirements or award criteria in each of their procedures. At this point, it is unclear, however, if the energy efficiency first principle also means that

⁴⁰⁷ Commission Recommendation (EU) 2021/1749 on Energy Efficiency First: from principles to practice — Guidelines and examples for its implementation in decision-making in the energy sector and beyond [2021] OJ L 350/9, ch 4.3.

⁴⁰⁸ Commission Recommendation (EU) 2024/1716 setting out guidelines for the interpretation of Articles 5, 6 and 7 of Directive (EU) 2023/1791 of the European Parliament and of the Council as regards energy consumption in the public sector, renovation of public buildings and public procurement [2024] COM(2024) 3744, 38.

⁴⁰⁹ *ibid.*

⁴¹⁰ *ibid.*

⁴¹¹ *ibid.*

⁴¹² *ibid.*

aggrieved economic operators could file proceedings at the courts, should an energy efficient solution have not been considered by the respective authorities or if it has consequences for the set-up of a procedure and its (lack of) emphasis on energy efficiency. Based on the above reading of this principle, the latter interpretation seems unlikely nonetheless.

Furthermore, under Article 79 and Recital 121 of the Ecodesign Regulation (ESPR), implementing measures adopted by Directive 2009/125/EC will remain in force until repealed by ESPR, to ensure legal certainty and continuity. Hence, the reference to the implementing measures of Directive 2009/125/EC in Annex IV EED is not necessarily incoherent, but instead consistent with the above transitional provisions. On the other hand, a lack of reference to ESPR, which overall repeals Directive 2009/125/EC is lacking to ensure legal continuity. Nonetheless, in this case, referring to ESPR, after the 2024 reform, does not entirely follow the EED, since the scope of the former is not limited to energy-related products, as was the case with the previous ecodesign legal instruments, but instead covers all physical goods placed in the market.

Similarly in terms of scope, it seems that Article 7(7) and 7(8) Energy Efficiency Directive applies to all procurements, whereas Article 7(1) limits its application to only above threshold procurement. This is also noted in Recommendation (EU) 2024/1716⁴¹³, 'In contrast to Article 7(1) of Directive (EU) 2023/1791, which only applies to public contracts and concessions with inter alia a value equal to or greater than the thresholds laid down in the Public Procurement Directives, Article 7(7) and (8) of Directive (EU) 2023/1791 apply to all public procurement procedures.'⁴¹⁴ It would be more consistent to keep the application of Article 7 entirely to above the procurement thresholds.

Finally, there is another incoherency in terms of scope. Notably, '[d]espite that buildings are not covered by the Classical Public Procurement Directives, given their explicit exclusion among the listed excluded service contracts, nevertheless the thresholds set out in the Public Procurement Directives for service contracts apply to them. Therefore, building purchase or rental is subject to the Article 7 of Directive (EU) 2023/1791 but remains excluded from the public procurement rules.'⁴¹⁵ Similar to the above conclusion, it appears more coherent to either apply a similar approach by either excluding building purchase or rental from Article 7 or to include such procurements in the scope of Directive 2014/24/EU.

⁴¹³ Commission Recommendation (EU) 2024/1716 setting out guidelines for the interpretation of Articles 5, 6 and 7 of Directive (EU) 2023/1791 of the European Parliament and of the Council as regards energy consumption in the public sector, renovation of public buildings and public procurement [2024] COM(2024) 3744, 38.

⁴¹⁴ Commission Recommendation (EU) 2024/1716 setting out guidelines for the interpretation of Articles 5, 6 and 7 of Directive (EU) 2023/1791 of the European Parliament and of the Council as regards energy consumption in the public sector, renovation of public buildings and public procurement [2024] COM(2024) 3744, 42.

⁴¹⁵ *ibid* 34.

To conclude in terms of legal coherency, this means the following:

- The Energy Efficiency Directive contains procedural and substantive requirements for public procurement in amongst others Article 3 and 7, including targets, technical requirements and the application of the energy efficiency first principle to public procurement;
- This Directive refers to the Public Procurement Directives in terms of scope and ensures application of the latter's provisions, thereby adding to streamlining their relationship in terms of coherency. However, there is some incoherency when it comes to Article 7(7) and 7(8) Energy Efficiency Directive which also apply under the procurement thresholds. Furthermore, the purchase or rental of buildings falls under Article 7, but are excluded from Directive 2014/24/EU;
- There is unclarity about the application of the energy efficiency first principle and its relationship with the Public Procurement Directives;
- In terms of monitoring, Article 7 (5) Energy Efficiency Directive requires Member States to 'ensure that contracting authorities and contracting entities make publicly available information on the energy efficiency impact' of certain contracts referred to in Article 7(1) Energy Efficiency Directive 'by publishing that information in the respective notices on Tenders Electronic Daily (TED), in accordance with Directives 2014/23/EU, 2014/24/EU and 2014/25/EU, and Commission Implementing Regulation (EU) 2019/1780.' Furthermore, Article 7(8) mandates Member States to 'report to the Commission on the measures taken to address the barriers to uptake of energy efficiency improvements as part of their integrated national energy and climate progress reports submitted pursuant to Article 17 of Regulation (EU) 2018/1999.'

Based on the above legal coherency discussion, the following recommendations are made:

- When it comes to the incoherencies in terms of scope, it appears more coherent to either exclude building purchase or rental from Article 7 or to include such procurements in the scope of Directive 2014/24/EU. Furthermore, it seems also more coherent to make Article 7 entirely applicable above the procurement thresholds;

- The energy efficiency first principle should be further clarified in relation to public procurement. At present, the most favorable interpretation seems to be that it is a procedural requirement to consider energy efficiency in public procurement in, for instance, procurement policy or the set-up of the procurement procedure, meaning that it can co-exist alongside the public procurement principles. Alternatively, giving it more teeth would mean that aggrieved economic operators could file proceedings at the courts, should an energy efficient solution have not been considered by the respective authorities or if it has consequences for the set-up of a procedure and its (lack of) emphasis on energy efficiency.
- The use of delegated law-making and monitoring is discussed further in Section 6.

4.5 Social conditions and Public Procurement

4.5.1 The EU Pillar of Social Rights Action Plan

The EU Pillar of Social Rights Action Plan was adopted in 2021,⁴¹⁶ following the EU Pillar of Social Rights.⁴¹⁷ This set of instruments adopts a broad set of social rights and principles enhancing the EU's social policy.⁴¹⁸ Notably, the Pillar builds on the 'social market economy' paradigm⁴¹⁹ and the various social clauses established in the Treaties, such as Article 9 TFEU on 'the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion'⁴²⁰ and Articles 151 and 152 TFEU on the promotion of employment, improved living, and working conditions, and the promotion of social

⁴¹⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Pillar of Social Rights Action Plan [2021] COM(2021) 102 final (EU Pillar of Social Rights Action Plan).

⁴¹⁷ Establishing a European Pillar of Social Rights [2017] COM(2017) 250 final; European Commission: Secretariat-General, European Pillar of Social Rights [2017] Publications Office of the European Union <<https://data.europa.eu/doi/10.2792/95934>> (European Pillar of Social Rights), accessed 7 March 2025.

⁴¹⁸ Sacha Garben, 'The European Pillar of Social Rights: An assessment of its Meaning and Significance' (2019) 21 Cambridge Yearbook of European Legal Studies 101, 102 <<https://doi.org/10.1017/cel.2019.3>> accessed 7 March 2025.

⁴¹⁹ TEU, art 3(3); European Pillar of Social Rights, 4.

⁴²⁰ European Pillar of Social Rights, 4.

partners.⁴²¹ Accordingly, it aims to facilitate the undertaking of social measures by the Member States.⁴²²

In general, the EU Pillar of Social Rights addresses twenty sectors, including for instance ‘education, training, and life-long learning,’ ‘gender equality,’ ‘equal opportunities,’ ‘active support to employment,’ ‘secure and adaptable employment,’ and ‘wages.’⁴²³ The accompanying Action Plan aims to guide the implementation of the Social Pillar’s principles.

Public Procurement and EU Pillar of Social Rights Action Plan

In terms of public procurement, the EU Pillar of Social Rights Action Plan underlines its importance in securing access to essential goods and services and promoting fair working conditions and inclusivity. Notably, it notes that ‘sectoral EU policies and regulatory frameworks regarding services of general interest,’ including ‘public procurement practices and obligations for minimum provision of services,’ need to support Member States in facilitating ‘access and accessibility of essential goods and services.’⁴²⁴ Therefore, the Action Plan proposed the ‘Guidance Notices on Public Procurement of Innovation and on Socially Responsible Public Procurement,’ to encourage national, regional, and local authorities to adopt ‘socially-responsible criteria in public procurement.’⁴²⁵ Accordingly, the Action Plan highlights the continuous cooperation between the EU and the International Labour Organisation (ILO) in key areas, such as ‘sustainable procurement,’ specifically regarding decent working conditions and worldwide social inclusion.⁴²⁶

4.5.2 The Minimum Wage Directive

The Minimum Wage Directive (EU) 2022/2041 (MWD) was adopted in 2022.⁴²⁷ Under Article 151 TFEU, the Union and Member States have as an objective ‘the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection and dialogue between management and labour ...’⁴²⁸ Accordingly, while the establishment of minimum wages falls under the

⁴²¹ European Pillar of Social Rights, 4-5.

⁴²² Konstantinos Alexandris Polomarkakis, ‘The European Pillar of Social Rights and the Quest for EU Social Sustainability’ (2019) 29(2) Social & Legal Studies 183, 191 <<https://doi.org/10.1177/0964663919829199>> accessed 7 March 2025.

⁴²³ EU Pillar of Social Rights Action Plan, 3.

⁴²⁴ EU Pillar of Social Rights Action Plan, 28.

⁴²⁵ *ibid.*

⁴²⁶ *ibid* 39.

⁴²⁷ Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union (Minimum Wage Directive).

⁴²⁸ See also Minimum Wage Directive, rec 2.

competence of the Member States, the EU retains a supporting and complementary role.⁴²⁹

The MWD establishes a threefold framework for the ‘adequacy of statutory minimum wages,’⁴³⁰ ‘promoting collective bargaining on wage-setting,’⁴³¹ and ‘enhancing effective access of workers to rights to minimum wage protection where provided for in national law and/or collective agreements.’⁴³² Member States with statutory minimum wages are obligated to establish the necessary procedures for setting and updating of statutory minimum wages.⁴³³ Member States have to implement criteria that contribute to the accuracy of the minimum wages. These criteria aim to achieve social and labour goals: a decent standard of living, reduction of in-work poverty, promotion of social cohesion and upward social convergence and the reduction the gender pay gap.⁴³⁴

The national criteria have to include the following elements, namely the purchasing power of statutory minimum wages, taking into account the cost of living, the general level of wages and their distribution, the growth rate of wages, and long-term national productivity levels and developments.⁴³⁵ Nevertheless, the MWD does not require a specific outcome, namely an EU-wide minimum wage, but rather sets a procedural framework, hence introducing an obligation of conduct, instead of result.⁴³⁶

Article 4 MWD contains an obligation for the Member States to promote collective bargaining on wage-setting.⁴³⁷ Member States have to promote the building and strengthening of the capacity of social partners to engage in collective bargaining and encourage negotiations between social partners.⁴³⁸ Furthermore, the rights of workers and trade union representatives to participate in collective bargaining should be protected and trade unions and employers’ organisations have to be protected from acts of interference.⁴³⁹ Lastly, Article 8 of the Directive enhances effective access of workers to minimum wage protection, through effective and proportionate controls by enforcement bodies.⁴⁴⁰

⁴²⁹ Marketa Pape, ‘Directive on adequate minimum wages [EU Legislation in Progress]’ (2022) <<https://epthinktank.eu/2022/06/15/directive-on-adequate-minimum-wages-eu-legislation-in-progress/>> accessed 12 April 2025.

⁴³⁰ Minimum Wage Directive, art 1(1)(a).

⁴³¹ *ibid* art 1(1)(b).

⁴³² *ibid* art 1(1)(c).

⁴³³ *ibid* rec 18 and art 5(1).

⁴³⁴ Minimum Wage Directive, art 5(1).

⁴³⁵ Minimum Wage Directive, art 5(2).

⁴³⁶ Andhov et al. (n 78) 49.

⁴³⁷ Minimum Wage Directive, art 4.

⁴³⁸ *ibid* art. 4(1)(a)-(b).

⁴³⁹ *ibid* art. 4(1)(c)-(d).

⁴⁴⁰ *ibid* rec 18 and art 8.

Public Procurement and the Minimum Wage Directive

The CJEU has long been reluctant in accepting minimum wage as a criterion for the award of a public contract. For instance, in the *Rüffert case*, the Court ruled that contracting authorities shall not be required to award public contracts only to ‘those undertakings which, when submitting their tenders, agree in writing to pay their employees, in return for performance of the services concerned, at least the remuneration prescribed by the collective agreement the minimum wage in force at the place where those services are performed.’⁴⁴¹ Nevertheless, in the *RegioPost case*, the Court confirmed the legality of a public procurement criterion, according to which tenderers and their subcontractors should ‘undertake, by means of a written declaration,’ to ‘pay staff who are called upon to perform the services covered by the public contract [...] a minimum wage laid down in that legislation,’ as well as the validity of the respective exclusion ground in case of non-conformity with this requirement.⁴⁴²

Article 9 Minimum Wage Directive (MWD) contains a specific provision on public procurement: ‘In accordance with Directives 2014/23/EU, 2014/24/EU and 2014/25/EU, Member States shall take appropriate measures to ensure that, in the awarding and performance of public procurement or concession contracts, economic operators and their subcontractors comply with the applicable obligations regarding wages, the right to organise and collective bargaining on wage-setting, in the field of social and labour law established by Union law, national law, collective agreements or international social and labour law provisions, including ILO Freedom of Association and the Protection of the Right to Organise Convention No 87 (1948) and ILO Right to Organise and Collective Bargaining Convention No 98 (1949).’ This Article introduces an obligation for Member States that within the awarding and performance of public procurement contracts, social and labour obligations are followed by economic operators and subcontractors,⁴⁴³ hence specifying Article 18(2) Directive 2014/24/EU.⁴⁴⁴ The above term ‘appropriate measures’ may, for instance, include conditions related to contract performance.

