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FROM GREEN VISION TO LEGAL OBLIGATION: THE CASE FOR MAKING GREEN PUBLIC PROCUREMENT MANDATORY

Inken Böttge,* Helena Kumpar Zidanić** and Aria Tzamalikou***

Abstract: EU public procurement is most likely the most important part of the internal market since public authorities' purchasing power accounts for more than 14% of EU GDP and can serve as a powerful driver of demand and for sustainable products. This is where a compelling concept that holds the key to a greener future of Europe comes into play: Green Public Procurement (GPP). As a unique instrument of EU law, it most prominently encourages Member States' public authorities to make environmentally responsible choices in public procurement procedures. Therefore, recently, there has been a push for a horizontal general applicable mandate for GPP in EU public procurement law, while under the current framework, this has been of a rather voluntary nature. Nevertheless, mandatory GPP requirements have been introduced for certain sectors, advocating a more strategic and outcome-oriented approach to public purchasing. The present contribution analyses the legal framework of EU GPP. Based on current developments, it maps out and explains the approach towards more strategic and outcome-oriented purchasing. It goes on to elaborate on the ability and effectiveness of the regime of mandating GPP in horizontal and sectoral legislation to achieve environmentally friendly public purchases, and identifies the feasibility and consequences of such a mandate. Finally, it argues for a sectoral approach to mandating GPP.

Keywords: EU public procurement, green public procurement, sustainability, mandatory GPP, sectoral approach.

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1 Introduction

‘Congratulations to you [reading this]! You have chosen wisely’.¹ This is because EU public procurement is most likely the most important part of the internal market, since public authorities’ purchasing power accounts for more than 14% of EU GDP and ‘can serve as a powerful driver of demand and for sustainable products’.² This certainly indicates that public authorities can significantly affect market demand with their purchasing decisions, including those for more environmentally friendly goods and services.

As you embark on this journey of discovery, let us introduce you to a powerful concept that holds the key to a greener future of Europe: Green Public Procurement (GPP). In a world where sustainability is no longer a choice but a necessity due the planet’s limited resources and the looming threat of climate change, GPP stands tall as a symbol of change. This is all the more important due to the EU’s various environmental commitments under the WTO Government Procurement Agreement,³ the UN Paris Agreement,⁴ and the 8th Environment Action Plan.⁵

As a unique instrument of EU law dealing with public money, it most prominently empowers Member States’ contracting authorities⁶ to make environmentally responsible choices in public procurement processes. According to the Commission’s 2008 definition, GPP is a ‘process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life-cycle when compared to goods, services and works with the same primary function that would otherwise be procured’.⁷

¹ Prof Dr Sarah Schoenmaekers, Lecture on state aid and public procurement in the European Union of 18 April 2023 at Maastricht University, the Netherlands.

² Commission, ‘Circular Economy Action Plan, For a cleaner and more competitive Europe’ (2020) para 2.2 <https://ec.europa.eu/environment/circular-economy/pdf/new_circular_economy_action_plan.pdf> accessed 25 May 2023.

³ WTO, ‘Agreement on Government Procurement 2012 and related WTO legal texts’ (2012) <https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf> accessed 1 June 2023.

⁴ UN, ‘Paris Agreement’ (2015) <https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf> accessed 1 June 2023.

⁵ Decision (EU) No 591/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030 [2022] OJ L 114/22.

⁶ For a definition on contracting authorities, see Article 2(1)(1) of Directive 2014/24/EU: The state, the regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law, the latter being characterised by their establishment for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.

⁷ Commission, ‘Public procurement for a better environment {SEC (2008) 2124} {SEC (2008) 2125}{SEC (2008) 2126}’ (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM (2008) 400 final.

However, while mandatory GPP requirements have been introduced for certain sectors or products through sectoral legislation, there is no horizontal generally applicable mandate for GPP in EU public procurement law. Instead, it is of a rather *voluntary nature*. For example, Directive 2014/24/EU⁸ only *allows* environmental concerns to be taken into account,⁹ without obliging contracting authorities to make environmentally friendly purchases. Nevertheless, there appears to be a compelling push for a general, more strategic, and outcome-oriented approach to public purchasing. This has resulted in developments of mandating GPP in sectoral legislation to achieve broader sustainability goals. In this paradigm, the focus involves a shift from a mere transactional and economic mindset guided by a procedurally set process under the General 2014 Public Procurement Directives¹⁰ to a more strategic and results-based one. It rests on the premise that contracting authorities identify their actual needs and objectives, followed by an alignment of their procurement decisions with broader policy goals of sustainability. Instead of merely following the procedurally set process under Directive 2014/24, contracting authorities therefore play a more proactive role in identifying innovative solutions and making informed decisions about '*what to purchase*'.

In the realm of those developments, where, taken to the extreme, every decision appears to carry the weight of our planet's future, one critical question looms large: To what extent can GPP become mandatory under the existing framework of EU public procurement law? As the world grapples with the urgent need for environmental preservation, the concept of mandating GPP holds the potential to drive monumental change. In this vein, some proponents argue that making GPP compulsory would compel contracting authorities as well as business operators to take a greener path, leaving no room for complacency. Others raise valid concerns about the feasibility, potential drawbacks, and unintended consequences of such a mandate. For example, imposing a general mandate of GPP could pose challenges for SMEs not (yet) having the necessary capacities to implement the complexity of such rules, while contracting authorities fear an increased administrative burden and costs associated with purchasing environmentally friendly products or services. Potential challenges may also result from the divergences across the EU since Member States implement GPP to different degrees.

⁸ Directive (EU) No 24/2014 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L 94/65.

⁹ S Schoenmaekers, 'The Influence of Sustainable Reporting Obligations on Public Purchasing' (2023) ERA Forum 378.

¹⁰ Directive (EU) No 24/2014 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65; Directive (EU) No 23/2014 of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L94/1; Directive (EU) No 25/2014 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 [2014] OJ L 94/243. This contribution, however, will only address Directive 2014/24.

