

# *Environment and public procurement: proposals for aligning EU law with the European Green Deal*

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# Environment and Public Procurement: Proposals for Aligning EU Law with the European Green Deal

## Abstract

This chapter examines Green Public Procurement (GPP) within the EU legal framework, identifying challenges and proposing reforms to align EU procurement policy with the European Green Deal and evolving EU sustainability and due diligence standards. Drawing on recent legislative developments like the EU Corporate Sustainable Due Diligence Directive (2024/1760) and the Corporate Sustainability Reporting Directive (2022/2464), recommendations aim to balance GPP's environmental benefits with potential impacts on competition and economic efficiency.

### Reform Proposals:

- Introduction of minimum mandatory sustainability and procedural requirements in GPP.
- Integration of environmental due diligence requirements for economic operators.
- Utilization of sustainability reports as selection criteria and contract performance conditions.
- Optimization and broad adoption of Life-Cycle Costing (LCC) methodologies and tools.
- Mandatory use of environmental third-party labels.
- Establishment of a flexible framework for prioritizing environmental objectives.

**Keywords:** green public procurement, environmental sustainability, due diligence, labels, life-cycle costing, competition law

## Introduction

Public procurement in the EU represents approximately 14% of its GDP, or EUR 2 trillion annually, involving over 250,000 public authorities.<sup>1</sup> As major purchasers in sectors like energy, transport, healthcare, and education, public authorities can significantly advance environmental policy goals, including climate change mitigation, resource efficiency, and sustainable consumption through Green Public Procurement (GPP).

While GPP, Sustainable Public Procurement (SPP), and Socially Responsible Public Procurement (SRPP) are powerful tools for societal goals, environmental objectives

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<sup>1</sup>European Commission (2024) “Public Procurement” [https://single-market-economy.ec.europa.eu/single-market/public-procurement\\_en](https://single-market-economy.ec.europa.eu/single-market/public-procurement_en)

can conflict or require prioritization. The European Court of Auditors' December 2023 report (pr28/2023) underscored the need for an environmental objective hierarchy within the new public procurement legal regime.<sup>2</sup> This chapter explores current provisions and proposes reforms to better integrate environmental considerations into EU public procurement law.

## **Environmental provisions in the 2014 Directive: Novel but also controversial**

The 2014 Public Procurement Directive introduced environmental provisions to facilitate better integration of green considerations. This section critically discusses these rules, analysing their impact and outlining steps to align EU procurement law with contemporary green objectives. This chapter focuses on specific provisions, acknowledging that green considerations apply throughout the public procurement procedure.

### **Mandatory Horizontal Clause**

The 2014 Directive's Article 18(2) mandates Member States to ensure compliance with applicable environmental laws. This clause allows exclusion of economic operators (Article 57(4)(a)) and subcontractors (Article 71) for non-compliance, and rejection of abnormally low tenders linked to environmental non-compliance (Article 69(1)(d)).

However, the clause's effectiveness is questionable. Most EU stakeholders believe its impact has been limited due to lack of clarity on enforcement authority, "appropriate measures," its broad scope, and difficulties in enforcing performance throughout the contract lifecycle.<sup>3</sup>

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<sup>2</sup> European Court of Auditors "Special report 28/2023: Public procurement in the EU – Less competition for contracts awarded for works, goods and services in the 10 years up to 2021" <[www.eca.europa.eu/ECAPublications/SR-2023-28/SR-2023-28\\_EN.pdf](http://www.eca.europa.eu/ECAPublications/SR-2023-28/SR-2023-28_EN.pdf)> accessed 18 January 2025.

<sup>3</sup> Valentina Caimi and Silvia Sansonetti (2023) for the European Parliament's Committee on Employment and Social Affairs "The Social Impact of Public Procurement- Can the EU Do More?" <[www.europarl.europa.eu/RegData/etudes/STUD/2023/740095/IPOL\\_STU\(2023\)740095\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2023/740095/IPOL_STU(2023)740095_EN.pdf)> accessed 18 January 2025; Willem Janssen "Shifting Towards Mandatory Sustainability Requirements in EU Public Procurement Law: Context, Relevance and a Typology" in W. Janssen and R. Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift* (Hart Publishing, 2023); Carina Risvig Hamer and Marta Andhov "Article 18 Public procurement principles" in Caranta and Sanchez-Graells (eds), *European Public Procurement-Commentary on Directive 2014/24/EU* (Edward Elgar, 2021).