Furthermore, in the *Rüffert case*, the Court based its reasoning on Article 3(8) Directive 96/71/EC, which required that ‘collective agreements or arbitration awards’ meet three conditions (i) observance by all undertakings, (ii) within the relevant geographical area, and (iii) in the profession or industry concerned.⁴⁴⁵ However, Recital 31 MWD underlines that it aims to ‘ensure that economic operators apply to their workers the wages provided for in collective agreements for the relevant sector and geographical area,’ notably omitting the condition such

⁴⁴¹ Case C-346/06 *Rüffert* [2008] EU:C:2008:189, par 43. Huisjes H, *Naar een inclusief aanbestedingsbeleid binnen de sociale markteconomie* (Boom Juridisch 2023).

⁴⁴² Case C-115/14 *RegioPost* [2015] EU:C:2015:760, paras 77 and 88.

⁴⁴³ Ratti Luca, ‘Brighter Later: The Uncertain Legal Future of the EU Directive on Adequate Minimum Wages’ (2023) 24 ERA Forum 231, 242.

⁴⁴⁴ Andhov et al. (n 78) 51.

⁴⁴⁵ Case C-346/06 *Rüffert* [2008] EU:C:2008:189, paras 28-29.

agreements shall be observed by all undertakings. Consequently, a broader scope for the application of the collective agreements in public procurement is foreseen, thereby hedging the criteria from the *Rüffert* case.⁴⁴⁶

Relationship with the Public Procurement Directives

The wording of Article 9 Minimum Wage Directive (MWD) is very similar to Article 18(2) Directive 2014/24/EU and its equivalents in the other Directives, aiming to ensure that economic operators within public procurement comply with existing rules and regulations.⁴⁴⁷ There are also differences, such as the reference to ‘awarding and performance instead only ‘performance’ and the more specific nature of Article 9 focusing on ‘wages, the right to organize and collective bargaining on wage-setting’ instead of the general reference to ‘social and labour law’. This provision suffers from the same legal uncertainty as discussed under Section 3.2.2, created amongst other things by the undefined nature of ‘appropriate measures’.

To conclude in terms of legal coherency, this means the following:

- Article 9 Minimum Wage Directive requires Member States to take appropriate measures to ensure that economic operators comply with social and labour rules, thus introducing horizontal substantive requirements;
- This directive refers explicitly to the Public Procurement Directives, adding to streamlining the coherency of its relationship;
- The content of Article 9 Minimum Wage Directive overlaps significantly with Article 18(2) Directive 2014/24/EU. Other than adding more specificity to what is intended by social and labour law under Article 18(2), which could add to a clear enforcement agenda, similar issues arise in relation to ‘appropriate measures’ as noted in Section 3.2.2;
- The Minimum Wage Directive does not include any reporting obligation regarding its public procurement requirements.

Based on the above legal coherency discussion, the following recommendations are made:

- Given the substantial overlap between Article 18(2) Directive 2014/24/EU and Article 9 Minimum Wage Directive, the added value of the latter can be questioned;

⁴⁴⁶ Andhov et al. (n 78) 51.

⁴⁴⁷ Directive 2014/24/EU, art 18(2).

- Article 9 Minimum Wage Directive can either be further clarified in terms of what is meant by ‘appropriate measures’ as discussed in Section 3 as well, or could be deleted entirely given the lack of added value;
- The use of monitoring is discussed further in Section 6.

4.6 Mobility and Energy Transition and Public Procurement

4.6.1 The Clean Vehicles Directive

In 2019, the revised Clean Vehicles Directive (EU) 2019/1161 (CVD) was adopted under Article 192(1) TFEU.⁴⁴⁸ The current CVD is the result of the reform of the 2009 Clean Vehicles Directive.⁴⁴⁹ The CVD aims to promote and stimulate ‘the market for clean and energy-efficient vehicles’ by mandating Member States to ensure that contracting authorities and entities consider ‘lifetime energy and environmental impacts, including energy consumption and emissions of CO₂ and of certain pollutants’ when purchasing certain road transport vehicles.⁴⁵⁰ By providing this demand-side stimulus for clean vehicles, the CVD aims to support a low-emission mobility transition⁴⁵¹ and to improve the contribution of the transport sector to the EU environment, climate and energy policies.⁴⁵²

Public procurement and the Clean Vehicles Directive

The 2009 Clean Vehicles Directive (CVD) contained procedural options by ‘setting technical specifications for energy and environmental performance in the documentation for the purchase’ (technical specifications) or ‘including energy and environmental impacts in the purchasing decision’ (award criteria).⁴⁵³ If contracting authorities used award criteria, the EU provided methodology for calculation of life cycle costs was mandatory.

In the impact assessment of 2018, which preceded the revision of the 2009 CVD, the Commission found that the old Directive did not deliver on its goals. Public

⁴⁴⁸ Directive of the European Parliament and the Council (EU) 2019/1161 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles [2019] OJ L188 (Clean Vehicles Directive).

⁴⁴⁹ Directive of the European Parliament and the Council 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles [2009] OJ L 120 (Clean Vehicles Directive 2009).

⁴⁵⁰ Clean Vehicles Directive, art 1(2).

⁴⁵¹ *ibid* rec 33.

⁴⁵² *ibid* art 1. See also: EU Commission, Commission Notice on the application of Articles 2, 3, 4 and 5 of Directive 2009/33/EC of the European Parliament and of the Council on the promotion of clean road transport vehicles in support of low-emission mobility 2020/C 352/01 C/2020/7048.

⁴⁵³ Böttge et al. (n 269) 264.

procurement of green transport was seemingly not stimulated sufficiently, which was deemed partially due to the limited scope, unclear provisions on procurement and limited use of an overall deemed complex monetization methodology.⁴⁵⁴

In the current CVD, Member States are required to ensure that the procurement of vehicles and service complies with the minimum procurement targets for clean light-duty vehicles in Table 3 of the Directive.⁴⁵⁵ Article 1 CVD requires Member States to ensure that contracting authorities and contracting entities take into account lifetime energy and environmental impact.

In Annex of this Directive, emission thresholds are established for the definition of clean light-duty vehicles and for heavy duty vehicles.⁴⁵⁶ These are based on the number of particles per kilometre, as well as the weight of nitrogen oxides emitted per kilometre. In Table 3 Annex, every Member State is assigned minimum procurement targets for clean light-duty vehicles in the period of 2021-2025 and the period 2026-2030. Table 4 contains separate targets for trucks and buses. The targets are incremental over time and are specific for each Member State.

The targets depend on economic capacity and the exposure to pollution.⁴⁵⁷ Therefore, the impact assessment looked at metrics like GDP per capita and urban population density.⁴⁵⁸ The transfer to a target-based system based on time periods is expected to provide policy certainty for relevant markets and time for the adjustment of public procurement procedure to the Member States.⁴⁵⁹

The CVD uses minimum procurement targets, which are monitored through a reporting and monitoring clause.⁴⁶⁰ Member States are obligated to report to the Commission about the implementation of the CVD every five years.⁴⁶¹ Originally, the reports had to include the enforcement reports mandated by Article 83(3) Directive 2014/24/EU and Article 99(3) Directive 2014/25/EU, and be submitted to the Commission every three years. In order to lighten the administrative burden for Member States and to align reporting obligations with other pieces of sectoral legislation, the reporting frequency was reduced to five years, and the demand to include enforcement reports was not included.⁴⁶²

⁴⁵⁴ Impact Assessment accompanying the document 'Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles [2017] COM(2017) 653 final, SWD(2017) 367 final.

⁴⁵⁵ Clean Vehicles Directive, art. 5(1).

⁴⁵⁶ *ibid* Annex 1, Table 2.

⁴⁵⁷ *ibid* rec 18.

⁴⁵⁸ *ibid*.

⁴⁵⁹ *ibid*.

⁴⁶⁰ *ibid* art 10.

⁴⁶¹ Clean Vehicles Directive, art 10(2).

⁴⁶² As amended by Decision (EU) 2024/1254 of the European Parliament and of the Council of 24 April 2024 amending Directives 2009/12/EC, 2009/33/EC and (EU) 2022/1999 of the European Parliament and of the Council and Council Directive 96/67/EC as regards certain reporting requirements in the fields of road transport and aviation, rec 6 and art 2.

The first review of the 2019 Clean Vehicles Directive is due in 2027.⁴⁶³ The Commission will then evaluate the effects, and possibly change the minimum targets of Tables 3 and 4 for the following years.⁴⁶⁴

Relationship with the Public Procurement Directives

The Clean Vehicles Directive (CVD) contains mandatory minimum procurement targets. According to Article 3(1)(a), the CVD applies to contracts if they fall within the scope of Directive 2014/24/EU and Directive 2014/25/EU. The included targets refer to the Member States. It is unclear what this means for contracting authorities in 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.’ This flexibility ensures that Member States can take into account different factors, including economic capacity, air quality, population density, characteristics of the transport systems, policies to decarbonise transport and reduce air pollution. Accordingly, Member States have the discretion to not explicate the responsibility for these obligations. This leaves room for legal uncertainty for contracting authorities about their individual responsibility, and can hamper the achievement of the targets.⁴⁶⁵

To conclude in terms of legal coherency, this means the following:

- The Clean Vehicles Directive introduces targets for the procurement of clean vehicles in Article 5;
- This directive refers to Directive 2014/24/EU and Directive 2014/23/EU for its scope, adding to the coherency of their relationship;
- At this point in time, the Member States are the addressees of the Clean Vehicles Directive, which could result in action under Article 290 TFEU if the objectives are not achieved. In practice, however, there is still room for subsequent unclarity about who needs to fulfill the posed targets in each Member State as contracting authorities are not directly addressed, should this not be clarified in national legislation;
- In terms of monitoring, the Clean Vehicles Directive contains monitoring requirements on its implementation and, more specifically, about ‘the number and the categories of vehicles covered by the contracts’, thereby tracking the achievement of the targets.

⁴⁶³ Clean Vehicles Directive, art 10(5).

⁴⁶⁴ *ibid.*

⁴⁶⁵ Andhov et al. (n 78) 34.

Based on the above legal coherency discussion, the following recommendations are made:

- It could be considered to include an obligation for the Member States to transparently allocate targets for individual contracting authorities or to address these authorities directly in the Clean Vehicles Directive to avoid unclarity, which would also make the achievement of the targets become more feasible;
- The use of monitoring is discussed further in Section 6.

4.6.2 The Heavy Duty Vehicles Regulation

The communication of 9 December 2020 ‘Sustainable and Smart Mobility Strategy — putting European transport on track for the future’ sets out a roadmap for a sustainable and smart future for European Transport. In June 2024, the EU adopted the new Heavy Duty Vehicles Regulation (EU) 2024/1610 (HDVR),⁴⁶⁶ amending Regulation 2019/1242 and Regulation 2018/58 and repealing Regulation 2018/956. The goal of the HDVR is to deliver a 90% reduction of emissions from the transport sector by 2050.⁴⁶⁷ Currently, heavy-duty vehicles (HDVs) are responsible for more than a quarter of greenhouse gas emission from road transport in the Union, accumulating to 6% of the total EU emissions.⁴⁶⁸

The CO₂ emission reduction targets in the HDVR aim to accelerate the uptake of zero-emission HDVs on the Union market, stimulate innovation in zero-emission technologies in a cost-efficient way and give the necessary signal to accelerate the deployment of charging and refueling infrastructure across the Union.⁴⁶⁹ The HDVR is an integral part of the ‘Fit for 55’ legislative package, aiming to reduce greenhouse gas emissions in 2030 by 55%.⁴⁷⁰

As laid down in Article 2(1) HDVR, this Regulation applies to new lorries, buses and trailers that have been type-approved or individually approved under Regulation (EU) 2018/858.⁴⁷¹ To reach a sustainable transport sector, the average CO₂ emissions of the Union fleet of new HDVs has to reduce by 90% in

⁴⁶⁶ Regulation (EU) 2024/1610 of the European Parliament and of the Council of 14 May 2024 amending Regulation (EU) 2019/1242 as regards strengthening the CO₂ emission performance standards for new heavy-duty vehicles and integrating reporting obligations, amending Regulation (EU) 2018/858 and repealing Regulation (EU) 2018/956, OJ L 2024/1610 (Heavy Duty Vehicles Regulation).

⁴⁶⁷ Heavy Duty Vehicles Regulation, rec 5.

⁴⁶⁸ *ibid.*

⁴⁶⁹ *ibid* rec 10.

⁴⁷⁰ *ibid* rec 6.

⁴⁷¹ Specifically, Article 2(1) HDVR refers to the following categories mentioned in Article 4(1)(a) Regulation 2018/858/EU: M₂ and M₃ (motor vehicles with more than 8 passenger seats, including buses), categories N₁, N₂ and N₃ (transport lorries in all weight categories) and categories O₃ and O₄ (trailers heavier than 3.5 tons).

2040.⁴⁷² Urban buses have a different target, namely 100% of urban buses should be zero-emission vehicles in 2040.⁴⁷³

Public Procurement and the Heavy Duty Vehicles Regulation

To reach the emission reduction goals of the Heavy Duty Vehicles Regulation (HDVR), the latter contains rules about the procurement of new HDVs. For the procurement of zero-emission urban buses, Article 3e(1) stipulates that contracting authorities shall base the award of public supply of service contracts for these vehicles on the economically most advantageous tender, including the best price-quality ratio.