So, fasten your seatbelt and get ready to explore the transformative potential of GPP. In this contribution, we delve into the heart of this contentious debate by exploring the merits, challenges, and implications of mandating GPP under EU public procurement law, without looking at national legislation and practice. Together, we shed light on whether GPP can be turned into a general horizontal obligation under Directive 2014/24, or if alternative approaches can achieve more effective results. Thus, the present contribution strongly argues for a sectoral approach to mandating GPP.

In order to elucidate the question of to what extent and by what means GPP can become mandatory under EU public procurement law, this paper engages in doctrinal legal analysis by referring to legislation, the case law of the Court of Justice of the EU (CJEU, Court) and academic articles. The first section provides an analysis of the current legal framework of GPP and its developments from a public procurement and environmental perspective. To complete this legal analysis, based on developments within sectoral legislation, the second part maps out and explains the approach to more strategic and outcome-oriented public purchasing. The last section elaborates on the ability and potential effectiveness of the regime of mandating GPP in horizontal and sectoral legislation to achieve environmentally friendly public purchases. In this way, the feasibility, potential drawbacks, and unintended consequences of such a mandate are addressed.

2 Green public procurement: not a ‘may’ but a ‘must’?

2.1 The legal framework

Originally, the EU public procurement regulation emerged with the aim of establishing a common market by creating a level playing field for businesses across Europe. Here, the objective of public procurement was primarily economic and not to discriminate against different firms from other Member States.¹¹ This was codified through the Directive on procedural rules guiding national authorities in the Member States on *how* to choose an economic operator.¹² Nevertheless, apart from those procedural and economic-centred aspects, the Commission also encouraged the inclusion of non-economic elements including a ‘wider use of GPP in order to establish a framework for the use of market-based instruments to achieve smart, sustainable and inclusive growth’.¹³ Besides the EU legislature, the CJEU also played a significant role in the development of

¹¹ R Caranta, ‘Sustainability Takes Centre Stage in Public Procurement’ (2023) 85(1) *Ruch Prawniczy, Ekonomiczny I Socjologiczny* Rok 45.

¹² Council Directive (EEC) No 305/1971 of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts [1971] OJ L 185/5.

¹³ Commission, ‘Europe 2020. A strategy for smart, sustainable and inclusive growth’ (Communication from the Commission) COM (2010) 2020 final 14.

GPP. In its early case law,¹⁴ the Court particularly endorsed the inclusion of environmental elements in public procurement policies.¹⁵ Subsequent case law and non-binding Commission instruments eventually prompted the legislature to include environmental concerns in the 2004 Public Procurement Directive (now: Directive 2014/24). Shortly afterwards, both environmental and sectoral legislation emerged which resulted in a highly fragmented GPP legislative framework.

In order to understand the development and current status of GPP in EU law, this section covers various sources of GPP. Specifically, it deals with primary and secondary legislation, most notably Directive 2014/24, soft law adopted by the Commission, and CJEU case law.

2.1.1 Hard law concerning GPP: Directive 2014/24

The general EU stance on the protection of the environment can be seen in the EU Treaties. As the primary line of obligation, Article 11 TFEU and Article 37 of the EU Charter provide that environmental protection requirements must be integrated into the definition and implementation of EU policies and activities to promote sustainable development.¹⁶ Taking on from this, Directive 2014/24 'clarifies how 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'.¹⁷ In order to accomplish this objective, Directive 2014/24 contains several provisions which are designed to incorporate environmental concerns in the public procurement process.

Primarily, as a principle of public procurement, Article 18(2) requires Member States to ensure that economic operators, in the performance of public contracts, comply with, *inter alia*, environmental obligations arising from EU law. Furthermore, Article 42(3)(a) allows contracting authorities to formulate technical specifications which specify the characteristics necessary for work, service or supply, in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise. Pursuant to Article 43(1), contracting authorities may also require specific labels in technical specifications, award criteria, or contract performance conditions proving that certain environmental characteristics are fulfilled. Moreover, Article 62(2) enables contracting authorities during the qualitative selection of participants to require compliance with certain environmental management systems or standards. In the selection and qualification stage of the

¹⁴ Case C-31/87 *Gebroeders Beentjes BV v State of the Netherlands* ECLI:EU:C:1988:422; Case C-225/98 *Commission v French Republic* ECLI:EU:C:2000:494.

¹⁵ K Pedersen and E Olsson, 'Chapter 13: The Role of the European Court of Justice in Public Procurement', in C Bovis (ed), *Research Handbook on EU Public Procurement Law* (Edward Elgar Publishing 2016) 16.

¹⁶ Article 11 of the Treaty on the Functioning of the European Union (TFEU); Article 37 of the Charter of Fundamental Rights of the European Union (EU Charter).

¹⁷ Recital 91 Directive 2014/24.

procurement procedure, according to Article 56(1), contracting authorities may also decide not to award a contract to the most economically advantageous tender (MEAT) where it is established that the tenderer did not comply with the principles under Article 18(2). If the contracting authority can demonstrate violation of those principles, economic operators may even be excluded from participation in the procurement procedure on the basis of Article 57(4)(a).

Moreover, Article 67(1) stipulates that contracting authorities must base the award of public contracts on MEAT. According to Article 67(2), such a tender should be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing, and may include the best price-quality ratio, which will be assessed on the basis of criteria, including environmental aspects. Furthermore, Article 69(3)(2) prescribes the duty for contracting authorities to reject an abnormally low tender where they have established that it does not comply with the obligations in Article 18(2). Additionally, Article 70 allows Member States to lay down special conditions relating to the performance of a contract, including environmental considerations, provided that they are linked to the subject matter of the contract. Finally, according to Article 71(1), there is also the duty for subcontractors to comply with the obligations referred to in Article 18(2).