## Labels

The 2014 Directive permits contracting authorities to reference specific labels or eco-labels in technical specifications, award criteria, or contract performance clauses without specifying underlying criteria.<sup>4</sup> Article 43(1)(a) demands all label requirements be linked to the purchased works, goods, or services. Labels cannot be used in selection criteria related to the tenderer's general corporate policy, aligning with the CJEU's *Max Havelaar* (C-368/10) ruling, which permitted detailed eco-label specifications but not the eco-label itself.<sup>5</sup> This aims to reduce administrative burden by removing repeated assessment of label relevance.<sup>6</sup>

Nevertheless, strict interpretation of the subject-matter link raises concerns. It can discourage public purchasers from referencing general certification schemes that include requirements not directly linked to the specific purchase.<sup>7</sup> This is significant because many sustainability criteria are best enforced at the organizational level, not per product or service.<sup>8</sup>

Also, labels must be established transparently by independent bodies, with participation from all relevant stakeholders.<sup>9</sup> Criteria must be objective, non-discriminatory, and accessible.<sup>10</sup> To avoid limiting competition, equivalent labels or other proof must be accepted if an economic operator cannot obtain the label on time.<sup>11</sup> While this shifts the burden of proof from the 2004 directives, the investigation and verification process for labels often exceeds award procedure timelines, especially

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<sup>4</sup> Birna Guðrún Magnadóttir and others, *Nordic Guideline – Green Public Procurement: How to Use Environmental Management Systems and Ecolabels in EU tenders* (Nordic Council of Ministers 2017).

<sup>5</sup> *Max Havelaar* (C-368/10) EU:C:2012:284.

<sup>6</sup> Vilhelmiina Ihämäki et al. “Green public procurement in the European Union and the use of eco-labels IER 4114” [www.maastrichtuniversity.nl/sites/default/files/2023-03/green\\_public\\_procurement\\_in\\_the\\_european\\_union\\_and\\_the\\_use\\_of\\_eco-labels.pdf](http://www.maastrichtuniversity.nl/sites/default/files/2023-03/green_public_procurement_in_the_european_union_and_the_use_of_eco-labels.pdf) accessed 18 January 2025; Roberto Caranta (2015) “The Changes to the Public Contract Directives and the Story They Tell About How EU Law Works” *Common Market Law Review* (52) 6, pp.391-460

<sup>7</sup> *Ibid.*

<sup>8</sup> Abby Semple (2015) “The Link to the Subject Matter- A Glass Ceiling for Sustainable Public Contracts?” in Sjäffjell B. and Wiesbrock A. (eds), *Sustainable Public Procurement Under EU Law- New Perspectives on the State as Stakeholder* (1st ed., Cambridge University Press), pp. 50-74.

<sup>9</sup> *Ibid.*

<sup>10</sup> Article 43, paragraph 1(c) of the 2014/24/EU Directive; European Commission (2014) “Public Procurement Reform Factsheet No. 7: Green Public Procurement” <https://ec.europa.eu/docsroom/documents/15509?locale=en> accessed 18 January 2025.

<sup>11</sup> *Ibid.*

with reduced minimum deadlines.<sup>12</sup> Hence, it is argued that in most cases the burden of proof is easily met.<sup>13</sup> Additionally, by accepting a manufacturer's own dossier, the public purchaser can no longer insist on third-party certification regarding the environmental characteristics of the product in question. Hence, in practice there is no progression from the 2004 Directives, and confusion is caused by the seemingly contradictory wording of Article 43.<sup>14</sup>

### **Life-cycle costing**

A key novelty of the 2014 Directive is allowing the Most Economically Advantageous Tender (MEAT) award criterion to be based on life-cycle costing (LCC). This means offers can be selected based on LCC, encompassing all costs over a contract's lifecycle, including internal costs (e.g., R&D, production, transport, energy, maintenance, disposal) and environmental externality costs (e.g., greenhouse gas emissions, pollution from raw material extraction or product use).<sup>15</sup> LCC can be applied at various stages: market consultation, technical criteria, award criteria, label use and performance requirements.<sup>16</sup> The 2014 Directive's promotion of LCC shifts focus beyond initial purchase price to include indirect costs of non-environmentally preferable assets throughout their operational and use phases.<sup>17</sup>

Environmental externality costs can only be considered if their monetary value is quantifiable and verifiable.<sup>18</sup> If no common EU method exists, national, regional or local methods can be established.<sup>19</sup> However, localised carbon footprint calculations raise concerns about increased national preferences. Any methods used for the environmental externality cost assessment should be objective, not specific to one

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<sup>12</sup> Roberto Caranta (2015) "Labels as Enablers of Sustainable Public Procurement" in Sjøfjell B. and Wiesbrock A. (eds), *Sustainable Public Procurement Under EU Law- New Perspectives on the State as Stakeholder* (1st ed., Cambridge University Press), pp. 99-113.

<sup>13</sup> *ibid*

<sup>14</sup> Bogdana Neamtu, B. and Dacian Dragos (2015) "Sustainable Public Procurement: The Use of Eco-Labels" *European Procurement and Public Private Partnership Law Review* (10)2, pp. 92-101; Abby Semple (2012) "Reform of the EU procurement directives and WTO GPA: forward steps for sustainability?" in Albano G. L., Snider K. F., Thai K. V. (eds) *Charting a course in public procurement innovation and knowledge sharing* (1st ed., Academics Press, 2013).

<sup>15</sup> Commission (fn 10).

<sup>16</sup> Dacian Dragos, Bogdana Neamtu "Life-cycle thinking in EU public procurement-Moving beyond a simple 'buzz word'" in A. Castelli, G. Piga, S. Saussier, T. Tátrai *The Challenges of Public Procurement Reforms* (Routledge, 2020).