Furthermore, contracting authorities are obligated to use at least two of the five criteria mentioned in Article 3e(2) HDVR as either technical specifications or as award criteria. Firstly, contracting authorities can use the proportion of products of tenders originating in third countries that do (1) not have a free trade agreement with the Union and (2) are not party to the World Trade Organization Agreement on Government Procurement (GPA).⁴⁷⁴ Secondly, the availability of essential spare parts can be used as an award criterion or technical specification.⁴⁷⁵ If this is used as an award criterion, the weighting has to be between 15% and 40%.⁴⁷⁶ Thirdly, a tender can require a 'commitment by the tenderer that possible changes in its supply chain during the execution of the contract will not adversely affect the execution of the contract'.⁴⁷⁷ Fourthly, contracting authorities can require 'certification or documentation demonstrating that the organization of the tenderer's supply chain allows it to comply with the security of supply requirement'.⁴⁷⁸ Lastly, environmental requirements beyond the minimum requirements flowing from applicable EU legal acts can be used as an award criterion or technical specification.⁴⁷⁹

Relationship with the Public Procurement Directives

The Heavy Duty Vehicles Regulation (HDVR) mandates the use of two out of five mentioned criteria as either technical specifications or award criteria (including a potential weighting), thereby constituting procedural and substantive requirements. There is a reference to 'and in compliance with Directive 2014/23/EU, 2014/24/EU or 2014/25/EU', meaning that the procurement under the HDVR must align with Articles 42 and 67 Directive 2014/24/EU. The HDVR

⁴⁷² Heavy Duty Vehicles Regulation, art 3a(1)(d).

⁴⁷³ *ibid* art 3(d).

⁴⁷⁴ Heavy Duty Vehicles Regulation, art 3e(2)(a).

⁴⁷⁵ *ibid* art 3e(2)(b).

⁴⁷⁶ *ibid* art 3e(3).

⁴⁷⁷ *ibid* art 3e(2)(c).

⁴⁷⁸ *ibid* art 3e(2)(d).

⁴⁷⁹ *ibid* art 3e(2)(e).

uses the concepts of public contract under Directive 2014/24/EU and concession under Directive 2014/23/EU for its scope.

The approach of the HDVR in Article 3, on the one hand, leaves discretion for contracting authorities, and on the other hand, limits the type of criteria to be included for these types of procurement, similar to the Net-zero Industry Act discussed below. This legislative approach seems incoherent with professional public procurement practice and the other legislative requirements discussed elsewhere. Either discretion is granted to tailor-make a public procurement procedure based on, for instance, market consultations and earlier experience that depict if a set criterion is effective to achieve the objectives of a procedure and, thus, procure effectively. Alternatively, the legislator can depict a specific criterion to always be useful for public procurement procedure. As a consequence, it appears better to either make these criteria mandatory or to provide discretion, instead of creating limited flexibility of choice in their application and the risk of overcompliance with some of the criteria.

To conclude in terms of legal coherency, this means the following:

- The Heavy Duty Vehicles Regulation introduces procedural and substantive requirements for public procurement of heavy duty vehicles in Article 3, including technical specifications and award criteria;
- This regulation refers to the Public Procurement Directives in terms of scope and provisions, thereby adding to streamlining the coherency of their relationship;
- The approach of the Heavy Duty Vehicles Regulation in Article 3 seems inconsistent with public procurement practice and the other legislative requirements, given that a criterion is either deemed relevant for a specific procurement by the respective contracting authority or deemed relevant by the legislator, or it is deemed not relevant, whereas the provision now ends up somewhere in the middle of mandatory and discretion;
- The Heavy Duty Vehicles Regulation does not include any reporting obligation regarding its public procurement requirements.

Based on the above legal coherency discussion, the following recommendations are made:

- In light of the noted balance between mandatory and discretion, it can be considered to make the criteria of Article 3 Heavy Duty Vehicles Regulation explicitly mandatory or not mandatory;
- The use of monitoring is discussed further in Section 6.

4.6.3 The Net-zero Industry Act

In the wake of the 2019 European Green Deal and the 2021 communication 'Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery'⁴⁸⁰ the Net-zero Industry Act (EU) 2024/1735 (NZIA) was adopted in 2024.⁴⁸¹ The legal basis of this regulation is the internal market provision of Article 114 TFEU. The NZIA aims to improve the function of the internal market by establishing a framework in order to ensure the Union's access to a secure and sustainable supply of net-zero technologies.⁴⁸² Union-wide action is needed to safeguard the function of the internal market, as uncoordinated national measures risk distorting competition for net-zero technologies, given the complexity and transnational characters.⁴⁸³

The general objective of the Regulation is to '...establish a framework in order to ensure the Union's access to a secure and sustainable supply of net-zero technologies, including by scaling up the manufacturing capacity of net-zero technologies and their supply chains to safeguard their resilience.'⁴⁸⁴ Article 4 of the Regulation where they are final products, specific components or specific machinery primarily used for the production of those products.⁴⁸⁵

Public Procurement and the Net-zero Industry Act

Article 1(2) Net-zero Industry Act (NZIA) contains a demand-side stimulus goal for net-zero technologies through public procurement measures, as well as supporting innovation through public procurement. Article 25 NZIA introduces minimum mandatory requirements regarding environmental sustainability. This applies to public procurement procedures falling within the scope of Directives 2014/23/EU, 2014/24/EU or 2014/25/EU, if the contracts have net-zero technologies listed in Article 4(1)(a)-(k) NZIA as part of their subject matter, and for works contracts and concessions including these technologies.⁴⁸⁶ These mentioned technologies are mostly renewable energy-related technologies, like sustainable fuel and heatpumps, but also include carbon capture and storage (CCS) and nuclear fission energy technologies.⁴⁸⁷ The minimum requirements shall take the form of either technical specifications or contract performance clauses.⁴⁸⁸

⁴⁸⁰ European Commission, 'Updating the 2020 Industrial Strategy: towards a stronger Single Market for Europe's recovery' (2021) COM(2021) 350 final.

⁴⁸¹ Regulation (EU) 2024/1735 of the European Parliament and of the Council of 13 June 2024 on establishing a framework of measures for strengthening Europe's net-zero technology manufacturing ecosystem and amending Regulation (EU) 2018/1724 (Net-zero Industry Act).

⁴⁸² Net-zero Industry Act, art 1.

⁴⁸³ *ibid* rec 2.

⁴⁸⁴ *ibid* art 1(1) and art 1(2)(a)-(f).

⁴⁸⁵ *ibid* art 2, art 3(1) and art. 4.

⁴⁸⁶ *ibid* art 25(1).

⁴⁸⁷ *ibid* art 4(1)(a)-(k).

⁴⁸⁸ *ibid* art 25(4).

The content of the minimum requirements will be established in an implementing act as referred to in Article 25(5) NZIA. This act will specify the requirements on environmental sustainability and will consider at least the market situation at Union level for the relevant technologies, the provisions regarding sustainability from other (non-)legislative acts and the EU international commitments, including the Agreement on Government Procurement (GPA).⁴⁸⁹

On an exceptional basis, contracting authorities can decide not to apply the minimum requirements mandated by Article 25(1) NZIA, if three conditions are met.⁴⁹⁰ In accordance with Article 25(3) NZIA, notwithstanding Article 25(1) NZIA, contracting authorities have to apply at least one of the following conditions, requirements or contractual obligations.⁴⁹¹ Firstly, they can include a special condition that relates to social or employment-related considerations that takes the form of a contract performance clause within the meaning of Article 70 of Directive 2014/24/EU and of Article 87 of Directive 2014/25/EU and of the general principles of Directive 2014/23/EU.⁴⁹² Secondly, a requirement can be included in the public procurement procedure to demonstrate compliance with applicable cybersecurity requirements.⁴⁹³ Thirdly, contracting authorities can include 'specific contractual obligation to deliver the component of the contract relating to net-zero technologies listed in Article 4(1)(a)-(k) on time, that may give rise to an obligation to pay an appropriate charge if this obligation is not fulfilled, and that goes beyond the requirements provided for in applicable national legislation, if such legislation exists.'⁴⁹⁴

Article 25(7) NZIA prescribes that a tender's contribution to resilience has to be taken into account in procedures falling under Article 25(1) NZIA, if the value is equal to or above the application thresholds of the Public Procurement Directives.⁴⁹⁵ To assess the contribution to resilience, the Commission shall adopt an implementing act providing for a list of each of the net-zero technology final products and their main specific components, which includes information of the shares of Union supply originating in different third countries.⁴⁹⁶ If more than 50% of the supply of a specific net-zero technology or its main specific component within the Union originates from a third country, or if this supply has increased by 10% in the last two years and is at least 40%, contracting authorities have to include the following conditions for public procurement procedures. Firstly, they have to include an obligation for the duration of the contract not to supply more than 50 % of the value of the specific net-zero technology from each individual third country as determined by the Commission.⁴⁹⁷ Secondly, the contract has to

⁴⁸⁹ Net-zero Industry Act, art 25(5).

⁴⁹⁰ *ibid* art 25(9).

⁴⁹¹ *ibid* art 25(3).

⁴⁹² *ibid* art 25(3)(a).

⁴⁹³ *ibid* art 25(3)(b).

⁴⁹⁴ *ibid* art 25(3)(c).

⁴⁹⁵ *ibid* art 25(7).

⁴⁹⁶ *ibid* art 29(2).

⁴⁹⁷ Net-zero Industry Act, art 25(7)(a).

include an obligation that no more than 50% of the value of the main specific components of the specific net-zero technology is supplied or provided directly from each individual third country.⁴⁹⁸ Thirdly, the contract has to include an obligation to provide upon request evidence for the two first conditions.⁴⁹⁹ Lastly, an obligation should be included that in the event of non-observance of the first two conditions, a proportional charge of at least 10% of the value has to be paid.⁵⁰⁰ These conditions shall not apply to contracts covered by the Union's Appendix I to the Government Procurement Agreement (GPA) as well as by other relevant international agreements by which the Union is bound, where the specific net-zero technology or its main specific components originates from sources of supply that are signatories to those agreements.⁵⁰¹

If the application of Article 25(7) NZIA leads to a situation where there are now suitable tenders or no suitable requests to participate in response to a public procurement procedure, contracting authorities may on an exceptional basis decide to use the negotiated procedure without prior publication pursuant to Article 32(2), point (a) Directive 2014/24/EU, Article 50, point (a) Directive 2014/25/EU or Article 31(5) Directive 2014/23/EU.⁵⁰² Furthermore, they can decide not to apply Article 25(7) NZIA in a specific subsequent public procurement procedure that aims to address the same needs as those which led to the commencement of the initial procedure referred to in this paragraph.⁵⁰³

In accordance with Article 25(12) NZIA, the application of Article 25 NZIA shall be without prejudice to use additional non price criteria, to exclude abnormally low tenders under Article 69 of Directive 2014/24/EU and Article 84 of Directive 2014/25/EU, and to Articles 107 and 108 TFEU in the case of uncompetitive public procurement procedures.⁵⁰⁴

Relationship with the Public Procurement Directives

The scope of the Net-zero Industry Act (NZIA) is the procedures falling within the scope of the Public Procurement Directives, as mentioned in Article 25(1) NZIA. Article 25(3)(a) NZIA refers to a special condition within the meaning of Article 70 Directive 2014/24/EU and of Article 87 Directive 2014/25/EU and of the general principles of Directive 2014/23/EU. The NZIA uses technical specifications and/or contract performance clauses, as referred to in Article 25(4) NZIA, aligning with Article 36 and the general principles of Directive 2014/23/EU, Article 42 and 70 Directive 2014/24/EU and Article 60 and 87 Directive 2014/25/EU.

⁴⁹⁸ *ibid* art 25(7)(b).

⁴⁹⁹ *ibid* art 25(7)(c).

⁵⁰⁰ *ibid* art 25(7)(d).

⁵⁰¹ *ibid* art 25(8).

⁵⁰² *ibid* art 25(11) subparagraph 1 and art 25(11)(a).

⁵⁰³ *ibid* art 25(11)(b).

⁵⁰⁴ Net-zero Industry Act, art 25(12).

Moreover, the NZIA prescribes the resilience contribution to be taken into account for certain contracts, referring to the threshold values set out in Article 8 of Directive 2014/23/EU, Article 4 of Directive 2014/24/EU and Article 15 of Directive 2014/25/EU. If this resilience contribution leads to the situation where there are no suitable tenders, contracting authorities can use the negotiated procedure without prior publication laid down in Article 32(2)(a) Directive 2014/24/EU, Article 50(a) Directive 2014/25/EU or Article 31(5) Directive 2014/23/EU.

In terms of definitions, the NZIA defines ‘public procurement of innovative solutions’ in Article 3(15) NZIA as ‘public procurement of innovative solutions’ means a public procurement procedure for which contracting authorities or contracting entities act as a launch customer for net-zero technologies, which may include conformity testing’. This is distinct from the definition of ‘innovation’ under Article 2(22) Directive 2014/24/EU. This can lead to legal uncertainty if these gate-keeping concepts vary across different legislative instruments.

Similar to the HDVR, Article 25(3) NZIA’s legislative approach seems incoherent with professional public procurement practice and the other legislative requirements discussed elsewhere. Either discretion is granted to tailor-make a public procurement procedure based on, for instance, market consultations and earlier experience that depict if a set criterion is effective to achieve the objectives of a procedure and, thus, procure effectively. Alternatively, the legislator can depict a specific criterion to always be useful for public procurement procedure. As a consequence, it appears better to either make these criteria mandatory or to provide discretion, instead of creating limited flexibility of choice in their application and the risk of overcompliance with some of the criteria.