Following from the above, Directive 2014/24 refers to environmental obligations in numerous articles, covering every stage of the procurement procedure and beyond. In this sense, it can be seen as empowering the contracting authorities to engage more strongly in GPP.¹⁸ Nevertheless, under the current framework, GPP remains *voluntary* in the sense that it is left to the Member States to mandate its implementation, and, ultimately, to the contracting authorities themselves to incorporate the above provisions when drawing up the contract notices. Considering Article 288 TFEU, the Directive is only binding as to the result to be achieved upon the Member States to which it is addressed, but leaves them the choice of the form and methods to achieve the results. It is therefore not a directly applicable legal instrument as it must be transposed into national law and cannot directly bind contracting authorities.¹⁹ Thus, *if not obliged by national law, the application of environmental concerns is ultimately left to the discretion of the contracting authorities.*

¹⁸ M Andhov, R Caranta, W Janssen and O Martin-Ortega, 'Shaping Sustainable Public Procurement Law 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' (The Greens/EFA in the European Parliament 2022) 10 <<https://extranet.greens-efa.eu/public/media/file/1/8361>> accessed 16 May 2023.

¹⁹ Article 288 TFEU.

2.1.2 *Soft law instruments concerning GPP*

The Commission plays a crucial role in developing and promoting GPP. Since the late 1990s, it has enacted a vast number of soft-law instruments on GPP matters, including guidelines, green papers, and other policy documents.²⁰ Today, these instruments are complementary to Directive 2014/24 and serve to help contracting authorities and economic operators to engage in GPP.

One of the important policy documents was the Commission's 2008 Communication on 'Public procurement for a better environment'²¹ which defined GPP as 'a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured',²² and set grounds for the development of 'common GPP criteria' for products and services.²³

Soon after the 2008 Communication, in 2010, the Commission adopted its 'Europe 2020 strategy for smart, sustainable and inclusive growth'²⁴ where the wider use of GPP appeared as a target in three flagship initiatives: 'Innovation Union',²⁵ 'Resource-efficient Europe',²⁶ and 'Energy 2020'.²⁷ Following on from this, the Commission issued its 'Circular Economy Action Plan (CEAP)' which highlighted the importance of public procurement in overall EU consumption as it accounts for nearly 20% of EU GDP. Accordingly, GPP can be considered a crucial factor in the circular economy, calling, however, for necessary actions, such as emphasising circular economy aspects, greater uptake by the public authorities, and reinforcing the use of GPP in EU procurement and funding.

²⁰ For an extensive overview, see Centre for European Policy Studies (CEPS) and College of Europe, 'The Uptake of Green Public Procurement in the EU27' (STUDY – FWC B4/ENTR/08/006, 2012), <<https://ec.europa.eu/environment/gpp/pdf/CEPS-CoE-GPP%20MAIN%20REPORT.pdf>> accessed 23 May 2023; and F De Leonardis, 'Green Public Procurement: From Recommendation to Obligation' (2011) 34(1) *International Journal of Public Administration* 110-113.

²¹ Commission (n 7).

²² *ibid* 4.

²³ *ibid* 5 ff; in order to clarify the notion, this contribution speaks of 'common GPP criteria' whenever reference is made to EU GPP criteria adopted by the Commission following its 2008 Communication.

²⁴ Commission (n 13).

²⁵ Commission, 'Europe 2020 Flagship Initiative Innovation Union' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM (2010) 546 final.

²⁶ Commission, 'Roadmap to a Resource Efficient Europe' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM (2011) 571 final.

²⁷ Commission, 'Energy 2020 A Strategy for competitive, sustainable and secure energy' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) (COM (2010) 639 final).

Furthermore, the 2011 'Green Paper on the modernisation of EU public procurement policy'²⁸ initially presented the two underlying ideas of public procurement, namely the concept of '*how to buy*' and '*what to buy*',²⁹ aiming to achieve the objectives of environmental protection, social inclusion, and the promotion of innovation as presented in the Commission's 'Europe 2020 Strategy'.³⁰ Here, the concept of '*how to buy*' refers to the procedurally prescribed process under Directive 2014/24. The idea of '*what to buy*' imposes mandatory requirements adopted via delegated acts or incentives to steer the decision on which goods and services should be procured. An example of the latter would be sector-specific legislation imposing environmental requirements such as maximum levels for energy and resource use, environmental harmful substances, minimum levels of recycling, or alternatively by setting targets, eg that a certain percentage of public purchases must be environmentally friendly.³¹

Another instrument is the Commission's 'Buying Green' handbook on GPP which was fully revised in 2016.³² This is the main guidance document designed for public authorities to help them to procure goods and services with a lower environmental impact and builds upon Directive 2014/24.³³ It illustrates how environmental considerations can be included at each stage of the procurement process, gives practical examples, and describes key GPP sectors. Importantly, the handbook also refers to the above-mentioned common GPP criteria. They are adopted to promote GPP and should lead to more harmonisation as they are envisaged to be implemented directly into tender documents.³⁴ This aims at lessening the administrative costs both for economic operators and contracting authorities and facilitating the inclusion of green requirements into procurement procedures.³⁵ Currently, the common GPP criteria cover 21 products and service groups, though some of which are outdated. The intention is for the criteria to be updated.³⁶

In 2019, the Commission tabled its famous European Green Deal.³⁷ In this regard, GPP appeared as one of the major targets of the climate ambition for 2030 and 2050 in the context of enabling buyers to make

²⁸ Commission, 'Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market', COM (2011) 15 final.

²⁹ *ibid* 35 ff, 41 ff.

³⁰ Commission (n 13).

³¹ *ibid* 41.

³² Commission, 'Buying green! A handbook on green public procurement' (3rd edn, 2016), <<https://ec.europa.eu/environment/gpp/pdf/Buying-Green-Handbook-3rd-Edition.pdf>> accessed 23 May 2023.

³³ *ibid* 4.

³⁴ *ibid* 6.

³⁵ *ibid* 15.

³⁶ *ibid*.