<sup>17</sup> Stéphane Saussier, Christopher H. Bovis "Life-cycle costing in public procurement: Colloquium" in A. Castelli, G. Piga, S. Saussier, T. Tátrai (eds) *The Challenges of Public Procurement Reforms* (Routledge, 2020).

<sup>18</sup> Article 68, para. 1(b) of the 2024/24/EU Directive.

<sup>19</sup> Commission (fn 10).

procedure, and require data providable with reasonable effort by enterprises.<sup>20</sup> However, LCC application by procurement officers remains limited<sup>21</sup> due to several challenges, such as absence of clear methodologies,<sup>22</sup> lack of competence and knowledge to assess/verify bidder information<sup>23</sup>, and insufficient reliable data, especially for environmental cost drivers difficult to monetize.<sup>24</sup> Addressing these challenges is crucial to increase procurement officers' confidence in using LCC.

## **Green Public Procurement: The Way Ahead**

Given the 2014 Directive's novel yet controversial environmental provisions, several changes and additions are necessary. These reforms aim to better promote GPP in the EU, aligning it with the European Green Deal and recent EU sustainability and due diligence standards, specifically the EU Corporate Sustainable Due Diligence Directive (2024/1760) and the Corporate Sustainability Reporting Directive (2022/2464), which establish a coherent framework for understanding companies' sustainability profiles.

### **Introduction of Minimum Mandatory Sustainability and Procedural Requirements**

Since 2014, the EU Public Procurement Directive has offered opportunities to integrate environmental objectives, yet this has led to considerable legal uncertainty for public

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<sup>20</sup> Article 68, para. 2.

<sup>21</sup> Please read the survey carried out on a sample of 119 public administrations from different countries in Benedetta Nucci, Fabio Iraldo, Maria Rosa De Giacomo “The relevance of Life Cycle Costing in Green Public Procurement” (2016)(1) *Economics And Policy Of Energy And The Environment* , pp. 91-109.

<sup>22</sup> Marta Andhov, Roberto Caranta, Anja Wiesbrock “The European Union law of life-cycle costing” in M. Andhov, R. Caranta, A. Wiesbrock, *Cost and EU Public Procurement Law Life-Cycle Costing for Sustainability* (Routledge 2021); Raquel Carvalho “Life-cycle Costing in the Member States” in M. Andhov, R. Caranta, A. Wiesbrock, *Cost and EU Public Procurement Law Life-Cycle Costing for Sustainability* (Routledge 2021).

<sup>23</sup> Benedetta Nucci, Fabio Iraldo, Maria Rosa De Giacomo “The relevance of Life Cycle Costing in Green Public Procurement” (2016)(1) *Economics And Policy Of Energy And The Environment* , pp. 91-109; Andhov, Caranta, Wiesbrock (fn 22); Carvalho (fn 22).

<sup>24</sup> Áurea Adell Querol, Bettina Schaefer, Josep Esquerrà i Roig “LCC and GPP Competing or complementary approaches?” in A. Castelli, G. Piga, S. Saussier, T. Tátrai (eds) *The Challenges of Public Procurement Reforms* (Routledge, 2020); Oshani Perera, Barbara Morton, Tina Perfrement “Life Cycle Costing in Sustainable Public Procurement: A Question of Value”, IISD, Winnipeg, Manitoba, Canada <[www.iisd.org/system/files/publications/life\\_cycle\\_costing.pdf](http://www.iisd.org/system/files/publications/life_cycle_costing.pdf)> accessed 10 December 2024; Aure Adell et al. “Existing approaches to encourage innovation through procurement” ICLEI- Local Governments for Sustainability, European Secretariat, Freiburg, Germany; UNEP-SETAC “Towards a Life Cycle Sustainability Assessment: Making Informed Choices on Products” United Nations Environment Programme, Paris; Elisabeth Hochschorner, Maria Noring “Practitioners' use of life cycle costing with environmental costs—a Swedish study” (2011)16 *The International Journal of Life Cycle Assessment*, pp. 897-902; Jason J. Czarnecki and Steven Van Garsee “What is Life-Cycle Costing?” in M. Andhov, R. Caranta and A. Wiesbrock *Cost and EU Public Procurement Law: Life-Cycle Costing for Sustainability* (Routledge, 2021).

procurers, especially those new to environmental factors.<sup>25</sup> Despite existing EU Green Public Procurement (GPP) criteria, their voluntary nature offers insufficient incentives for contracting authorities and Member States to procure green.<sup>26</sup> Indeed, GPP implementation varies widely across Member States, with only a third mandating it for specific sectors or contracts.<sup>27</sup>

In this context, the Commission's new Circular Economy Action Plan commits to proposing minimum mandatory GPP criteria and targets in sectoral legislation, coupled with compulsory reporting.<sup>28</sup> Also, the 2022 Communication stated contracting authorities would be required to use green procurement criteria for specific product groups.<sup>29</sup> As a result, over 46 sector-specific mandatory requirements already exist at EU level (e.g., Energy Star Regulation, Clean Vehicles Directive, Energy Performance of Buildings Directive, Energy Efficiency Directive), with 8 more pending. This signifies a shift towards mandating, not just encouraging, GPP. Despite this proliferation of sectoral legislation, many commentators advocate for GPP's comprehensive mandatory uptake.<sup>30</sup> We likewise contend the Commission should propose minimum EU-recognised mandatory criteria and explore competition rule relaxation where necessary, while ensuring targeted sustainability requirements continue in sectoral

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<sup>25</sup> Commission “Green Public Procurement Criteria and Requirements” < [https://green-business.ec.europa.eu/green-public-procurement/gpp-criteria-and-requirements\\_en](https://green-business.ec.europa.eu/green-public-procurement/gpp-criteria-and-requirements_en)> accessed 10 December 2024.