To conclude in terms of legal coherency, this means the following:

- The Net Zero Industry Act contains substantive and procedural requirements for public procurement in Article 25, including delegated law-making, namely either technical specifications or contract performance clauses;
- Accordingly, this means that these delegated acts must comply with Article 42 and 70 Directive 2014/24/EU respectively, to avoid an incoherent system for public procurement;
- The Net-zero Industry Act refers to the Public Procurement Directives in terms of scope and provisions, thereby adding to streamlining the coherency of its relationship;
- The Net-zero Industry Act defines ‘public procurement of innovative solutions’ in Article 3(15) Net-zero Industry Act, which is distinct from the definition of ‘innovation’ under Article 2(22) Directive 2014/24/EU.

This difference in terminology could hinder the application of both provisions in practice;

- Given that the Net-zero Industry Act delegated acts regulate environmental sustainability, they must consider (i) the market situation at Union level of the relevant technologies, (ii) provisions regarding environmental sustainability set out in other Union legislative and non-legislative acts applicable to public procurement procedures covered by the obligation set out in Article 25(1) Net-zero Industry Act, (iii) the Union's international commitments, including the GPA and other international agreements to which the Union is bound. These pre-conditions are different from the other in scope delegated acts;
- The approach of the Net-zero Industry Act in Article 25(3) seems inconsistent with public procurement practice and the other legislative requirements, given that a criterion is either deemed relevant for a specific procurement by the respective contracting authority or deemed relevant by the legislator, or it is deemed not relevant, whereas the provision now ends up somewhere in the middle of mandatory and discretion;
- The Net-zero Industry Act does not include any reporting obligation regarding its public procurement requirements.

Based on the above legal coherency discussion, the following recommendations are made:

- It can be considered to streamline the definition of innovation in the Net-zero Industry Act and the Public Procurement Directives, to avoid legal uncertainty in practice;
- The Net-zero Industry Act contains various pre-conditions for delegated law-making. The conditions of the delegated law-making possibilities should be streamlined across the legislative instruments to ensure that all of them are introduced with the same pre-conditions in mind;
- In light of the noted balance between mandatory requirements and discretion, it can be considered to make the criteria under Article 25(3) Net-zero Industry Act explicitly mandatory or not mandatory;
- The use of delegated law-making and monitoring is discussed further in Section 6.

5. Micro Analysis – Legislative instruments regulating Public Procurement as a Trade Instrument

5.1 Introduction

Within the shift of regulating public procurement as a trade instrument, this section will discuss and assess the policy documents and subsequent legislative instrument in the scope of this study, namely the International Procurement Instrument.

5.2 Public procurement as a trade instrument

5.2.1 The EU-China Strategic Outlook

In addition to the Industry Strategy discussed before, the EU-China Strategic Outlook was adopted in 2019, in light of China's increasing 'economic power and political influence'⁵⁰⁵ and its unwillingness to participate in human rights dialogues.⁵⁰⁶ Particularly, the Outlook adopts a 'relational shift'⁵⁰⁷ and a triple characterisation of China as (i) 'cooperation partner,' (ii) 'economic competitor in the pursuit of technological leadership,' and (iii) 'systemic rival promoting alternative models of governance.'⁵⁰⁸

In general, the Outlook aims to shift the EU's policy for China 'towards a more realistic, assertive, and multi-faceted approach,' ensuring fair, balanced, and mutually beneficial relations.⁵⁰⁹ Accordingly, the Outlook's three objectives focus on (i) deepening the EU's engagement with China to promote common interests at a global level, (ii) achieving 'balanced and reciprocal' economic conditions, and (iii) adapting the EU by 'changing economic realities' and strengthening 'domestic policies and industrial base.'⁵¹⁰ The Outlook's outcome is summarised in 10 Actions including amongst other things climate change, peace and security, and stability, sustainable economic development and good governance.⁵¹¹

⁵⁰⁵ Joint Communication to the European Parliament, the European Council and the Council - EU-China – A strategic outlook [2019] JOIN(2019) 5 final (EU-China Strategic Outlook), 1.

⁵⁰⁶ Axel Berkofsky, 'China and the EU: Strategic Partners No More' (2019) Issue Brief - Institute for Security & Development Policy 1, 4 <www.isdp.eu> accessed 1 March 2025.

⁵⁰⁷ Alice Politi, 'The Paradigm-Shift in EU-China Relations and the Limits of the EU's Current Strategy Towards China: A Relational Perspective' (2023) 54(4) Asian Affairs 670, 677 <<https://doi.org/10.1080/03068374.2023.2281164>> accessed 1 March 2025.

⁵⁰⁸ *ibid*; EU-China Strategic Outlook, 1.

⁵⁰⁹ EU-China Strategic Outlook, 1.

⁵¹⁰ *ibid* 2.

⁵¹¹ EU-China Strategic Outlook, 11.

Public Procurement and the EU-China Strategic Outlook

Regarding public procurement, the EU-China Strategic Outlook aims to promote 'open procurement,' following the EU's Strategy on Connecting Europe and Asia.⁵¹² As a starting point, it is noted that businesses 'encounter difficulties to gain access to procurement opportunities in the Chinese as well as other foreign markets,' especially in highly competitive sectors such as transport, equipment, telecommunications, power generation, medical equipment, and construction services,⁵¹³ given China's closure of the procurement market⁵¹⁴ under the 'Made in China 2025' economic policy.⁵¹⁵

Public procurement is explicitly addressed by the Outlook's Actions 6 and 7. Mainly, Action 6 aims 'to promote reciprocity and open up procurement opportunities in China' through the International Procurement Instrument.⁵¹⁶ Furthermore, given public procurement's significant share of the EU's GDP, the Outlook adopts a 'more strategic approach'⁵¹⁷ to achieve a relevant level playing field,⁵¹⁸ for example, by ensuring that 'procurement procedures conducted in the EU on the basis of international agreements comply with the Treaty principles of transparency and equal treatment'⁵¹⁹ and 'public procurement for projects benefiting from EU funding [...] guarantee a high standard of quality, security, sustainability and social responsibility.'⁵²⁰

Lastly, given China's increasing presence in the Western Balkans, public procurement is underlined as a key means for the EU to pursue its 'enlargement,' 'neighbourhood policies,' 'resilience of its partners,' and 'full adherence to EU values, norms and standards' in this region.⁵²¹ Accordingly, the International Procurement Instrument Regulation (EU) 2022/1031 was adopted following the Outlook's strategy, as will be analysed further.

⁵¹² *ibid* 5.

⁵¹³ *ibid* 7.

⁵¹⁴ *ibid* 6.

⁵¹⁵ *ibid* 5.

⁵¹⁶ *ibid* 7.

⁵¹⁷ *ibid*.

⁵¹⁸ *ibid*.

⁵¹⁹ *ibid*.

⁵²⁰ *ibid*.

⁵²¹ EU-China Strategic Outlook, 4.

5.2.2 The International Procurement Instrument

The International Procurement Instrument Regulation (EU) 2022/1031 (IPI)⁵²² was adopted after a decade of negotiations.⁵²³ In light of the rising ‘protectionist measures’ regarding international procurement and the absence of respective international commitments by most WTO members, the IPI aims to enhance the ‘level playing field’ in third-country procurement markets for EU businesses.⁵²⁴ The IPI’s goal is not to exclude third-country companies from the internal market,⁵²⁵ but rather to foster reciprocity and mutual benefit, even though the broader interests of the EU play an important part here.⁵²⁶

The IPI, adopted under Article 207(2) TFEU, intends ‘to improve the access of Union economic operators, goods and services to the public procurement and concession markets of third countries’ by introducing procedures for the Commission ‘to undertake investigations into alleged third-country measures or practices against Union economic operators, goods and services, and to enter into consultations with the third countries concerned.’⁵²⁷ Specifically, a ‘third-country measure or practice’ is considered to be ‘any legislative, regulatory or administrative measure, procedure or practice, or combination thereof, adopted or maintained by public authorities or individual contracting authorities or contracting entities in a third country, at any level, that results in a serious and recurrent impairment of access of Union economic operators, goods or services to the public procurement or concession markets of that third country.’⁵²⁸ This Regulation is applicable to ‘non-covered procurement’, namely procedures that ‘the Union has not undertaken market access commitments in an international agreement in the field of public procurement or concessions’⁵²⁹ and fall under the scope of Directives 2014/23/EU, 2014/24/EU, 2014/25/EU.⁵³⁰

⁵²² European Parliament and the Council Regulation of 23 June 2022 on the access of third-country economic operators, goods and services to the Union’s public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI) [2023] OJ L 173 (IPI).

⁵²³ Lucian Cernat, ‘The International Procurement Instrument (IPI): promoting a level playing field around the world’ (2023) 930 ICE Revista De Economía 85, 93 <<https://doi.org/10.32796/ice.2023.930.7568>> accessed 15 February 2025.

⁵²⁴ Kamala Dawar, ‘The EU 2022 International Procurement Regulation Enters in to Force Reciprocity’ (2023) 57(1) Journal of World Trade 139, 153 <<https://doi.org/10.54648/trad2023005>> accessed 15 February 2025.

⁵²⁵ Michael Bowsher et al., ‘International Procurement Developments in 2022: New Perspectives in Global Procurement’ (2023) 2022 Gov. Contr. Year in Rev. 59 (Thomson Reuters 2023), GWU Legal Studies Research Paper No. 2023-11, GWU Law School Public Law Research Paper No. 2023-11 59, 62 <www.papers.ssrn.com> accessed 16 February 2025.

⁵²⁶ IPI, rec 5; Nathan Meershoek, ‘Reciprocity as Security: Reconsidering Third Country Access to European Critical Infrastructure Procurement’ (2023) 28 European Foreign Affairs Review 75.

⁵²⁷ IPI, art 1(1).

⁵²⁸ IPI, art 2(1)(i).

⁵²⁹ *ibid* art 2(1)(k).

⁵³⁰ *ibid* art 1(1-2).

Public Procurement and the International Procurement Instrument

Notably, under Article 5(1) International Procurement Instrument (IPI), the Commission may initiate an investigation into ‘an alleged third-country measure or practice’ either ‘on its own initiative or upon a substantiated complaint of a Union interested part or a Member State’ by publishing a notice in the Official Journal of the European Union, which includes its preliminary assessment of the third-country measure or practice, and an invite to provide relevant information within a specified timeframe. Following this notice, the Commission shall invite the respective third country to ‘submit its view, provide relevant information and enter into consultations’ in order to ‘eliminate or remedy the alleged third-country measure or practice.’⁵³¹ The described procedure shall be concluded within nine months after its initiation or could be extended by five months under justified circumstances,⁵³² and its main findings shall be made publicly available.⁵³³ If the outcome of this proceeding indicates that ‘the alleged third-country measure or practice is not maintained or that it does not result in a serious and recurrent impairment of access of Union economic operators, goods or services to the public procurement or concession markets of the third country,’ the Commission shall cease the investigation.⁵³⁴ Furthermore, the Commission may suspend the investigation at any time if the concerned third country ‘takes satisfactory corrective actions to eliminate or remedy the serious and recurrent impairment of access’ or ‘undertakes commitments towards the Union to end or phase out the third-country measure or practice,’⁵³⁵ reserving its right to resume the investigation should it determine that ‘the reasons for the suspension are no longer valid.’⁵³⁶

On the other hand, under Article 6(1) IPI, if the Commission concludes that ‘a third-country measure or practice exists, it shall, if it considers it to be in the interest of the Union, adopt an IPI measure by means of an implementing act.’ The assessment of whether it is in the interest of the Union to adopt such a measure shall be based on ‘an appreciation of all the various interests taken as a whole, including the interests of the Union’s economic operators.’⁵³⁷ This leaves a broad discretion to define these interests by the Commission.

The IPI measure shall be determined ‘in light of available information’ and on the basis of ‘(its) proportionality [...] with regard to the third-country measure or practice’ and ‘the availability of alternative sources of supply for the goods and services concerned, in order to avoid or minimise a significant negative impact on contracting authorities and contracting entities.’⁵³⁸ Furthermore, it may take

⁵³¹ *ibid* art 5(2).

⁵³² *ibid* art 5(3).

⁵³³ *ibid* art 5(4).

⁵³⁴ *ibid* art 5(5).

⁵³⁵ *ibid* art 5(6).

⁵³⁶ IPI, art 5(7).

⁵³⁷ *ibid* art 6(2) and 6(9).

⁵³⁸ *ibid* art 6(3) and 6(9).

the form of access restriction to economic operators, goods or services from a third country to public procurement procedures by requiring contracting authorities and entities to impose a respective score adjustment or exclude tenders submitted by economic operators originating in that third country.⁵³⁹ This score adjustment shall apply ‘only for the purpose of the evaluation and ranking of the tenders’ and ‘not affect the price to be paid under the contract.’⁵⁴⁰ When specifying the scope of the IPI measure, the Commission shall include ‘the sectors or the categories of goods, services and concessions [...] as well as any applicable exceptions,’ the specific categories of contracting authorities or entities and of economic operators, ‘the specific thresholds’ and ‘where appropriate, the percentage values of a score adjustment.’⁵⁴¹ Regarding the latter requirement, it shall be ‘be set up to 50 % of the evaluation score of the tender, depending on the third country and sector of envisaged goods, services, works or concessions’ or if the price or cost is the sole contract award criterion, the score adjustment shall be twice the aforementioned percentage value.⁵⁴²

The IPI measure shall only apply to public procurement procedures with ‘an estimated value equal to or above EUR 15 000 000 net of VAT for works and concessions, and equal to or above EUR 5 000 000 net of VAT for goods and services,’ which will be further determined by the Commission based on the results of the investigation and the proportionality and availability criteria already mentioned.⁵⁴³ Furthermore, the IPI measure shall apply ‘in the case of specific contracts awarded under a dynamic purchasing system where the IPI measure also applies to those dynamic purchasing systems,’ but not to ‘specific contracts the estimated value of which is below the respective values set out in Article 8 of Directive 2014/23/EU, Article 4 of Directive 2014/24/EU or Article 15 of Directive 2014/25/EU’ and ‘to public procurement procedures for the award of contracts based on a framework agreement or to contracts for individual lots to be awarded in accordance with Article 5(10) of Directive 2014/24/EU or Article 16(10) of Directive 2014/25/EU.’⁵⁴⁴

Moreover, under the procedure of Article 7 IPI, the Commission may adopt, upon a justified request by a Member State and with a view to a fair distribution among Member States of the award procedures subject to IPI measures, a list of local contracting authorities in that Member State, within administrative units with a population below 50,000 inhabitants, that are exempted from the application of this Regulation. Additionally, Article 9 IPI provides for derogation of the application of the IPI measure if ‘only tenders from economic operators originating in a third country subject to an IPI measure meet the tender requirements’ or ‘the

⁵³⁹ *ibid* art 6(6).