³⁷ Commission, 'The European Green Deal' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM (2019) 640 final.

more sustainable decisions. Both EU institutions and national contracting authorities should lead by example and ensure that the procurement is green, for which the Commission plans to propose further legislation and guidance.³⁸

In 2020, the Commission adopted a new CEAP 'For a cleaner and more competitive Europe'.³⁹ Here, the Commission stated that public procurement 'represents 14% of the EU GDP and can serve as a *powerful driver of demand for sustainable products*'.⁴⁰ Accordingly, the Commission commits to propose minimum mandatory GPP criteria and targets in sectoral legislation and compulsory reporting in order to monitor the uptake of GPP.⁴¹ The same attitude can also be seen from the recent 2022 Communication 'On making sustainable products the norm',⁴² in which the Commission declared that 'contracting authorities would be required to use green procurement criteria to purchase specific groups of products'.⁴³

Furthermore, in 2021 the Commission adopted a report on the 'Implementation and best practices of national procurement policies in the Internal Market'.⁴⁴ Here, the Commission identified that Member States have implemented GPP in their national laws to different degrees.⁴⁵ Accordingly, only one third of the Member States have introduced a legal obligation to introduce GPP for specific sectors, product groups, or if the value of the contract is above specific thresholds.⁴⁶

Another source to mention is the 'GPP Training Toolkit'.⁴⁷ This toolkit is a module-based training course provided by the Commission and designed for public purchasers and GPP trainers. The toolkit specifically aims at achieving a higher uptake of GPP within public purchases by providing guidance, high-quality training material, and targeted training schemes to public bodies.

Finally, the 2021 'Innovation procurement' initiative should be mentioned.⁴⁸ Innovation procurement enables public buyers to foster the market uptake of innovative products, services, and works, it increases

³⁸ *ibid* 8.

³⁹ Commission (n 2).

⁴⁰ *ibid* 5.

⁴¹ *ibid*.

⁴² 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.

⁴³ *ibid* 6.

⁴⁴ Commission, 'Implementation and best practices of national procurement policies in the Internal Market' (Report from the Commission) COM (2021) 245 final 9.

⁴⁵ *ibid*.

⁴⁶ *ibid*.

⁴⁷ Commission, 'GPP Training Toolkit (2023)' <https://ec.europa.eu/environment/gpp/toolkit_en.htm> accessed 23 May 2023.

⁴⁸ Commission, 'Guidance on Innovation Procurement' (Commission Notice) COM (2021) 4320 final 5.

opportunities for SMEs to access markets, and boosts the development of innovative solutions to allow for green and digital transformation.⁴⁹ In this regard, the Commission held that the General 2014 Directives 'adjusted the public procurement framework to the needs of public buyers and economic operators arising from technological developments, economic trends and increased societal focus on sustainable public spending'.⁵⁰ Most interestingly, it (re)introduced the idea from the 2011 Green Paper of public procurement rules no longer being only concerned with pre-set rules on '*how to buy*' but leaving room for incentives on '*what to buy*'.⁵¹ The Commission further elaborated that the objective of spending tax-payers' money will gain new dimensions beyond merely satisfying the primary needs of public entities.⁵² These new dimensions concern 'whether it brings the best added value in terms of quality, cost-efficiency, *environmental* and social impact and whether it brings opportunities for the suppliers' market'.⁵³

2.1.3 CJEU case law on GPP

Most importantly, the CJEU was the first to include non-economic, also known as 'horizontal', objectives in EU public procurement processes. In that regard, it is argued that the Court is not just interpreting the legal framework of GPP but even developing it.⁵⁴ This commenced with the *Beentjes* case⁵⁵ as early as 1988, where the CJEU opened the door to horizontal GPP policies. Here, the CJEU held that the option to award a contract on the basis of MEAT under the relevant law (Directive 71/305/EEC at this time⁵⁶) 'leaves it open to the authorities awarding contracts to choose the criteria on which they propose to base their award of the contract'.⁵⁷ Accordingly, the Court found that the Directive did not lay down a uniform and exhaustive body of Community rules, and therefore does not exclude a condition related to the employment of long-term unemployed persons, as long as it has no direct or indirect discriminatory effect on tenderers from other Member States.⁵⁸

Twelve years later in *Nord pas de Calais*,⁵⁹ the CJEU further clarified that EU public procurement law does not preclude contracting authorities from using non-economic, in that case employment-related, criteria

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ *ibid.* (emphasis added).

⁵⁴ Pedersen and Olsson (n 15) 405.

⁵⁵ Case C-31/87 *Gebroeders Beentjes BV v State of the Netherlands* ECLI:EU:C:1988:422.

⁵⁶ Council Directive (n12).

⁵⁷ *ibid.*, para 19.

⁵⁸ *ibid.*, paras 2, 20, 30.

⁵⁹ Case C-225/98 *Commission v French Republic* ECLI:EU:C:2000:494.

for the award of public contracts provided that the condition is consistent with all the fundamental principles of EU law, in particular the principle of non-discrimination.⁶⁰

The case-law series continued with the ground-breaking *Concordia Bus Finland* case⁶¹ concerning the inclusion of environmental elements in public procurement. Here, the CJEU defined that, when a contracting authority decides to award a contract to the tenderer who submits MEAT, it may consider criteria relating to the preservation of the environment, provided that (i) they are linked to the subject matter of the contract; (ii) they do not confer an unrestricted freedom of choice on the authority; (iii) they are expressly mentioned in the contract documents or the tender notice; (iv) and they comply with all the fundamental principles of EU law, in particular the principle of non-discrimination.⁶²

The next case arriving before the CJEU was *EVN and Wienstrom*⁶³ in 2003. This case concerned the considerable weight put on environmental concerns within award criteria. The CJEU held that EU public procurement law does not preclude contracting authorities from applying the condition that electricity is produced from renewable energy sources weighing 45% of the award, provided that they comply with both the procedural rules and the fundamental principles of EU law. The Court also emphasised that the use of renewable energy sources for producing electricity is useful for protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases, which are amongst the main causes of climate change which the EU and its Member States have pledged to combat.⁶⁴

Another case lining up in the case law on GPP matters was *Evropaïki Dynamiki v European Environment Agency* in 2010 which concerned the issue of a vague formulation of environmental criteria as award criteria.⁶⁵ The Court found that the European Environmental Agency, acting as the contracting authority, had not breached EU public procurement law by formulating the award criteria as the 'general environmental policy' required of the company. The Court explained that such a criterion can be satisfied in many ways, such as through certified environmental management schemes, genuine environmental policies, and other equivalents.⁶⁶

Another well-known case is *Max Havelaar*,⁶⁷ which concerned the use of environmental criteria, more specifically the use of eco-labels, in different stages of the procurement procedure. In that case, the CJEU

⁶⁰ *ibid*, paras 46, 50.