<sup>26</sup> Jonas Tallberg “Paths to Compliance: Enforcement, Management, and the European Union” (2002)56(3) International Organisation; 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.

<sup>27</sup> Commission, ‘Implementation and best practices of national procurement policies in the Internal Market’ (Report from the Commission) COM (2021) 245 final 9.

<sup>28</sup> Commission “A New Circular Economy Acton Plan for a Cleaner and More Competitive Europe” COM(2020) 98 final.

<sup>29</sup> Commission, ‘On making sustainable products the norm’ (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM(2022) 140 final.

<sup>30</sup> Enrique Carreras and Davide Vannoni “Mandatory Requirements in Sustainable Procurement: The Economic Perspective” in W. Janssen and R. Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift* (Hart Publishing, 2023); Willem Janssen “Shifting towards Mandatory Sustainability Requirements in EU Public Procurement Law: Context, Relevance and a Typology” in W. Janssen and R. Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift* (Hart Publishing, 2023).; Marta Andhov and Federica Muscaritoli “Climate Change and Public Procurement: Are We Shift ing the Legal Discourse ?” in W. Janssen and R. Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift* (Hart Publishing, 2023); Marta Andhov “Contracting Authorities and Strategic Goals of Public Procurement – A Relationship Defi ned by Discretion ?” in S Bogojević , X Groussot and J Hettne (eds), *Discretion in EU Public Procurement Law* (Oxford , Hart Publishing , 2019) 134; 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 ) ERA Forum 699 ; Lela Mélon , “More Than a Nudge ? Arguments and Tools for Mandating Green Public Procurement in the EU” (2020) 12 Sustainability 988 .

legislation. . Therefore, the new Directive needs a clear provision obligating, not merely allowing, GPP requirements for contracting authorities and Member States.<sup>31</sup>

This reinforces the "how to buy" framework of the Public Procurement Directives, crucial for leveraging public spending for green objectives and providing a coherent basis for increasing sustainability requirements from other EU laws.<sup>32</sup>

Also, A general mandatory provision would clarify existing Public Procurement Directive provisions, such as Article 57(4) on discretionary exclusion for environmental non-compliance, and incentivize "further market developments in providing environmentally-friendly solutions" and "a strong and efficient incentive for public procurers to engage in GPP".<sup>33</sup> Regarding procedural requirements, the new Directive should include a "comply or explain" principle, requiring justification when GPP criteria are not integrated.<sup>34</sup>

Mandatory GPP criteria should be adopted in the most appropriate form, such as mandatory technical specifications, selection<sup>35</sup> and award criteria or contract performance clauses and targets. Minimum binding environmental procurement targets are particularly welcome given varying institutional quality and public sector capacity among Member States. According to a survey, properly motivated bureaucrats need more discretion and require fewer rules.<sup>36</sup> Therefore, such targets, general and cross-sectoral, would allow strong bureaucracies discretion while ensuring purchases meet specified environmental thresholds. "Minimum" implies

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<sup>31</sup> This was also suggested by 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 ) ERA Forum 699.

<sup>32</sup> 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

<sup>33</sup> Lela Mélon , "More Than a Nudge ? Arguments and Tools for Mandating Green Public Procurement in the EU" (2020) 12 Sustainability 988. See also Commission "Proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC" COM (2022) 142 final, 2022/0095 (COD).

<sup>34</sup> ClientEarth "Sustainable Public Procurement in the European Union-Briefing in support of mandatory requirements" <[www.clientearth.org/latest/documents/briefing-sustainable-public-procurement-in-the-european-union/](http://www.clientearth.org/latest/documents/briefing-sustainable-public-procurement-in-the-european-union/)> accessed 18 January 2025; Fredo Schotanus and Ruben Nicolas "Coercive, Mimetic and Normative Influences on the Uptake of Sustainable Public Procurement: An Institutional Perspective" in W. Janssen and R. Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift* (Hart Publishing, 2023).

<sup>35</sup> Indicatively, the Net-Zero Industry Act (NZIA) and the Ecodesign for Sustainable Products Regulation (ESPR) mandate specific selection criteria for green public procurement and renewable energy auctions, focusing on sustainability, resilience, and other non-price factors.