⁵⁴⁰ *ibid* art 6(7).

⁵⁴¹ *ibid* art 6(8).

⁵⁴² *ibid*.

⁵⁴³ IPI, art 6(4).

⁵⁴⁴ *ibid* art 6(5).

decision not to apply the IPI measure is justified for overriding reasons relating to the public interest, such as public health or protection of the environment.'

Under Article 6(10) IPI, the Commission may withdraw or suspend the IPI measure by means of an implementing act if the third country 'takes satisfactory corrective actions to eliminate or remedy the impairment of access' or 'undertakes commitment to end the measure or practice in question,' reserving its right to reinstate the IPI measure at any time if it considers that 'the corrective actions or commitments undertaken have been rescinded, suspended or improperly implemented.' Furthermore, Article 6(11) IPI provides that an IPI measure shall last for five years from its entry into force, unless extended for five years, adjusted or replaced with a different IPI measure by means of an implementing act, after a prior review.

To avoid circumvention of this Regulation,⁵⁴⁵ under Article 8(1), contracting authorities and entities shall prohibit successful tenders to 'subcontract more than 50% of the total value of the contract to economic operators originating in a third country which is subject to an IPI measure' or supply or provide goods or services originating in the third country which is subject to the IPI measure representing more than 50% of the total value of the contract, irrespective of whether they are supplied or provided directly by the successful tenderer or by a subcontractor.

Lastly, Article 10 IPI refers to Directives 89/665/EEC and 92/13/EEC for ensuring the legal protection of economic operators having or having had an interest in obtaining a particular contract falling under the scope of this Regulation.

The Commission has already launched an investigation pursuant to the procedure of Article 5(4) against the People's Republic of China. According to its relative report, China's legal and administrative framework 'provides for a generally applicable preference for the procurement of domestic goods and services, including medical devices,' implementing the 'Buy China' policy.⁵⁴⁶ Particularly, the Commission argues that this framework mandates the procurement of domestic medical devices instead of imported ones, hence resulting in a 'serious and recurrent impairment of access of Union economic operators and Union-made medical devices' to the relevant public procurement market.⁵⁴⁷ Given the absence of any specific corrective actions from China, the Commission will consider the application of Article 6 IPI.⁵⁴⁸

⁵⁴⁵ Cernat (n 523) 95.

⁵⁴⁶ Report from the Commission pursuant to Article 5(4) of Regulation (EU) 2022/1031 on the investigation under the International Procurement Instrument concerning measures and practices of the People's Republic of China in the public procurement market for medical devices [2025] SWD(2025) 2 final, 1, 2.

⁵⁴⁷ *ibid* 12.

⁵⁴⁸ *ibid*.

Relationship with the Public Procurement Directives

The International Procurement Instrument (IPI) contains requirements related to restriction of access to public procurement procedures, namely score adjustment or exclusion.

Article 1(2) IPI underlines that this Regulation applies to public procurement procedures falling into the scope of Directives 2014/23/EU, 2014/24/EU, 2014/25/EU. Moreover, Article 1(5) IPI provides that environmental, social and labour requirements shall also apply to economic operators in accordance with these Directives. Regarding the definition of ‘economic operator’,⁵⁴⁹ ‘estimated value’,⁵⁵⁰ ‘contracting authority’,⁵⁵¹ ‘contracts’,⁵⁵² and ‘tenderer’⁵⁵³ Article 2 IPI refers similarly to the Public Procurement Directives. As far as the IPI measure is concerned, Article 6(5) IPI excludes its application regarding ‘specific contracts the estimated value of which is below the respective values set out in Article 8 of Directive 2014/23/EU, Article 4 of Directive 2014/24/EU or Article 15 of Directive 2014/25/EU’ and ‘public procurement procedures for the award of contracts based on a framework agreement or to contracts for individual lots to be awarded in accordance with Article 5(10) of Directive 2014/24/EU or Article 16(10) of Directive 2014/25/EU.’

To conclude in terms of legal coherency, this means the following:

- The International Procurement Instrument contains procedural and substantive requirements related to restriction of access to public procurement procedures, namely score adjustment or exclusion.
- The International Procurement Instrument extensively refers to the Public Procurement Directives in terms of scope in Articles 1-2, thereby adding to streamlining their relationship;
- The Remedies Directive is explicitly linked to the International Procurement Instrument in Article 10, thereby adding to clarity about the possibilities for legal review between the International Procurement Instrument and the Public Procurement Directives as well. Notably, there is still a distinction here based on the CJEU’s ruling in Kolin on whom can gain rights from the Remedies Directive. The IPI is applicable to contracts falling under the Public Procurement Directives, but not all economic operators can benefit from those rights, because it excludes economic operators from third countries;

⁵⁴⁹ IPI, art 2(1)(a).

⁵⁵⁰ *ibid* art 2(1)(c).

⁵⁵¹ *ibid* art 2(1)(f).

⁵⁵² *ibid* art 2(1)(l).

⁵⁵³ *ibid* art 2(1)(m).

- In terms of reporting, the International Procurement Instrument contains reporting obligations on the application of the measures taken under this regulation. Amongst other things, contracting authorities and entities must report via Tenders Electronic Daily about the workings of measures, including exclusions and score adjustments, in their public procurement procedures under Article 13 International Procurement Instrument.

6. Macro Analysis - Coherency issues affecting Public Procurement Legislation in the EU

The above analysis of the Public Procurement Directives and the other legislative instruments has brought up a variety of legal coherence issues and recommendations on a micro level. Overseeing this analysis, the following conclusions are drawn on a more macro-level, whilst building on the analysis of each legislative instrument in Sections 3-5.

Public procurement legislation has become fragmented

From the above analysis, and taking from the many other legislative instruments mentioned in Annex I as well, the regulatory landscape for public procurement in the EU is clearly not solely governed by the Public Procurement Directives anymore. Instead, the increased strategic role for public procurement has over the years resulted in the adoption of 52 legislative instruments including both Regulations and Directives, which even excludes those 10 instruments still pending.

Two categories of legislative instruments are identified that embody this shift in regulatory approach: those legislative instruments related to green and social public procurement that constitutes the majority of the framework, and those reflecting the EU's response to a shifting global trade and industry landscape. Predominantly, these sectoral pieces of legislation include some provisions on public procurement in a broader, not public procurement-related, setting related to the achievement of environmental, social and trade objectives.

The need to consider public procurement legislation as a whole

In light of this fragmentated regulatory landscape, there is a need to assess public procurement regulation in the EU as whole, by including the Public Procurement Directives and the other sectoral instruments and not by considering the individual provisions in each legislative instrument separately. Otherwise, the primary and shared object of regulation, namely public procurement, runs the risk of being faced with further fragmentation, with the subsequent risk of ineffectiveness as a result. In this light, mandating the use of criteria or targets related to the achievement of environmental, social or trade objectives can indeed be an effective legislative course to achieve broader climate change and social injustice objectives in the EU, but it is also clear that a fragmented framework will limit the effectiveness of their achievement.

In other words, any coordinated effort to overcome current and future incoherencies would require a coordinated approach between all legislative

instruments involved. To implement the changes, an omnibus approach in which all of them can be changed at once to ensure legal coherency should be considered. Alternatively, it is possible to include the changes to these other legislative instruments in the new proposals for Public Procurement Directives as well.

This effort to achieve further coherency should also consider the effects of multiple legislative instruments' applicability to the same public procurement procedure in the future. When considered in isolation, the application of the substantive requirements in the other legislative instruments limit the discretion of contracting authorities for the achievement of their respective objectives. However, there is a need to ensure that substantive requirements in multiple legislative instruments that apply to the same public procurement procedure are aligned, assuming that a variety of objectives would need to be achieved at the same time through procurement criteria, such as the accumulation of mandatory weighting of award criteria. Furthermore, it is useful to further research the effects of such combinations, which limit the discretion for tailor-made choices for specific procurements, including unregulated but potentially still relevant aspects of quality and price. This is, for instance, the case for horizontal legislative instruments, such as the ESPR, which can coincide with cyber security requirements under 2024/2847 and the CVD, which can coincide with, for instance, the Batteries Regulation and other energy efficiency requirements.

Legal coherency issues in need of attention

Addressing the discussed fragmentation is relevant for two levels of incoherency based on the findings of the micro level analysis of this Study. The first level of incoherency identified in this Study concerns the identified incoherency in use of terminology and scope, absence of appropriate cross-references, unclear substantive overlap without legal conflict and differences in reporting and monitoring requirements discussed also below, all often relating to legal uncertainty or effectiveness of the framework. The second level of incoherency identified in this Study concerns the incoherency in terms of legal conflict, meaning that a simultaneous application of the other sectoral legislative instruments would lead to a violation of EU law. These levels are further discussed and summarized under the recommendations below, which were discussed before in relation to the legislative instruments before.

Fundamentally, the individual provisions in the other legislative instruments regulate public procurement in addition to the Public Procurement Directives, but from their own specific regulatory perspective. Accordingly, these green, social or trade perspectives instrumentalize public procurement in a specific manner, thereby creating a mix of objectives applicable to public procurement, including but not limited to strategic autonomy, market integration, circular economy and energy efficiency. Potentially due to the separate legislative discussions related to each of these legislative instruments within their own broader context, a picture

emerges in which the coherence of public procurement regulation as a whole in the European Union has not been a central consideration in this development. This is exemplified by the differences in chosen legal basis for these instruments, but also due to the variety of approaches taken to regulating public procurement. In the different legislative instruments discussed in this Study and further exemplified by those instruments noted in Annex I, targets, procedural requirements, substantive requirements or a combination, are proposed in different constellations. Furthermore, it is sometimes unclear why a specific regulatory approach is chosen, also in light of the different legal basis including Article 114 TFEU (internal market) or Article 192 (environment) and subsequent objectives for the legislative instrument. This can partially also explain that there are some notable differences between the scope of public procurement legislation. For instance, the Deforestation Regulation applies also under the thresholds of the Public Procurement Directives, whereas the latter only applies above the thresholds. Similarly, this is also relevant for parts of Article 7 Energy Efficiency Directive. To reconcile objectives related to Articles 114 and 192 TFEU, it is recommended to streamline legislative provisions to be applicable above the procurement thresholds. Finally, it seems that subsidiarity discussions, depicting which level of regulatory action (EU or MS) is most effective, have insufficiently been taken into account.⁵⁵⁴ Ultimately, due to this variety, it means that the system as a whole does not emanate from ‘a set of consistent principles and policies’ as noted under the Methodology Section of this Study.

The use of delegated law-making

As noted during the discussion of the legislative instruments, which is also present in the sectoral instruments outside of this Study’s scope in Annex I, there are various delegated and implementing law-making alternatives given to the EU Commission to shape EU public procurement legislation further in the future. The principal advantage of this approach lies in its enhanced flexibility, coupled with the added expedience it offers by not following the usual legislative process typically required for the adoption of new legal instruments or the amendment of existing ones. There is a simultaneous need to ensure that this regulatory approach remains effective, particularly in light of the requirement that the totality of the competences in light of the move from ‘how to buy’ to ‘what to buy’ still remains within the boundaries of the CJEU’s Schengen Border Case, limiting delegated law-making to issues outside of political choice.⁵⁵⁵

Given that much of the delegated and implementing acts have not been adopted yet, it means that a significant part of the legislative framework regulating public procurement is, thus, still uncertain. The amount of delegated and implementing

⁵⁵⁴ Willem Janssen, ‘On Discretion and Sustainability in EU Public Procurement Law’ in Ton Van Den Brink and Virginia Passalacqua (eds), *Balancing Unity and Diversity in EU Legislation* (Edward Elgar Publishing 2024).

⁵⁵⁵ Case 355/10 *Schengen Border Case* [2012] EU:C:2012:516.

acts to be adopted means that there is an imperative need for the EU Commission to adopt these acts with a coherency perspective in mind. It means that during the adoption process of these acts, the rules of the Public Procurement Directives and other delegated and implementing acts, should be taken into account to ensure a coherent framework. As noted before in Section 3, important here is the nature of adopted measures. In this light, it seems fruitful to keep the nature of the Public Procurement Directives procedural based ultimately on the public procurement principles ('how to buy'), and that the other legislative instruments, including the delegated and implementing acts included in them, regulate public procurement from a substantive perspective, thereby depicting, for instance, the required levels of sustainability from a minimum harmonisation perspective ('what to buy').

The role of remedies for bidders across the EU

When it comes to the Public Procurement Directives, the rights of economic operators related to legal protection have been included in the Remedies Directive.⁵⁵⁶ Whilst balancing these rights with the procedural autonomy of the Member States, this Directive feeds towards the need for the Member States to ensure that effective and rapid remedies are available against decisions taken by contracting authorities and contracting entities. Accordingly, it includes, amongst other things, a standstill period between the award and signature of the contract and provisions on interim measures, damages and rules related to ineffectiveness, and it explicates the need for transparency related to the award.