⁶¹ Case C-513/99 *Concordia Bus Finland* ECLI:EU:C:2002:495.

⁶² *ibid*, para 64.

⁶³ Case C-448/01 *EVN AG and Wienstrom GmbH v Republik Österreich* ECLI:EU:C:2003:651.

⁶⁴ *ibid*, paras 35-40.

⁶⁵ Case T-331/06 *Evropaïki Dynamiki v European Environment Agency* ECLI:EU:T:2010:292.

⁶⁶ *ibid*, paras 70-78.

⁶⁷ Case C-368/10 *Commission v Netherlands* ECLI:EU:C:2012:284.

held that technical specifications may include environmental characteristics. Furthermore, it stated that contracting authorities are authorised to choose the award criteria based on considerations of an environmental nature, including the fact that the product concerned was of a fair-trade origin. However, at the time, the relevant Directive 2004/18/EC did not allow those eco-labels to be deployed as technical specifications, since technical specifications exclusively refer to the characteristics of a product, while the requirement that products need to be of a fair-trade origin relates to the conditions governing the performance of a contract.⁶⁸ Hence, the CJEU found this practice not to be compatible with the Directive.

Finally, the *Tim SpA* case from 2020⁶⁹ concerned the general procurement principles of Article 18(2) of Directive 2014/24. Here, the CJEU stated that the exclusion criteria on the ground of the violation of the principles of public procurement can be applied to the subcontractor, and elaborated that the obligations for economic operators to comply, in the performance of the contract, with obligations relating to environmental, social and/or labour law, constitute, in the general scheme of Directive 2014/24, a *cardinal value* with which the Member States must comply.⁷⁰

2.2 Prescribing ‘what to buy’: towards a more strategic and outcome-oriented approach

Considering that the above-mentioned legal instruments did not achieve the effective implementation of GPP and the more compelling environmental targets recently laid down, sectoral legislation emerges as the most promising approach in realising GPP. This stems from the fact that mandatory GPP requirements were introduced in numerous pieces of sectoral legislation which started even before the Commission’s advocacy for mandatory GPP. Above all, the incorporation of GPP through sectoral legislation can also be attributed to Directive 2014/24 specifying that it is not appropriate to set general mandatory requirements for environmental procurement due to the significant differences between individual sectors and markets.⁷¹

The first tendencies towards sectoral mandatory GPP can be traced back to the 2008 Energy Star Regulation.⁷² This Regulation is still in force, and, in particular, Article 6 mandates central government authorities to specify certain minimum energy-efficiency levels to be reached by the office equipment they purchase. Legal developments continued with

⁶⁸ *ibid.*, paras 73–76.

⁶⁹ Case C-395/18 *Tim SpA* ECLI:EU:C:2020:58.

⁷⁰ *ibid.*, paras. 12, 14, 38.

⁷¹ Recital 95 Directive 2014/24.

⁷² Regulation (EC) No 106/2008 of the European Parliament and of the Council of 15 January 2008 on a Union energy-efficiency labelling programme for office equipment [2008] OJ L39/1.

the 2009 Clean Vehicles Directive⁷³ requiring contracting authorities, when purchasing road transport vehicles, to take into account operational lifetime energy and environmental impacts such as energy consumption, CO₂ emissions, and certain pollutants.⁷⁴ Procedurally, this obligation could have been fulfilled by either setting technical specifications or by including energy and environmental impacts as award criteria.⁷⁵ However, the 2009 Clean Vehicles Directive fundamentally changed with the 2019 amendment (hereinafter CVD),⁷⁶ as will be shown in the following analysis. A similar tendency towards sectoral mandatory GPP can also be seen in the 2012 Energy Efficiency Directive (EED)⁷⁷ mandating the public sector to purchase only products, services, and buildings with high energy-efficiency performance.⁷⁸

Recently, the Commission's proposal for minimum mandatory GPP criteria and targets in sectoral legislation together with compulsory reporting to monitor the uptake of GPP⁷⁹ are just a drop in the vast sea of proposals and amendments to existing legislation. They, *inter alia*, concern batteries and waste batteries, ecodesign requirements for sustainable products, construction products or packaging, and packaging waste.

Based on the above-mentioned legislative developments, this section will demonstrate that there is a more strategic and outcome-oriented approach in public procurement law. This paradigm rests on the premise that the EU initially focused on mere procedural rules concerning '*how to buy*' rather than on '*what to buy*'. As will be shown, by introducing mandatory GPP through sectoral legislation, the EU created an innovative framework instructing contracting authorities '*what to buy*'.⁸⁰

The sectoral legislation entailing implications andatory GPP that is tackled in this section are the 2019 Clean Vehicles Directive (CVD),⁸¹ the Batteries and Waste Batteries Regulation (BWBR),⁸² the Proposal

⁷³ Directive (EC) No 33/2009 of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles [2009] OJ L120/5.

⁷⁴ *ibid.*, Article 5.

⁷⁵ *ibid.*, Article 5(3).

⁷⁶ Directive (EU) No 1161/2019 of the European Parliament and of the Council of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles [2019] OJ L188/116 [hereinafter CVD].