<sup>36</sup> Erica Bosio et al "Public Procurement in Law and Practice" ( 2022 ) 112 American Economic Review 1091.

basic targets with scope for derogation *in melius*.<sup>37</sup> Achieving sustainability targets could be added to the Directive's aims via a Recital.<sup>38</sup>

Furthermore, environmental criteria should be independent award criteria, not solely part of LCC. Monetizing environmental externalities is difficult, and even when feasible, it doesn't guarantee the greenest option.<sup>39</sup> Amending Article 67 of Directive 2014/24 to award contracts to the "most economically and sustainably advantageous offer" would address this. A General Court judgment affirmed that award criteria need not be purely economic, as non-economic factors can affect an offer's value.<sup>40</sup>

### **Introduction of environmental due diligence requirements**

Improved implementation and enforcement of the mandatory environmental horizontal clause is achievable by linking it to environmental due diligence requirements for economic operators. This would mandate tender participants to conduct environmental due diligence, identifying, preventing, mitigating, and accounting for environmental risks or impacts within their operations, subsidiaries, contractors, and subcontractors. Non-compliance would lead to exclusion from tendering, mirroring Germany's supply chain due diligence law.<sup>41</sup> This shifts EU public procurement rules from solely focusing on the award procedure to prioritizing preferred products/services and avoiding certain suppliers.<sup>42</sup>

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<sup>37</sup> M. Andhov, R. Caranta, W.A. Janssen, O. Martin-Ortega "Shaping Sustainable Public Procurement Laws in the European Union-An analysis of the legislative development from 'how to buy' to 'what to buy' in current and future EU legislative initiatives" <[www.greens-efa.eu/en/article/study/shaping-sustainable-public-procurement-laws-in-the-european-union](http://www.greens-efa.eu/en/article/study/shaping-sustainable-public-procurement-laws-in-the-european-union)> accessed 21 February 2025; See also the Action Plan for the Environmental Sustainability of Consumption in the Public Administration', published by the Italian Ministry of Environment and cited by Aura Iurascu "How Will the Adoption of Mandatory GPP Criteria Change the Game? Lessons from the Italian Experience" (2023)1 EPPPL, p. 10.

<sup>38</sup> Marta Andhov et al. "Sustainability through public procurement: the way forward – Reform Proposals" (2020) <<https://researchprofiles.ku.dk/da/publications/sustainability-through-public-procurement-the-way-forward-reform->> accessed 21 February 2025.

<sup>39</sup> Aurea Adell Querol et al. "LCC and GPP: Competing or Complementary Approaches?" in A. Castelli, G. Piga, S. Saussier, T. Tátrai The Challenges of Public Procurement Reforms (Routledge, 2020), p 55.

<sup>40</sup> Sophia Group v Parliament (T-578/19); See also Grith Skovgaard Ølykke and Susie Smith "Use of labels and certificates as award criteria: Sophia Group v Parliament (T-578/19)" (2021)5 P.P.L.R., NA136-NA140

<sup>41</sup> Section 22 of Deutscher Bundestag (2021), Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten (German Supply Chain Due Diligence Act), 2021; Claire Methven O'Brien and Roberto Caranta "Should EU public procurement law integrate sustainability due diligence requirements? EU institutions' procurement as a case study" in C. M. O'Brien and R. Caranta *The Economics and Law of Public Procurement* (Routledge, 2024); Anna Burghardt-Kaufmann et al. (2023) "Due Diligence in Supply Chains – Update on corporate human rights and environmental due diligence requirements in the EU and Germany", <[www.whitecase.com/insight-alert/due-diligence-supply-chains-update-corporate-human-rights-and-environmental-due](http://www.whitecase.com/insight-alert/due-diligence-supply-chains-update-corporate-human-rights-and-environmental-due)> accessed 21 February 2025.

<sup>42</sup> Willem Janssen and Roberto Caranta, *Mandatory Sustainability Requirements in EU Public Procurement Law*

However, For EU applicability, Recital 97 of the 2014 Directive's subject-matter requirement should be redefined. This redefinition is not wholesale abandonment, but a clarification to integrate broader due diligence from recent EU legislation like the Corporate Sustainable Due Diligence Directive (2024/1760) and Corporate Sustainability Reporting Directive (2022/2464) into public procurement. This would allow consideration of a company's comprehensive sustainability performance, even if it touches on general operations, while maintaining proportionality and relevance to the contract, thereby ensuring coherence between EU legislative instruments.

Recital 97 states, *“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”*.

The rationale, from the Commission’s Green Paper, was to prevent contracting authorities from influencing undertaking behavior regardless of the purchased product or service, ensuring efficient use of public money.<sup>43</sup> Also, meeting the various requirements could disproportionately burden SMEs lacking economic and human resources.<sup>44</sup>

However, no evidence supports the alleged effects of loosening, maintaining, or expanding the subject matter test.<sup>45</sup> Also, improving SMEs' environmental performance is crucial for greener growth, as they account for 60-70% of industrial pollution in Europe.<sup>46</sup> Green procurement can incentivize SMEs to comply with environmental regulations and support their greening efforts by expanding the green product market.<sup>47</sup> Therefore, integrating suppliers' environmental due diligence

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*Reflections on a Paradigm Shift* (Hart Publishing, 2023); Claire Methven O’Brien and Roberto Caranta “Should EU public procurement law integrate sustainability due diligence requirements? EU institutions’ procurement as a case study” in C. M. O’Brien and R. Caranta *The Economics and Law of Public Procurement* (Routledge, 2024).