The analysis of the legislative instruments has shown that the Remedies Directive is not explicitly referred to, with the exception of the International Procurement Instrument. Article 1.1 Remedies Directive itself refers to 'Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.' The question is, thus, if the discussed legislative instruments in this Study would qualify as 'community law in the field of public procurement' or if this only includes the Public Procurement Directives. This clarification would take away legal uncertainty that exists due to the fact that these instruments generally do not regulate only procurement but instead often include a single provision of a broader legislative instrument. Such coherency is further emphasized by the conclusion that this is likely different for legal instruments, such as the Clean Vehicles Directive or the International Procurement Instrument, which have public procurement as their main focus.

⁵⁵⁶ As referred to under n 4.

These instruments seemingly fall under the category of ‘community law in the field of public procurement’ already.

Consequently, it is recommended to explicitly confirm that other legal instruments included in the scope of this Study also fall inside the scope of the Remedies Directive. Accordingly, this ensures that economic operators can file claims based on a violation of the legal instruments. Furthermore, it would take away potential national procurement competence issues for review bodies that are not competent to review compliance of decisions by contracting authorities with environmental or social legislation.

In addition to explicitly confirming the scope of the Remedies Directives, one other aspect of future research is to scope this issue further on the Member State level with a particular focus on judicial review. It is clear that at least in some Member States the scope of review already includes these provisions in one way or another⁵⁵⁷ or that the application of the provisions on access to judicial review might be resolved by arguments derived from the Charter of Fundamental Rights of the European Union.⁵⁵⁸ However, even in such scenarios, it is important to note the need for European law safeguards rather than relying on national solutions to provide for effective judicial protection.

The role of monitoring public procurement legislation

Noting the analysis of the discussed legislative instruments, there is an incoherency amongst the legislative instruments related to if and how they report on the related public procurement provisions. For instance, the Heavy Duty Vehicles Regulation, Batteries Regulation or Net-zero Industry Act are not monitored when it comes to these provisions, whereas the Deforestation Regulation, Construction Products Regulation, Energy Efficiency Directive, Clean Vehicles Directive, and International Procurement Instrument contain different approaches to monitoring. Furthermore, the Construction Products Regulation and Clean Vehicles Directive’s approaches align explicitly with Article 83 Directive 2014/24/EU, while the Deforestation Regulation prescribes merely a notification to the Commission, the Energy Efficiency Directive mandates relevant reporting through the national energy and climate progress reporting, and International Procurement Instrument provides for monitoring via Tenders Electronic Daily.

The consideration to introduce monitoring requirements is relevant in any type of legal framework, including that of public procurement. Whilst weighing up the

⁵⁵⁷ Note, for instance, the broad scope of effective judicial review by the Italian courts vested in the Italian Constitution, the ban of Dutch contracting authorities to violate public law obligations whilst exercising their private law competence to close contracts (Art. 3:14 Burgelijk Wetboek) or the explicit inclusion in Belgian law to make it an explicit part of their review (e.g. Art. 14 Wet betreffende de motivering, de informatie en de rechtsmiddelen inzake overheidsopdrachten, bepaalde opdrachten voor werken, leveringen en diensten en concessies).

⁵⁵⁸ For instance, Art. 47 of the Charter.

potential benefits and related administrative burdens, this is particularly relevant for situations in which the related legal framework is fragmented as it allows the involved stakeholders to gain information about its effectiveness. It is, therefore, recommended to consider, should the framework remain scattered across various pieces of legislation, to streamline these monitoring requirements, and to consider further reporting and monitoring in addition to those discussed before, where effective and necessary.

7. Conclusions and recommendations to ensure current and future coherence of Public Procurement Legislation

This Study has explored, analysed and proposed solutions for legal incoherencies, between the Public Procurement Directives and the other legislative instruments. In light of the conclusion that the regulatory framework for public procurement has become fragmented, recommendations have been made throughout this Study to ensure the current and future coherency of the legal framework for public procurement in the EU. These recommendations apply generally to the existing framework for public procurement in the European Union and are grouped together below. The observations and recommendations below are of use for the instruments that are outside of this Study's scope, as well as future instruments containing public procurement provisions:

- 1. Evaluate and reform public procurement legislation in the European Union as a whole instead of each legal instrument in isolation**

There is a need to evaluate and reform public procurement regulation in the EU as whole, including the Public Procurement Directives and the other sectoral instruments, and not by considering the individual provisions in each legislative instrument separately. Otherwise, the object of regulation, namely public procurement, runs the risk of being faced with further fragmentation.

- 2. Ensure awareness in practice and professional procurement to effectively implement these fragmented rules**

It is important to stress the need for awareness about the changed regulatory landscape on the level of contracting authorities and economic operators. Furthermore, it appears that the fragmented nature of this landscape will require more from them in terms of professional and legally compliant public procurement than before. This means that the quality of the procurement profession is of vital importance to ensure compliance with the law.

- 3. Clearly depict the nature of the Public Procurement Directives and their relationship with the other legislative instruments**

To avoid future incoherencies, it is recommended to clearly depict the regulatory nature of the Public Procurement Directives and the nature of the other legislative instruments, when it comes to 'how' they regulate public procurement. The suggested approach could be that the Public Procurement Directives remain procedural in nature based ultimately on the public procurement principles ('how to buy'), and that the other legislative instruments merely regulate public procurement from a substantive perspective, thereby depicting, for instance, the required

levels of sustainability from a minimum harmonisation perspective ('what to buy'). Alternatively, the Public Procurement Directives could still also contain exclusion grounds on 'whom not to buy from', whilst mainly containing procedural requirements on 'how to buy'. This could, for instance, be justified due to their binary implementation (i.e. these grounds either apply or they do not, rather than requiring an evaluation that similar to award criteria).

4. Use consistent terminology across the legislative instruments and in relation to the Public Procurement Directives

There is an incoherency amongst the legislative instruments as to how the references to public procurement are phrased, including the 'new' exclusion grounds in Deforestation Regulation and Ecodesign Regulation. This is also present in the relationship between the Public Procurement Directives and the other legislative instruments, including definitions in the Net-zero Industry Act and the Ecodesign Regulation. It is recommended to consider the effects thereof, and to streamline overlapping terminology in future reforms.

5. Streamline the scope of the Public Procurement Directives and the other legislative instruments

There are some notable differences between the scope of public procurement legislation. For instance, the Deforestation Regulation applies also under the thresholds of the Public Procurement Directives, whereas the latter only applies above the thresholds. Similarly, this is also relevant for parts of Article 7 Energy Efficiency Directive. It is recommended to streamline their applicability to above the procurement thresholds given the internal market context.

6. Include cross-references between the Public Procurement Directives and the other legislative instruments

There is an incoherency amongst the legislative instruments as to whether they refer to the Public Procurement Directives. It is recommended from a compliance perspective to also include in the other legislative instruments that compliance with the Public Procurement Directives is still required, by referring to either their general applicability or the specific relevant provisions, such as Articles 42, 67-68, 70 or their future successors depending on the type of provision involved. Even though this is not required from a strict legal perspective, this would solve any potential legal uncertainty about their simultaneous applicability and potentially ease applicability in practice.

7. Clarify Article 18(2) Directive 2014/24/EU and its equivalents in Directives 2014/23/EU and 2014/25/EU, and their relationship with the other legislative instruments

The legislative instruments related to green and social procurement all fall within the scope of Article 18(2) Directive 2014/24/EU due to the fact that these instruments concern EU environmental, social or labour law. There is, however, significant unclarity about the workings of Article 18(2) Directive 2014/24/EU, including also its equivalents in Article 30(3) Directive 2014/23/EU and Article 36(2) Directive 2014/25/EU. It is unclear what ‘appropriate measure’ means for national legislators or what is required in the contract performance phase in relation to this provision. As a consequence, there is a need to further explicate what ‘appropriate measures’ are. Further enhancement of this provision could, moreover, be done by referring to ‘contracting authorities’ in this provision instead of ‘Member States’, thereby creating an explicit requirement for these authorities. This is of importance for the workings of this provision, but also for related Articles 69(3) and 56(1) Directive 2014/24/EU that refer to it, or have their own slightly altered version of this provision, such as the Minimum Wage Directive.

8. Solve the incoherence between Article 31 Corporate Sustainability Due Diligence Directive and the link to the subject-matter of the contract

The granted possibility in Article 31 Corporate Sustainability Due Diligence Directive for contracting authorities to include compliance with this directive or its voluntary implementation in either award criteria or contract performance conditions is at odds with the proportionality requirements in the Public Procurement Directives being the link to the subject matter. The need for coherency is noted in the Recitals of the Corporate Sustainability Due Diligence Directive as well. As a means to further allow green and social public procurement, the link to the subject-matter requirement could be removed from the Public Procurement Directives, an explicit carve-out provision for the Corporate Sustainability Due Diligence Directive could be introduced in these Directives, or a provision in these Directives could be introduced to accommodate such corporate policies in general.

9. Streamline the system of exclusion grounds in Article 57 Directive 2014/24/EU and its equivalents in Directives 2014/23/EU and 2014/25/EU with the new exclusion grounds

Due to the different rationales of the exclusion system under the Public Procurement Directives, including Article 57 Directive 2014/24/EU, Article 38 Directive 2014/23/EU and Article 80 Directive 2014/25/EU, and the exclusion grounds in the other legislative instruments, such as the Deforestation Regulation and the Ecodesign Regulation, these systems can generally co-exist from a strict legal coherency perspective (punitive

vs. preventative). The 'new' exclusion grounds can, however, be made more coherent by referring to more consistent terminology, such as a 'temporary exclusion for a maximum period of 12 months from public procurement procedures under Directives 2014/24/EU, 2014/23/EU and 2014/25/EU.' The wording related to public funding, falling outside the scope of this Study, could, nonetheless, be enhanced by referring to 'access to public funding, including grants and subsidies'. In this respect, it should be clarified if these new exclusion ground are also a mandatory or facultative exclusion ground, and if a subsequent application of Article 57(4)(a) Directive 2014/24/EU can indeed extend the exclusion with three years following the imposition of a sanction. Finally, implementation of the exclusion grounds in national public procurement acts has the benefit of creating awareness for contracting authorities, but does create inconsistency in the system due to the unavailability of self-cleaning and derogations. Alternatively, it could be considered to keep exclusion grounds solely in the remit of the Public Procurement Directives by making the new exclusion grounds a mandatory exclusion ground instead of including them as a sanctions well.

Notably, it is also relevant to consider the role of 'competent authorities' and their competences related to exclusion grounds, such as under the Deforestation Regulation. Similarly, this relates to the role of the Commission in relation to the International Procurement Instrument and the related measures that can lead to exclusion. Previously, exclusion from public procurement procedures was solely a matter of assessment for contracting authorities. Enforcement is, thus, becoming diversified, meaning that there is a need for effective publication of penalties and measures, as is for instance foreseen under the Deforestation Regulation, and requires subsequent awareness of contracting authorities to apply them.

10. Clarify the scope of the Remedies Directive to include the provisions on public procurement in the other legislative instruments

To further enhance the relationship between the Public Procurement Directives and the other legislative instruments, it should be clarified and/or confirmed that the Remedies Directive also applies in relation to the provisions in the other legislative instruments. This ensures consistency of legal review in public procurement procedures in the Member States.

11. Ensure greater legal certainty when it comes to a number of individual provisions in the other legislative acts and their impact on public procurement

Throughout this Study there are a number of issues raised that would require attention in terms of legal certainty. These issues, for instance, concern 1) the legal requirements with an absent link with public

procurement practice, such as in the requirement to choose from a specified set of criteria in the Net-zero Industry Act or the Heavy Duty Vehicles Regulation, 2) the need to further specify who needs to achieve procurement targets, such as in relation to the Clean Vehicles Directive or 3) the need for further clarification, such as the energy efficiency first principle in the Energy Efficiency Directive.

12. Streamline the pre-conditions for delegated and implementing acts, and consider them as a whole instead of separately

Various legislative instruments contain law-making alternatives for the EU Commission, such as delegated acts and implementing acts, meaning that a major part of the development of the regulatory framework is still unclear. In addition to ensure compliance with the Public Procurement Directives, it is recommended to ensure that a broad coherency perspective is taken in their future adoption. There is, however, a variety of pre-conditions in each of the legislative instruments, ranging from extensive lists of conditions to none at all. Reference can, for instance, be made to the Batteries Regulation, the Ecodesign Regulation, and the Construction Products Regulation. It is recommended to streamline these conditions, whilst also taking into account that a tailor-made approach might be necessary given the regulatory context. The conditions noted in the Construction Products Regulation are most expansive when compared to the other instruments, meaning that these conditions could be used as a starting point.

13. Consider the need to monitor and report on obligations and to provide more consistency amongst them

Given that the public procurement framework is fragmented, it is important to consider the need to monitor these provisions coherently, and to ensure that monitoring follows a consistent method to ensure the cohesiveness of data that allows for an evaluation in due course. At present, legal instruments are monitored in different ways or not at all. This need must be balanced with the administrative burdens that such reporting would create for contracting authorities.

14. Implement the above changes in an omnibus approach or in the proposals for new Public Procurement Directives

Given the significant number of legislative instruments involved that regulate public procurement, combined with their recent adoption in many cases, it is recommended to implement the above changes in an omnibus approach, without departing from the general move towards ‘what to buy’, in which all of them can be changed at once to ensure legal coherency. Alternatively, it is possible to include the changes to these other legislative instruments in the new proposals for Public Procurement Directives as well.

15. Limitations to this Study and a call for further research

This Study has not conducted empirical research. However, given that many different legislative instruments now regulate public procurement, the importance of such research is emphasized to know how this changed body of law works out in the Member States and the individual public procurement procedures of contracting authorities, particularly once all the legislative procedures have been finalised and the implementation deadlines have passed. Further research could also encompass the other legislative instruments in Annex I, which were not included in the scope of this Study. The implementation in all the Member States and practice can, finally, also inspire these studies in the future.

8. Bibliography

Alexandris Polomarkakis K, 'The European Pillar of Social Rights and the Quest for EU Social Sustainability' (2019) 29(2) Social & Legal Studies 183
<<https://doi.org/10.1177/0964663919829199>> accessed 7 March 2025.