⁷⁷ Directive (EU) No 27/2012 of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC [2012] OJ L315/1.

⁷⁸ *ibid.*, Article 6.

⁷⁹ Commission (n 2) 5.

⁸⁰ Andhov (n 18) 13; Caranta (n 11) 46.

⁸¹ CVD (n 76).

⁸² Regulation (EU) No 2023/1542 of the European Parliament and of the Council concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC [2023] OJ L191/1 (hereinafter BWBR).

for an Ecodesign Regulation for Sustainable Products (EDSP),⁸³ and the Proposal for a Regulation on Packaging and Packaging Waste (PPWR).⁸⁴ The analysis focuses on specific substantive and procedural GPP requirements established in those acts which are briefly summarised in Table 1 and examined in detail thereafter. Moreover, it provides for the main takeaways and identifies the strategic and outcome-oriented approach in public procurement law specifically prescribing a sectoral ‘*what to buy*’.

⁸³ Commission, ‘Proposal for a Regulation of the European Council and of the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC’ COM (2022) 142 final (hereinafter EDSP).

⁸⁴ Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC’ COM (2022) 677 final (hereinafter PPWR).

Table 1 – Sectoral legislation with implications for mandatory GPP practices

Legislative Act	Specific substantive GPP requirements	Specific procedural GPP requirements	Type of harmonisation	Monitoring and compliance	Capacity building and awareness	Peculiarities
CVD ¹	mandatory minimum GPP targets	none; for contracting authorities to decide	minimum harmonisation	reporting and review	exchange of knowledge and best practices	targets to be reached within a certain reference period; Member State specific targets
BWBR ²	mandatory minimum GPP criteria or targets, to be developed by the Commission via delegated acts	setting technical specifications <i>and</i> including developed GPP in award criteria	mixed form (maximum or minimum harmonisation)	penalties for non-compliance	none	none
EDSP ³	mandatory ecodesign requirements, to be developed by the Commission via delegated acts, no specified form	technical specifications, selection criteria, award criteria, contract performance clauses, <i>or</i> targets, as appropriate	maximum harmonisation	implementation, monitoring and reporting requirements to be established by the Commission via delegated acts; penalties for non-compliance	initiatives which help SMEs to integrate ecodesign requirements in their value chains	reference to common GPP criteria
PPWR ⁴	mandatory minimum GPP criteria to be developed by the Commission via delegated acts	none, for contracting authorities to decide	minimum harmonisation	penalties for non-compliance	none	none

¹ 2019 Clean Vehicles Directive
² 2023 Batteries and Waste Batteries Regulation
³ The Proposal for an Ecodesign Regulation for Sustainable Products
⁴ The Proposal for a Regulation on Packaging and Packaging Waste

2.2.1 The 2019 Clean Vehicles Directive (CVD)

The CVD⁸⁵ in its Recital 21 explicitly states that Member States are called upon 'to foster [GPP] policies through the purchasing of zero-emission vehicles and ultra-low emission vehicles by public authorities for their own fleets or for public or semi-public car-sharing programmes, and for phasing out of new CO₂-emitting cars by 2035'.

In that vein, Article 1 CVD stipulates that '[t]his Directive *requires* Member States to ensure that contracting authorities and contracting entities take into account lifetime energy and environmental impacts, including energy consumption and emissions of CO₂ and of certain pollutants, when procuring certain road transport vehicles [...] (emphasis added)'. In contrast to the 2009 Clean Vehicles Directive which prescribed substantive criteria such as energy consumption or emissions of CO₂ to be taken into account when purchasing road transport vehicles,⁸⁶ the CVD sets out *mandatory minimum procurement targets* that are *Member State specific*, defined as minimum percentages in terms of the number of low and zero emission vehicles in the aggregate public procurement across a Member State, and required *to be reached within a certain reference period* ending in 2025 and 2030.⁸⁷

The CVD as opposed to its 2009 predecessor is not only limited to the procedural options of setting technical specifications or including energy and environmental impacts as award criteria, but provides for '*targets*', for which it is *up to the contracting authorities to decide how they intend to live up to the obligations set out under the CVD*.⁸⁸

Furthermore, the CVD allows Member States to apply or authorise their contracting authorities to opt for higher national targets or more stringent requirements than those stipulated in the Annex.⁸⁹ This, in fact, underlines the character of *minimum harmonisation* of the CVD, allowing Member States and their contracting authorities and entities to apply higher mandates.

As regards *monitoring and compliance* of the set obligations, the CVD requires the Member States to submit by 18 April 2026, and every three years thereafter, a report to the Commission on the implementation of this Directive.⁹⁰ These reports will accompany the reports required under the General 2014 PP Directives⁹¹ and will provide information on the measures taken to implement this Directive and on future implementa-

⁸⁵ CVD (n 76).

⁸⁶ 2009 CVD (n 73), Article 5; Andhov (n 18) 33.

⁸⁷ See CVD (n 76) Article 5 in conjunction with Table 3 and 4 of the Annex.

⁸⁸ Andhov (n 18) 33.

⁸⁹ CVD (n 76) Article 5(7).

⁹⁰ CVD (n 76) Article 10(2).

⁹¹ See Article 83(3) of Directive 2014/24/EU and the second subparagraph of Article 99(3) of Directive 2014/25/EU.

tion activities.⁹² Member States are thus required to establish monitoring systems and report on their progress in integrating green criteria into public procurement. This could potentially enable the EU to assess the effectiveness of the CVD and identify areas for improvement.

With respect to capacity building and awareness, the CVD requires the Commission to facilitate and structure the *exchange of knowledge and best practices* between Member States on the implementation of the CVD.⁹³ This particularly facilitates the learning and dissemination of successful approaches to mandatory GPP by, *inter alia*, sharing experiences and practical guidance on implementing green criteria in public procurement processes.