<sup>43</sup> European Commission “Green Paper on the Modernisation of EU Public Procurement Policy: Towards a More Efficient European Procurement Market” COM (2011) 15 final.

<sup>44</sup> Ibid.

<sup>45</sup> Semple (fn 8).

<sup>46</sup> Karen Miller et. al. (2011) “First assessment of the Environmental Compliance Assistance Programme for SMEs (ECAP)” <<https://www.ecologic.eu/15980> > accessed 8 March 2025.

<sup>47</sup> OECD (2018), “Environmental Policies and SMEs”, in *SME Policy Index: ASEAN 2018: Boosting Competitiveness and Inclusive Growth*, OECD Publishing, Paris, <<https://doi.org/10.1787/9789264305328-9-en>> accessed 8 March 2025.

requirements into the new Public Procurement Directive is warranted, supported by complementary programs for SMEs. Alternatively, economic operators already subject to environmental due diligence under other EU legislation, such as the Corporate Sustainable Due Diligence Directive, should be excluded from public contracts if non-compliant.<sup>48</sup>

### **Sustainability Reports as Selection Criterion and Contract Performance Condition**

If the subject-matter requirement is redefined, contracting authorities should consider economic operators' sustainability performance, not just product/service performance. Data from the EU Corporate Sustainability Reporting Directive (2022/2464) should assess bidders' sustainability. However, this raises concerns about public administrations' capacity and competence to analyze and verify such comprehensive data.

Therefore, it is suggested that CSRD sustainability reporting requirements should serve as selection criteria for participation. Reports should detail how bidding companies address potential negative sustainability impacts and how sustainable investments monitor, measure, and assess their impact. This would aid contracting authorities in assessing environmental and societal benefits or impacts from their practices, and evaluating bidders' integration of sustainable public procurement into their culture.

Addressing administrative burden and ensuring SME access is paramount when extending CSRD and CSDDD reporting and due diligence obligations to public procurement. While these Directives primarily target large undertakings, similar detailed requirements could disproportionately burden SMEs. To mitigate this, the detail and complexity of sustainability reports for procurement should be proportionate to the bidder's size and capacity. Simplified or "light" reporting templates, focusing on key, material sustainability aspects relevant to the contract, could be implemented for SMEs.

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<sup>48</sup> Claire Methven O'Brien, Amy Weatherburn "Commission Proposal for a Regulation on prohibiting products made with forced labour on the Union market: The issue of remedies" European Parliament, <[www.europarl.europa.eu/thinktank/en/document/EXPO\\_BRI\(2023\)702\\_583](http://www.europarl.europa.eu/thinktank/en/document/EXPO_BRI(2023)702_583)> accessed 8 March 2025; Claire Methven O'Brien and Roberto Caranta (2024) "Due Diligence in EU Institutions' Own-Account Procurement: Rules and Practices", <[www.europarl.europa.eu/thinktank/en/document/IPOL\\_STU\(2024\)758\\_335](http://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2024)758_335)> accessed 8 March 2025.

Additionally, sustainability reports should be contract performance conditions, contrary to Recital 104's stance against general corporate policy requirements. Regular sustainability reports offer transparency on supplier performance, promoting accountability for non-performance and demonstrating sustainable procurement policy impact. Access to detailed performance metrics drives improvement and innovation in ongoing public contracts, based on evidence. Thus, consistent submission of sustainability reports by nominated suppliers ensures sustainable procurement accountability and implementation success.

### **Optimisation of LCC Monetisation Calculations**

As the discussion above has shown, challenges in LCC application significantly impact environmentally-friendly procurement choices. LCC use is relatively low, except in construction.<sup>49</sup> For broader adoption, life-cycle costs must have clear monetary value.

In this context, several academics suggest a common EU (or national) mandatory LCC methodology could encourage use by reducing fragmentation and increasing legal certainty.<sup>50</sup> While Directive 2009/33 (Clean Vehicles Directive) mandated LCC, its ex-post evaluation showed it failed to drive cleaner vehicles.<sup>51</sup> Consequently, Directive (EU) 2019/1161, which amended it, removed the mandatory methodology, allowing contracting authorities to choose any LCC approach for MEAT criteria. On the contrary, “contracting authorities and contracting entities should be able to choose any life-cycle costing methodology in order to support their procurement processes on the basis of the most economically advantageous tender (‘MEAT’) criteria”.<sup>52</sup>

However, recent developments, notably the Clean Industrial Deal<sup>53</sup>, signal potential renewed openness towards mandating LCC methods. This initiative, part of the broader EU industrial strategy, could leverage LCC as a key tool for ensuring public investments genuinely support sustainable industrial transformation.

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<sup>49</sup> OECD (2022) “Life-Cycle Costing in Public Procurement in Hungary: Stocktaking of Good Practices”, OECD Public Governance Reviews, OECD Publishing, Paris, <<https://doi.org/10.1787/8d90f627-en>> accessed 10 April 2025.