Andhov M, Caranta R, Wiesbrock A (eds), Cost and EU Public Procurement Law: Life-Cycle Costing for Sustainability (Routledge 2020).

Andhov M, 'Contracting Authorities and Strategic Goals of Public Procurement - A Relationship Defined by Discretion?' (2021) University of Copenhagen Faculty of Law Research Paper No. 2021-1058 1
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3794794> accessed 26 March 2025.

Andhov M, Caranta R, Janssen WA and Martin-Ortega O, 'Shaping Sustainable Public Procurement Law in the European Union' (2022) 1 <www.greens-efa.eu> accessed 12 February 2025.

Andhov M and Muscaritoli F, 'Climate Change and Public Procurement: Are We Shifting the Legal Discourse?' in Willem Janssen and Roberto Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift* (1st edn, Hart Publishing 2023).

Arrowsmith S, 'The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies' (2012) 14 Cambridge Yearbook of European Legal Studies 1.

Arrowsmith S, *The Law of Public and Utilities Procurement: Regulation in the EU and UK* (3rd ed, Sweet & Maxwell 2014).

Backes C and Boeve M, 'Envisioning the Future of the Circular Economy: A Legal Perspective' (2022) 52(3-4) Environmental Policy and Law 253
<<https://doi.org/10.3233/EPL-219034>> accessed 2 March 2025.

Backes C and Boeve M, 'Regulating the Producer Instead of the Procurer – The EU Sustainable Products Initiative and Extended Producer Responsibility as Ways to Foster the Transition to a Circular Economy' in Willem Janssen and Roberto Caranta (eds.) *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift* (Hart Publishing 2023)

Balkin J, 'Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence' (1993) 103 The Yale Law Journal 105.

Berkofsky A, 'China and the EU: Strategic Partners No More' (2019) Issue Brief - Institute for Security & Development Policy 1 <www.isdp.eu> accessed 1 March 2025.

Botta G, 'The interplay between EU public procurement and human rights in global supply chains: Lessons from the Italian legal context' (2023) 4(3)

European Journals of Public Procurement Markets 51

<<https://www.doi.org/10.54611/LEPQ5875>> accessed 26 March 2025.

Böttge I et al., 'From Green Vision to Legal Obligation: The Case for Making Green Public Procurement Mandatory' (2023) 19 CYELP 249

<<https://doi.org/10.3935/cyelp.19.2023.519>> accessed 18 January 2025.

Bovis C, 'The principles of public procurement regulation' in Christopher Bovis (ed.) *Research Handbook on EU Public Procurement Law* (Elgar 2016).

Bowsher M et al., 'International Procurement Developments in 2022: New Perspectives in Global Procurement' (2023) 2022 Gov. Contr. Year in Rev. 59 (Thomson Reuters 2023), GWU Legal Studies Research Paper No. 2023-11, GWU Law School Public Law Research Paper No. 2023-11 59

<www.papers.ssrn.com> accessed 16 February 2025.

Bueno N, 'The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise' (2024) 9(2) Business and Human Rights Journal 294 <<https://doi.org/10.1017/bhj.2024.10>> accessed 14 February 2025.

Bufic A, 'Directive 2023/1791 EED: a step closer to mandatory green public procurement criteria through sectoral legislation' (2023) 5(3) European Journal of Public Procurement Markets 46 <<https://www.doi.org/10.54611/GDGO2591>> accessed 28 January 2025.

Caranta R, 'The impact of the Farm to Fork strategy on sustainable food and catering procurement' in Mark Stein et al. (eds.) *Sustainable Food Procurement* (Routledge 2024).

Caranta R, 'The more recent way of mandatory public procurement rules: sustainability rhymes with resilience' (2024) 5(4) European Journal of Public Procurement Markets 71, 75 <<https://www.doi.org/10.54611/LLJZ2561>> accessed 5 February 2025.

Caranta R and Janssen WA, 'Collective Reflections on the Future of Mandatory Sustainable Public Procurement' in Willem Janssen and Roberto Caranta (eds.), *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift* (1st edn, Hart Publishing 2023).

Caranta R, 'Towards mandatory SPP for buildings/works' (2022) 4(1) European Journal of Public Procurement Markets 9

<<https://www.doi.org/10.54611/OYAN5022>> accessed 29 January 2025.

Caranta R, 'Towards Socially Responsible Public Procurement' (2022) 23 ERA Forum 149.

Carvalho G and Kazim E, 'Themes in data strategy: thematic analysis of 'A European Strategy for Data' (EC)' (2022) 53(2) AI and Ethics 53

<<https://doi.org/10.1007/s43681-021-00102-y>> accessed 2 March 2025.

Cernat L, 'The International Procurement Instrument (IPI): promoting a level playing field around the world' (2023) 930 ICE Revista De Economía 85 <<https://doi.org/10.32796/ice.2023.930.7568>> accessed 15 February 2025.

Dawar K, 'The EU 2022 International Procurement Regulation Enters in to Force Reciprocity' (2023) 57(1) Journal of World Trade 139 <<https://doi.org/10.54648/trad2023005>> accessed 15 February 2025.

Den Hertog L and Stroß S, 'Coherence in EU External Relations: Concepts and Legal Rooting of an Ambiguous Term' (2013) 18 European Foreign Affairs Review 373.

Draghi M, 'The Future of European Competitiveness' (2024) <<https://commission.europa.eu>> accessed 27 March 2025.

Dulian M, 'Revising the Energy Efficiency Directive: 'Fit for 55' package' (2023) EPRS 1 <www.europarl.europa.eu> accessed 29 January 2025.

Eisele K, 'Fit for 55 package: Recasting the Energy Efficiency Directive' (2021) EPRS 1 <www.europarl.europa.eu> accessed 29 January 2025.

European Commission, 'Communication from the Commission to the Council and the European Parliament - Forest Law Enforcement, Governance and Trade (FLEGT) - Proposal for an EU Action Plan' [2003] COM/2003/0251 final.

European Commission, 'Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market' [2011] COM(2011) 15 final.

European Commission, 'Commission Staff Working Document - EU GPP Criteria for Office Building Design, Construction and Management' [2016] SWD(2016) 180 final.

European Commission, Directorate General for the Environment and ICLEI – Local Governments for Sustainability, Buying Green! A Handbook on Green Public Procurement: 3rd Edition. (Publications Office 2016) <<https://data.europa.eu/doi/10.2779/837689>> accessed 13 April 2025.

European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - Establishing a European Pillar of Social Rights' [2017] COM(2017) 250 final.

European Commission, 'Impact assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles {COM(2017) 653 final} {SWD(2017) 367 final}' [2017] SWD(2017) 366 final.

European Commission, 'Annex 2 - Strategic Action Plan on Batteries to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the

Regions; Europe on the Move - Sustainable Mobility for Europe: safe, connected and clean' [2018] COM(2018) 293 final.

European Commission, 'Joint communication to the European Parliament, the European Council and the Council - EU-China – A strategic outlook' [2019] JOIN(2019) 5 final.

European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Stepping up EU Action to Protect and Restore the World's Forests' [2019] COM(2019) 352 final.

European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Green Deal' [2019] COM(2019) 640 final.

European Commission, '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' [2020] COM(2020) 21 final.

European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European strategy for data' [2020] COM(2020) 66 final.

European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - A New Industrial Strategy for Europe' [2020] COM(2020) 102 final.

European Commission, 'Impact Assessment Report accompanying the 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' [2020] SWD(2020) 335 final.

European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system' [2020] COM(2020) 381 final.

European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - A Renovation Wave for Europe - greening our buildings, creating jobs, improving lives' [2020] COM(2020) 662 final.

European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and

Social Committee and the Committee of the Regions - The European Pillar of Social Rights Action Plan' [2021] COM(2021) 102 final.

European Commission, 'Updating the 2020 Industrial Strategy: towards a stronger Single Market for Europe's recovery' [2021] COM(2021) 350 final.

European Commission, 'Commission Staff Working Document Impact Assessment Report -Accompanying the document Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937' [2022] SWD(2022) 42 final.

European Commission, 'Report from the Commission pursuant to Article 5(4) of Regulation (EU) 2022/1031 on the investigation under the International Procurement Instrument concerning measures and practices of the People's Republic of China in the public procurement market for medical devices' [2025] SWD(2025) 2 final.

European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Competitiveness Compass for the EU' [2025] COM(2025) 30 final.

European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - The Clean Industrial Deal: A joint roadmap for competitiveness and decarbonisation' [2025] COM(2025) 85 final.

European Economic and Social Committee, 'Opinion of the European Economic and Social Committee on 'Proposal for a Directive of the European Parliament and of the Council on energy efficiency (recast)' [2021] COM(2021) 558 final.

Casanova P J and Pinto J, 'Interpreting the Energy Efficiency First Principle: Help or Hindrance for the Hydrogen Economy?' (2024) 33(6) European Energy and Environmental Law Review 274 <<https://doi.org/10.54648/eelr2024022>> accessed 28 May 2025.

Falvo C and Muscaritoli F, 'Towards Deforestation-Free Public Procurement?' (2024) 19(2) European Procurement & Public Private Partnership Law Review 91 <<https://doi.org/10.21552/epppl/2024/2/4>> accessed 13 February 2025.

Filippidou F and Jimenez Navarro J P, Achieving the Cost-Effective Energy Transformation of Europe's Buildings: Combinations of Insulation and Heating & Cooling Technologies Renovations: Methods and Data (Publications Office of the European Union 2019).

Franklin C, 'The Burgeoning Principle of Consistency in EU Law' (2011) Yearbook of European Law 11.

Garben S, 'The European Pillar of Social Rights: An assessment of its Meaning and Significance' (2019) 21 Cambridge Yearbook of European Legal Studies 101 <<https://doi.org/10.1017/cel.2019.3>> accessed 7 March 2025.

Garcia Da Silva B and Milcamps P-N, 'The Regulation on Deforestation-Free Products: When the EU Takes on Deforestation's Corrupted Roots' (2023) 32(6) *European Energy and Environmental Law Review* 293, 300-301
<<https://doi.org/10.54648/eelr2023019>> accessed 13 February 2025.

Gruyaert D and Pissierssens V, 'Transforming the Construction Sector Through Minimum Requirements' in Willem Janssen and Roberto Caranta (eds.) *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift* (Hart Publishing 2023).

Halleux V, 'New EU regulatory framework for batteries - Setting sustainability requirements' (2024) EPRS 1 <www.europarl.europa.eu> accessed 18 January 2025.

Halonen K-M, 'Is Public Procurement Fit for Reaching Sustainability Goals? A Law and Economics Approach to Green Public Procurement' (2021) 28 *Maastricht Journal of European and Comparative Law* 535.

Hornig D-C, 'Reshaping the EUs FTA Policy in a Globalizing Economy: The Case of the EU-Korea FTA' (2012) 46 *Journal of World Trade* 301.

Huisjes H, *Naar een inclusief aanbestedingsbeleid binnen de sociale markteconomie* (Boom Juridisch 2023).

Janssen WA, 'Verplicht maatschappelijk verantwoord aanbesteden. Een eerste verkenning van een paradigmaverandering.' (2020) 1 *Tijdschrift Aanbestedingsrecht en Staatssteun* 19.

Janssen WA and Caranta R (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift* (1st edn, Hart Publishing 2023).

Janssen WA, 'Shifting Towards Mandatory Sustainability Requirements in EU Public Procurement Law: Context, Relevance and a Typology' in Willem Janssen and Roberto Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift* (1st edn, Hart Publishing 2023).

Janssen WA, 'On Discretion and Sustainability in EU Public Procurement Law' in Ton Van Den Brink and Virginia Passalacqua (eds), *Balancing Unity and Diversity in EU Legislation* (Edward Elgar Publishing 2024).

Krämer L, 'EU Ecodesign and Product Policy: from Energy Efficiency to Circular Economy' (2024) 21 *Journal for European Environmental & Planning Law* 343
<<https://doi.org/10.1163/18760104-21030009>> accessed 5 February 2025.

Letta E, 'Much More Than A Market. Speed, Security, Solidarity: Empowering the Single Market to Deliver a Sustainable Future and Prosperity for All EU Citizens' (2024) <<https://www.consilium.europa.eu>> accessed 27 March 2025.

MacCormick N, *Legal Reasoning and Legal Theory* (Clarendon Press; Oxford University Press 1978).

Malcolm R, 'Ecodesign Laws and the Environmental Impact of our Consumption of Products' (2011) 23(3) *Journal of Environmental Law* 487
<<https://www.jstor.org/stable/44248790>> accessed 5 February 2025.

Manunza M, 'Public procurement Law as an Expression of the Rule of Law: On How the Legislature and the Courts Create a Layered Dynamic Legal System Based on Legal Principles' (2023), *Public Procurement Law Review*, 32(5), 319-334.

Meershoek N, 'Reciprocity as Security: Reconsidering Third Country Access to European Critical Infrastructure Procurement' (2023) 28 *European Foreign Affairs Review* 75.

Mélon L, 'More Than a Nudge? Arguments and Tools for Mandating Green Public Procurement in the EU' (2020) 12 *Sustainability* 988.

Michaux L and Gruyters J, 'Life Cycle Costing' (2020) 15 *European Procurement & Public Private Partnership Law Review* 61.

Pape M, 'Directive on adequate minimum wages [EU Legislation in Progress]' (2022) <<https://epthinktank.eu/2022/06/15/directive-on-adequate-minimum-wages-eu-legislation-in-progress/>> accessed 12 April 2025.

Politi A, 'The Paradigm-Shift in EU-China Relations and the Limits of the EU's Current Strategy Towards China: A Relational Perspective' (2023) 54(4) *Asian Affairs* 670 <<https://doi.org/10.1080/03068374.2023.2281164>> accessed 1 March 2025.