2.2.2 The 2023 Batteries and Waste Batteries Regulation (BWBR)

A similar approach can be inferred from the BWBR,⁹⁴ which was tabled by the Commission in December 2020. This legislation forms an integral part of the European Green Deal⁹⁵ and aims to modernise the EU's legislative framework for batteries by, *inter alia*, fostering the consideration of environmental impacts of batteries over their life cycle in public procurement.⁹⁶

To establish the necessary link to GPP, Article 85 BWBR – entitled Green Public Procurement – explicitly *mandates* that contracting authorities and contracting entities, ‘when procuring batteries or products containing batteries [...]to *take account of the environmental impacts of batteries over their life cycle* with a view to ensure that such impacts of the batteries procured are kept to a minimum’ (emphasis added). Just like the CVD, the BWBR also foresees *minimum mandatory GPP criteria or targets*, to be adopted by the Commission by means, however, of delegated acts.⁹⁷ Yet, in contrast to the CVD, the BWBR prescribes that contracting authorities and contracting entities must include *technical specifications and award criteria* based on Article 7 (carbon footprint of electric vehicle batteries and rechargeable industrial batteries), Article 8 (recycled content in industrial batteries, electric vehicle batteries, and automotive batteries), Article 9 (performance and durability requirements for portable batteries of general use), and Article 10 (performance and durability requirements for rechargeable industrial batteries and electric vehicle batteries).⁹⁸ The BWBR therefore explicitly prescribes that the obligation needs to be fulfilled by using technical specifications *and* – cumulatively – award criteria. Consequently, it is less discretionary in terms of

⁹² CVD (n 76) Article 10(2).

⁹³ CVD (n 76) Article 8.

⁹⁴ BWBR (n 82).

⁹⁵ *ibid* 1.

⁹⁶ *ibid* 1 and Article 85.

⁹⁷ *ibid*, Article 85(3).

⁹⁸ *ibid*, Article 85(2).

procedural options than the CVD under which it is completely up to the contracting authorities to decide how they intend to meet the set targets.

Under the BWBR, the Commission is not only required to adopt delegated acts concerning minimum mandatory GPP criteria, but also to specify the standards and requirements of Articles 7 to 10, on which contracting authorities need to base technical specifications and criteria within their procurement. These standards and requirements can be specified either by *maximum harmonisation* (eg, maximum life cycle carbon footprint thresholds in Article 7(3)(1) or by *minimum harmonisation* (eg, minimum shares of cobalt, lead, lithium or nickel recovered from waste in Article 8(3) or minimum values for electrochemical performance and durability for rechargeable industrial batteries and electric batteries in Article 10(2) and (3)).⁹⁹ Consequently, this entails that contracting authorities can only opt for higher standards in their procurement in the case of minimum harmonisation, and cannot go beyond the maximum set standards in the case of maximum harmonisation.

Importantly, the BWBR requires Member States to lay down rules on *penalties* applicable to infringements of this Regulation.¹⁰⁰ However, the BWBR does not contain any specific rules related to the monitoring of the implementation of the mandatory GPP criteria or targets and does not provide for any capacity building or awareness measures.

2.2.3 The proposal for an Ecodesign Regulation for Sustainable Products (EDSP)

The EDSP,¹⁰¹ unveiled in March 2022, provides for ecodesign requirements including product durability, reusability, upgradability and reparability, the presence of substances of concern in products, product energy and resource efficiency, recycled content of products, product remanufacturing and high-quality recycling, and for reducing products' carbon and the environmental footprint in order to ensure that all products placed on the Union market will become increasingly sustainable over the whole life cycle.¹⁰²

Article 2(6) of the proposed EDSP defines 'ecodesign' as 'the integration of environmental sustainability considerations into the characteristics of a product and the process taking place throughout the product's value chain'. 'Ecodesign requirements' refer to performance requirements or information requirements aimed at making a product more environmentally sustainable.¹⁰³ The proposed Regulation will apply to any physical good that is placed on the market or put into service, including com-

⁹⁹ Andhov (n 18) 36.

¹⁰⁰ BWBR (n 82) Article 93.

¹⁰¹ EDSP (n 83).

¹⁰² *ibid* 1, Recital 2.

¹⁰³ *ibid*, Article 2(7).

ponents and intermediate products, but excluding specific products such as food, feed, or medicinal products.¹⁰⁴

To make the necessary connection to GPP, Recital 87 of the proposal explicitly empowers the Commission to adopt delegated acts to *require*, where appropriate, contracting authorities to align their procurement with specific GPP criteria or targets, to be set out in delegated acts adopted pursuant to the Regulation.

Likewise, Article 4 of the proposed EDSP particularly entitles the Commission to adopt delegated acts by establishing ecodesign requirements for, or in relation to, products to improve their environmental sustainability. It is further stipulated in subparagraph 3(h) that delegated acts may supplement the EDSP by ‘establishing requirements applicable to public contracts, including implementation, monitoring and reporting of those requirements by Member States’. Based on this, Article 58 EDSP – under the title Green Public Procurement – asserts that ecodesign requirements pursuant to Article 4 subparagraph 3(h) may take the form of *mandatory technical specifications, selection criteria, award criteria, contract performance clauses, or targets, as appropriate*. However, the word ‘may’ does not refer to the nature of ‘mandatory’ requirements, but to the procedural prescription where they can be included in the procurement process.¹⁰⁵ Discretion is thus left to the Commission as regards the determination of procedural options for contracting authorities to include mandatory ecodesign requirements in their procurement processes.

Most innovatively, and in contrast to the above-mentioned legislation, the proposal *explicitly refers to the common GPP criteria* which must be taken into account by the Commission when preparing ecodesign requirements.¹⁰⁶ This is a positive step, since the common GPP criteria have already undergone rigorous assessment and validation, involving the participation of various stakeholders such as scientific experts, SMEs, industry representatives, public procurement authorities, and civil society organisations.¹⁰⁷ By facilitating broader stakeholder engagement, it therefore ensures the consideration of diverse perspectives and increases the likelihood of establishing legislation striking a fair balance between conflicting interests. Incorporating the common GPP criteria in sectoral legislation could also help promote standardisation by ensuring that GPP practices are uniformly followed without, for example, applying double standards within the same sector. This would thereby avoid distortion of the internal market and ensure fair competition. Referring to the common GPP criteria could also save time and resources and relieve the adminis-

¹⁰⁴ *ibid.*, Article 1(2).