<sup>50</sup> Dragos, Neamtu (fn 16); Abby Semple “Mixed Offerings for Sustainability in a New European Union Procurement Directive”(2012)21 Public Procurement Law Review, pp. 106-108.

<sup>51</sup> Commission “Ex-Post Evaluation of Directive 2009/33/EC on the Promotion of Clean and Energy Efficient Road Transport Vehicles”, COM 2015.

<sup>52</sup> Recital 24 of the Directive (EU) 2019/1161.

<sup>53</sup> European Commission “Clean Industrial Deal-A plan for EU competitiveness and decarbonisation” <[https://commission.europa.eu/topics/eu-competitiveness/clean-industrial-deal\\_en](https://commission.europa.eu/topics/eu-competitiveness/clean-industrial-deal_en)> accessed 10 April 2025.

Given that the quality of a common EU methodology is not always guaranteed (as seen with the old Clean Vehicles Directive), mandating an LCC calculation is not ideal. Instead, the new Public Procurement Directive should facilitate a participatory procedure for LCC methodology development, involving industry.<sup>54</sup> This addresses contracting authorities' lack of expertise, time, and funds, and alleviates concerns about LCC flexibility leading to abuses favoring specific undertakings.<sup>55</sup>

The creation of user-friendly LCC tools is also crucial for simplifying and universalizing LCC in daily procurement operations. OECD surveys indicate tools are mostly available for standardized products, leaving a "vast spectrum of products non-covered."<sup>56</sup> This means that there is a pressing need for user-friendly LCC tools for performing calculations, as this would ensure their widespread use in public procurement. OECD's mapping identified features contributing to user-friendliness: clear input distinction for buyers/suppliers, calculation transparency, embedded guidance, reference data availability, result visualization, appropriate support tools (e.g., Excel), basic investment explanations, and means of proof for input data. Based on these findings, contracting authorities should be equipped with user-friendly LCC tools, and the new Procurement Directive should reference them to promote their use.

### **Mandatory environmental third-party labels**

Based on the discussion above, it also gets apparent that translating environmental issues into monetary terms remains challenging.<sup>57</sup> Even LCC tool creation is labor-intensive, requiring extensive stakeholder and research body involvement. Furthermore, some items are impossible to price, or monetary calculations for environmental costs are incomplete.<sup>58</sup> Hence, LCC cannot substitute for quality criteria and proper technical specifications.

Against this background, environmental third-party labels certifying goods/services' environmental characteristics, offer a viable LCC alternative. This requires labels to

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<sup>54</sup> This was also highlighted by Andhov, Caranta and Wiesbrock (fn 22).

<sup>55</sup> Regarding these concerns, please read Dragos, Neamtu (fn 16) pp. 36-39.

<sup>56</sup> OECD (2022), Life-Cycle Costing in Public Procurement in Hungary: Stocktaking of Good Practices, OECD Public Governance Reviews, OECD Publishing, Paris, <<https://doi.org/10.1787/8d90f627-en>> accessed 10 April 2025.

<sup>57</sup> Pernilla Gluch, Henrikke Baumann "The life cycle costing (LCC) approach: a conceptual discussion of its usefulness for environmental decision-making" (2004)39(5) Building and Environment; ; Helena Estevan, Bettina Schaefer and Aure Adell (Ecoinstitut SCCL) "Life Cycle Costing State of the art report" <<https://iclei-europe.org/publications-tools/?c=search&uid=JVTB5WYD>> accessed 10 April 2025.

<sup>58</sup> Gluch, Baumann (fn 57).

adopt LCC methodologies and be based on standards considering durability, repairability, recyclability, and environmental footprint. This recommendation assumes mandatory use of third-party certified labels or equivalents, disallowing alternative proof if labels aren't obtained in time. Implementing this would require revising the 2014 Directive and overturning the Max Havelaar principle, which prohibited contracting authorities from referencing specific labels for MEAT selection. Mandatory label use would benefit contracting authorities by reducing costs and simplifying sustainability criteria and verification.<sup>59</sup> Portugal has adopted such a measure, and Japan mandates green public procurement for government agencies, strongly recommending certified products.<sup>60</sup> Nonetheless, concerns exist regarding competitive implications, particularly for SMEs and start-ups, due to high certification and third-party verification costs.<sup>61</sup>

To address this, the new Directive could introduce a grace period for certification fees and third-party verification, facilitating SME/startup access, similar to Thailand's 2-year grace period for its "Green Cart" catalog, which relies on self-declaration with random verification and sanctions for false claims.<sup>62</sup> Concurrently, SMEs and start-ups should receive financial support via eco-innovation funds, SME promotion, or eco-design competitions. These align with Recital (7) of Directive (EU) 2024/825 on empowering consumers, which emphasizes public authorities promoting access to sustainability labels for SMEs.