Pouikli K, 'The role of Green Public Procurement (GPP) under the EU Green Deal as a key level of the transition to a circular and climate neutral Europe' in Christiane Trüe and Lydia Scholz (eds.) *The EU Green Deal and its Implementation* (Nomos 2023).

Pouikli K, 'Towards Mandatory Green Public Procurement (GPP) Requirements under the EU Green Deal: Reconsidering the Role of Public Procurement as an Environmental Policy Tool' (2021) 21 *ERA Forum* 699.

Prechal S (ed), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press 2008).

Ramos Muñoz D, 'The Corporate Sustainability Due Diligence Directive (CSDDD). Everything, everywhere, all at once?' (2025) *EUSFiL Research Working Paper Series* 1 <www.papers.ssrn.com> accessed 14 February 2025.

Ratti L, 'Brighter Later: The Uncertain Legal Future of the EU Directive on Adequate Minimum Wages' (2023) 24 *ERA Forum* 231, 242.

Raz J, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (rev ed, repr, Clarendon Press 2001).

Renda A, 'The EU Industrial Strategy: Towards a Post-Growth Agenda?' (2021) 56 *Intereconomics* 133.

Riesenhuber K (ed), *European Legal Methodology* (Intersentia 2021).

Risvig Hamer C, 'Article 57 Exclusion criteria' in Michael Steinicke and Peter L. Vesterdorf (eds) *EU Public Procurement Law Brussels Commentary* (C.H. Beck, Hart, Nomos 2018).

Sánchez Graells A, *Public Procurement and the EU Competition Rules* (Hart Publishing 2015).

Sanchez-Graells A, 'Public Procurement and Core Human Rights: A Sketch of the EU Legal Framework' in Claire Methven O'Brien and Olga Martin-Ortega (eds) *Public Procurement and Human Rights: Risks, Dilemmas and Opportunities for the State as a Buyer* (Edward Elgar, 2019).

Schotanus F and Grandia J, 'Public Procurement Policy and Purchasing Strategy' in Jolien Grandia and Leentje Volker (eds) *Public Procurement – Theory, Practices and Tools* (Palgrave MacMillan 2023).

Semple A, 'Charge of the Light Brigade? The Clean Vehicles Directive and the Batteries Regulation' in Willem Janssen and Roberto Caranta (eds.) *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift* (Hart Publishing 2023).

Sjåfjell B and Wiesbrock A 'Why Should Public Procurement Be About Sustainability?' in Beate Sjåfjell and Anja Wiesbrock (eds), *Sustainable Public Procurement under EU Law* (1st edn, Cambridge University Press 2015).

Skovgaard Ølykke G, 'The provision on abnormally low tenders: a safeguard for fair competition?' in Grith Skovgaard Ølykke and Albert Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar Publishing, 2016).

Tátrai T and Diófási-Kovács O, 'European Green Deal – the way to Circular Public Procurement' (2021) 22 ERA Forum 523

<<https://doi.org/10.1007/s12027-021-00678-2>> accessed 7 March 2025.

Telles P and Skovgaard Ølykke G, 'Sustainable Procurement: A Compliance Perspective of EU Public Procurement Law' (2017) 12(3) EPPPL 239

<<https://doi.org/10.21552/epppl/2017/3/7>> accessed 17 March 2025.

Treviño-Lozano L and Uysal E, 'Bridging the gap between corporate sustainability due diligence and EU public procurement' (2023) 30(5) Maastricht Journal of European and Comparative Law 554.

Turunen T and Suikkanen J, 'EU and Recycling of Critical Raw Materials: Stuck in Legal Limbo?' (2024) 33(3) European Energy and Environmental Law Review 139 <<https://doi.org/10.54648/eelr2024009>> accessed 29 January 2025.

Uysal E and Janssen W A, 'The European Green Deal and Public Procurement Law' in Mar Campins Eritja and Xavier Fernández-Pons, *Deploying the European Green Deal* (1st edn, Routledge 2023).

Van Acker L, 'The new Ecodesign Package: an important step towards a circular economy' (2020) *Ars Aequi Juridische uitgeverij* 793 <www.arsaequi.nl> accessed 5 February 2025.

Von der Leyen U, 'Europe's Choice: Political Guidelines for the next European Commission 2024-2029' (2024).

Annex I. List of legislative instruments regulating public procurement in addition to the Public Procurement Directives

Equal pay for equal work	Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms
Foreign Subsidies Regulation (FSR)	Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market
Women on Boards	Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures
Cross-border threats to health	Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision No 1082/2013/EU
Medical countermeasures	Council Regulation (EU) 2022/2372 of 24 October 2022 on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level
Minimum Wage Directive (MWD)	Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union
International Procurement Instrument (IPI)	Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI)
Clean Vehicles Directive (CVD)	Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles
Accessibility	Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services

Enforcement Regulation	Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization
e-Invoicing	Directive 2014/55/EU of the European Parliament and of the Council of 16 April 2014 on electronic invoicing in public procurement
Energy Performance of Buildings	Directive (EU) 2024/1275 of the European Parliament and of the Council of 24 April 2024 on the energy performance of buildings (recast)
Ammunition production (ASAP)	Regulation (EU) 2023/1525 of the European Parliament and of the Council of 20 July 2023 on supporting ammunition production
EDIRPA (defence procurement)	Regulation (EU) 2023/2418 of the European Parliament and of the Council of 18 October 2023 on establishing an instrument for the reinforcement of the European defence industry through common procurement (EDIRPA)
Chips Act	Regulation (EU) 2023/1781 of the European Parliament and of the Council of 13 September 2023 establishing a framework of measures for strengthening Europe's semiconductor ecosystem and amending Regulation (EU) 2021/694 (Chips Act)
Batteries Regulation	Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC
Deforestation Regulation (EUDR)	Regulation (EU) 2023/1115 of the EP and of the Council of 31 May 2023 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
Energy Efficiency Directive (EED)	Directive (EU) 2023/1791 of the European Parliament and of the Council of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955 (recast)
Anti-coercion instrument (ACI)	Regulation (EU) 2023/2675 of the European Parliament and of the Council of 22 November 2023 on the protection of the

	Union and its Member States from economic coercion by third countries
Energy from Renewable Sources	Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) [as amended by: Directive (EU) 2023/2413 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999, and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652]
Fraud and Counterfeiting of Non-cash Means of Payment	Directive 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA
Money Laundering	Directive 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law
Sanctions against Russia because of Ukraine	Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine
Employers of illegally staying third-country nationals	Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals
Waste	Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (as amended by: Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste)
Electricity Directive	Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast)
Passenger transport services by rail and by road	Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70
Media Freedom Act	Regulation (EU) 2024/1083 of the EP and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act)

Heavy Duty Vehicles Regulation (HDVR)	Regulation (EU) 2019/1242 of the European Parliament and of the Council of 20 June 2019 setting CO2 emission performance standards for new heavy-duty vehicles and amending Regulations (EC) No 595/2009 and (EU) 2018/956 of the European Parliament and of the Council and Council Directive 96/53/EC [as amended by Regulation (EU) 2024/1610 of the European Parliament and of the Council of 14 May 2024]
Breach of EU Sanctions	Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures
Environmental Crimes	Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directive 2008/99/EC
Trafficking in human beings	Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [as amended by Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024]
Ecodesign Regulation (ESPR)	Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC
Critical Raw Materials Act (CRMA)	Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020
Net-zero Industry Act (NZIA)	Regulation (EU) 2024/1735 of the European Parliament and of the Council of 13 June 2024 on establishing a framework of measures for strengthening Europe's net-zero technology manufacturing ecosystem and amending Regulation (EU) 2018/1724
Corporate Sustainability Due Diligence Directive (CSDDD)	Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859

Shipments of waste	Regulation (EU) 2024/1157 of the European Parliament and of the Council of 11 April 2024 on shipments of waste, amending Regulations (EU) No 1257/2013 and (EU) 2020/1056 and repealing Regulation (EC) No 1013/2006
Electricity Market Design (EMD)	Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (recast) [as amended by Regulation (EU) 2024/1747 of the European Parliament and of the Council of 13 June 2024 amending Regulations (EU) 2019/942 and (EU) 2019/943 as regards improving the Union's electricity market design]
Fight against fraud	Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law
Financial regulation	Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union (recast)
Single Market Emergency Instrument (IMERA, formerly SMEI)	Regulation (EU) 2024/2747 of the European Parliament and of the Council of 9 October 2024 establishing a framework of measures related to an internal market emergency and to the resilience of the internal market and amending Council Regulation (EC) No 2679/98 (Internal Market Emergency and Resilience Act)
Cyber Resilience Act	Regulation (EU) 2024/2847 of the European Parliament and of the Council of 23 October 2024 on horizontal cybersecurity requirements for products with digital elements and amending Regulations (EU) No 168/2013 and (EU) 2019/1020 and Directive (EU) 2020/1828
Single European Sky	Regulation (EU) 2024/2803 of the European Parliament and of the Council of 23 October 2024 on the implementation of the Single European Sky (recast)
Construction Products Regulation (CPR)	Regulation (EU) 2024/3110 of the European Parliament and of the Council of 27 November 2024 laying down harmonised rules for the marketing of construction products and repealing Regulation (EU) No 305/2011
Packaging and packaging waste	Regulation (EU) 2025/40 of the European Parliament and of the Council of 19 December 2024 on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC

European Standardisation Regulation	Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council
Single Digital Gateway Regulation	Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) No 1024/2012
Union Secure Connectivity Programme Regulation	Regulation (EU) 2023/588 of the European Parliament and of the Council of 15 March 2023 establishing the Union Secure Connectivity Programme for the period 2023-2027
EU Space Programme Regulation	Regulation (EU) 2021/696 of the European Parliament and of the Council of 28 April 2021 establishing the Union Space Programme and the European Union Agency for the Space Programme and repealing Regulations (EU) No 912/2010, (EU) No 1285/2013 and (EU) No 377/2014 and Decision No 541/2014/EU
High common level of cybersecurity (NIS2) Directive	Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive) (Text with EEA relevance)
Security Action for Europe	Council Regulation (EU) 2025/1106 of 27 May 2025 establishing the Security Action for Europe (SAFE) through the Reinforcement of the European Defence Industry Instrument
Trans-European Transport Network Directive	Directive (EU) 2021/1187 of the European Parliament and of the Council of 7 July 2021 on streamlining measures for advancing the realisation of the trans-European transport network (TEN-T)
European Defence Industry Programme	Proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Industry Programme and a framework of measures to ensure the

		timely availability and supply of defence products (EDIP) COM(2024) 150 Final
Child Abuse	Sexual	Proposal for a Directive on combating the sexual abuse and sexual exploitation of children and child sexual abuse material and replacing Council Framework Decision 2004/68/JHA (recast) COM/2024/60 final
European Councils	Works	Proposal for a Directive amending Directive 2009/38/EC as regards the establishment and functioning of European Works Councils and the effective enforcement of transnational information and consultation rights COM(2024) 14 final
Late Payments		Proposal for a Regulation of the European Parliament and of the Council on combating late payment in commercial transactions COM(2023) 533 Final
Combating Corruption		Proposal for a Directive of the EP and of the Council on combatting corruption, replacing Council Framework Decision 2003/568/JHA and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and amending Directive (EU) 2017/1371 of the EP and of the Council COM(2023) 234 final
Green Claims		Proposal for a Directive of the EP and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive) COM(2023) 166 final
Health Data Space (EHDS)		Proposal for a Regulation of the EP and of the Council on the European Health Data Space COM(2022) 197 final
'Facilitation Directive' (migrant smuggling)		Proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit, and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA COM/2023/755 final
Critical Medicines Act		Proposal for a Regulation of the European Parliament and of the Council laying a framework for strengthening the availability and security of supply of critical medicinal products as well as the availability of, and accessibility of, medicinal products of common interest, and amending Regulation (EU) 2024/795
Crisis Management and Deposit Insurance (CMDI) - Bank Recovery		Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU as regards early intervention measures, conditions for resolution and financing of resolution action

and Resolution Directive	
-----------------------------	--

Annex II. About the author and Acknowledgements

prof. dr. W.A. (Willem) Janssen is the Endowed Professor of Public Procurement Law, holding the chair of the Dutch Association for Public Procurement Law, and an Associate Professor of European and Dutch Public Procurement Law. He holds these positions respectively at the Faculty of Law, Groningen University and at the Law Department of Utrecht University. He is a researcher at the Centre for Public Procurement (UUCePP) and the Centre for Regulation and Enforcement in Europe (RENFORCE). His line of research, 'Public Procurement (Law) for Good', delves into challenging questions related to sustainable and responsible outsourcing and insourcing in the public procurement (law) context. He is widely recognised as a public procurement law expert and publishes widely on this topic in international and Dutch academic journals, including his books on Mandatory Sustainability Requirements in EU Public Procurement Law (With R. Caranta, Hart 2023) and EU Public Procurement Law and Self-organisation (Eleven 2018). He co-leads interdisciplinary projects 'Public Interest Ecosystems' and the 'Transactional State', is part of the European Procurement Law Group, and is a regularly invited speaker on topics of climate change and social injustice. He is actively involved in improving public procurement law and practice across the EU, amongst other things, through his role as co-host of BESTEK – The Public Procurement Podcast.

The author is grateful for the research support provided by student assistants Angelos Papathanasiou and Jonas Veldhoen, both students of the Law and Sustainability in Europe Master programme. This Study has benefitted greatly first and foremost from the input from, and cooperation with, Roberto Caranta, the author of the Internal Coherence report, from the input from the EU Commission, the national representatives of the European Commission Expert Group on Public Procurement (EXPP), the national representatives in the Network of First Instance Review Bodies, the Members of the European Procurement Law Group, the Members of the Utrecht University Centre for Public Procurement and more specifically, Ton van den Brink, Abby Semple, Nathan Meershoek, Ezgi Uysal, Tom Huisjes and Lea Diestelmeijer.



Publications Office
of the European Union