### **How to better connect public procurement and competition law**

As the Commission emphasizes, “public authorities, including the EU institutions, should lead by example and ensure that their procurement is green”.<sup>63</sup> To achieve this

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<sup>59</sup> One Planet Network-EcoAdvance “Sustainable public procurement policies that use ecolabels and environmental certifications- Good Practices in the Use of Ecolabelling and Sustainable Public Procurement” <[www.oneplanetnetwork.org/sites/default/files/2024-11/English%20-%20Sustainable%20public%20procurement%20policies%20that%20use%20ecolabels%20and%20environmental%20certifications.pdf](http://www.oneplanetnetwork.org/sites/default/files/2024-11/English%20-%20Sustainable%20public%20procurement%20policies%20that%20use%20ecolabels%20and%20environmental%20certifications.pdf)> accessed 12 April 2025.

<sup>60</sup> João Sequeira Sena- Cuatrecasas “Green Public Procurement” <[www.cuatrecasas.com/resources/lf-eng-653fd8d38af31075579219.pdf?v1.82.3.20241213](http://www.cuatrecasas.com/resources/lf-eng-653fd8d38af31075579219.pdf?v1.82.3.20241213)> accessed 12 April 2025; One Planet Network-EcoAdvance (fn 59)

<sup>61</sup> Pedro Telles “Portugal's plan for mandatory green public procurement (II)” <[www.telles.eu/portugals-plan-for-mandatory-green-public-procurement-ii/](http://www.telles.eu/portugals-plan-for-mandatory-green-public-procurement-ii/)> accessed 12 April 2025.

<sup>62</sup> Siddharth Prakash, Tobias Schleicher, Mirja Michalscheck, Öko-Institut e.V “Barrier Analysis and Strategies for Ecolabels and Sustainable Public Procurement Implementation” <[www.oeko.de/fileadmin/oekodoc/Barrier-Analysis-report.pdf](http://www.oeko.de/fileadmin/oekodoc/Barrier-Analysis-report.pdf)> accessed 12 April 2025.

<sup>63</sup> Commission, The European Green Deal (Communication) COM(2019) 640 FINAL.

goal, the current legal framework attempts to elevate sustainability to the same level as economic efficiency. However, provisions within Directive 2014/24/EU, such as Recital 91, still impose restrictions on contracting authorities,. This Recital highlights that while contracting authorities can contribute to environmental protection and sustainable development, they must simultaneously “ensure that they can obtain the best value for money for their contracts”. This inherent tension, where ambitious green criteria might be perceived as unduly restricting competition, demands a governance shift in EU green public procurement. It necessitates balancing broader environmental benefits against negative effects on competition and economic efficiency.

Balancing environmental and economic objectives remains challenging, with no "one-size-fits-all" approach. From the perspective of public procurement officials, who act in the broader public interest of climate protection and future generations rather than for profit, introducing complex legal defenses against competition infringement could be perceived as an undue burden, actively disincentivizing green procurement efforts. Public purchasers, unlike private undertakings, are not incentivized by commercial gain to defend such complex legal positions.

Therefore, instead of a reactive 'defence', a proactive mechanism is proposed to provide greater legal certainty and reduce the risk of competition challenges for contracting authorities genuinely pursuing environmental objectives. Inspired by the approach to sustainability agreements in competition law, a new provision should be introduced into Directive 2014/24/EU to outline a 'Green Procurement Safe Harbour' or 'Sustainability Compliance Framework'. This framework would clarify the conditions under which contracting authorities' choices, driven by ambitious environmental considerations, would be presumed compliant with competition rules, thereby minimizing the risk of challenges.

This framework could establish cumulative conditions, akin to Article 101(3) TFEU exemptions, offering clear guidance and protection for contracting authorities:

- a) environmental standards or specifications of contracting authorities must demonstrably contribute to protecting health, life, or the environment;
- b) the public (current and future generations) must receive a fair share of resulting environmental and societal benefits; and
- c) environmental standards or specifications of contracting authorities must be genuinely necessary and proportionate to achieving these objectives.

The burden of proof for challenging the application of this safe harbour should be placed on the undertakings making the accusation. Thus, in cases of ambitious environmental standards or demanding environmental specifications, contracting authorities would operate with increased legal certainty, confident that their actions are unlikely to be challenged for artificially narrowing competition, contrary to Article 18 of Directive 2014/24/EU. This suggestion comes amid a growing focus on sustainability issues in competition law both at EU and national level. Indicatively, the European Commission has included guidance on sustainability agreements in the new Guidelines on horizontal cooperation agreements<sup>64</sup>, whilst the national competition authorities in the Netherlands and Greece have recently published draft guidance and adopted a competition law sustainability 'sandboxes'.<sup>65</sup>

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<sup>64</sup> European Commission “Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2023/C 192/01” < [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC\\_2023\\_259\\_R\\_0001](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2023_259_R_0001)> accessed 27 May 2025.

<sup>65</sup> Johan Ysewyn, Laura van Kruijsdijk & Eirini Marnera “Building a sustainability strategy – what companies can (not) do from a competition law perspective” < <https://www.covcompetition.com/2023/01/building-a-sustainability-strategy-what-companies-can-not-do-from-a-competition-law-perspective/>> accessed 27 May 2025.