¹⁰⁵ This is also reaffirmed by Article 1(1) last sentence and the general objectives of the proposal as can be drawn from Recital 87, both aiming to provide for the setting of mandatory GPP criteria.

¹⁰⁶ EDSP (n 83) Recital 9, 18, Article 5(4)(c).

¹⁰⁷ Commission, ‘Process for Setting Criteria’ <https://ec.europa.eu/environment/gpp/gpp_criteria_process.htm> visited 20 May 2023.

trative burden whilst ensuring that the key environmental concerns are adequately addressed. Besides this, the reference to common GPP criteria could also promote transparency as they provide for accessible and clear guidelines. Furthermore, common GPP criteria often draw upon international standards.¹⁰⁸ Making reference to these criteria in sectoral legislation thus also aligns EU legislation with global sustainability goals and commitments.

Importantly, the EDSP opts for a model of *maximum harmonisation*, which can be inferred from Article 3. This provision stipulates that Member States must not prohibit, restrict, or impede the placing on the market or putting into service of products that comply with ecodesign requirements set out in delegated acts, although they are not prevented from setting minimum energy performance requirements. Consequently, in so far as the Commission has adopted delegated acts establishing ecodesign requirements, contracting authorities can only demand requirements that are below these through their procurement processes.

Eventually, the EDSP foresees that implementation, monitoring, and reporting requirements are established by the Commission in the relevant delegated acts.¹⁰⁹ Nevertheless, the EDSP does not specify any measures related to training or the exchange of knowledge or best practices concerning GPP requirements. However, it is particularly noteworthy that the EDSP requires the Commission to take into account *initiatives which help SMEs* to integrate environmental sustainability aspects, including energy efficiency, in their value chain, and mandates Member States to take appropriate measures accordingly.¹¹⁰ Such measures may include financial support, specialised management and staff training, or organisational and technical assistance.¹¹¹

Finally, the proposed EDSP requires Member States to lay down rules on *penalties* in the case of infringements and to take all measures necessary to ensure that they are implemented.¹¹²

2.2.4 The Proposal for a Regulation on Packaging and Packaging Waste (PPWR)

The final initiative to be mentioned is the PPWR,¹¹³ unveiled in November 2022. The specific focus of the PPWR on GPP can be inferred from Article 57(1) – titled Green Public Procurement – which *mandates* contracting authorities when awarding any public contracts for packaging or packaged products or for services using packaging or packaged products in situations covered by the General 2014 Directives to apply

¹⁰⁸ For example, standards of the International Organisation for Standardization (ISO).

¹⁰⁹ EDSP (n 83) Article 4 subpara 3(h).

¹¹⁰ *ibid*, Article 19.

¹¹¹ *ibid*, Article 19(3).

¹¹² *ibid*, Article 68.

¹¹³ PPWR (n 84).

the GPP criteria. These criteria are to be developed by the Commission by means of delegated acts, in which it establishes *minimum mandatory GPP criteria* based on specific requirements set out in PPWR, such as the requirements for substances in packaging (Article 5), recyclable packaging (Article 6), minimum recycled content in plastic packaging (Article 7), compostable packaging (Article 8), packaging minimisation (Article 9), or reusable packaging (Article 10). As indicated in Article 57(3) PPWR, the obligation to apply these GPP criteria applies to any procedure for procurement by contracting authorities for the award of public contracts. However, the proposal does not prescribe any procedural requirements in the sense that contracting authorities are free to designate at which stage of the procurement process they wish to include GPP criteria.

Similar to the CVD, the PPWR opts for *minimum mandatory GPP criteria*, thus allowing contracting authorities to apply higher mandates than those prescribed under the proposed Regulation and its supplementing delegated acts.

Nevertheless, the PPWR does not contain any provisions specifically addressing the monitoring of the implementation of the GPP criteria. It merely requires Member States to lay down rules on penalties applicable to infringements of the PPWR.¹¹⁴ Regrettably, the PPWR also does not provide for any capacity-building and awareness measures.

2.2.5 Takeaways from the current sectoral approach

What can be drawn from the legislative initiatives as a general pattern is that they all *mandate GPP* and opt for a *sectoral approach* by way of product or sector-specific legislation. Whereas Directive 2014/24 focuses on procedural rules applicable to public procurement, the above-mentioned proposals cover GPP criteria and targets related to specific sectors and products for which contracting authorities are mandated to purchase only those products or services complying with the set criteria or targets.

While the vast sea of legislation differs in specific substantive requirements (reference to 'criteria', 'targets', or 'requirements'), procedural requirements (full discretion, medium discretion, or explicit obligations for contracting authorities at which stage to include GPP in the procurement process) and in the type of harmonisation (minimum harmonisation, maximum harmonisation, or a mixed form), *they still all have the common objective to opt for more sustainability in public procurement by, inter alia, reducing environmental impacts, supporting the development of green industries, and improving resource efficiency.*

In this regard, minimum harmonisation, the reference to common GPP criteria, as well as capacity building and awareness measures concerning contracting authorities and contracting entities and SMEs in some of the initiatives are a positive step forward as they are essential to

¹¹⁴ *ibid.*, Article 62(1).

achieve the objectives of GPP. By harmonising GPP criteria, the EU essentially also aims to *facilitate cross-border trade and ensures the functioning of the internal market* (free movement) by simultaneously *enhancing the environmental performance across EU Member States*.

Nevertheless, in some of the mentioned proposals, the Commission is vested with the authority to adopt GPP criteria through delegated acts. Controversies about delegated acts are extensively discussed in academic as well as institutional debate.¹¹⁵ This raises concerns because the envisaged delegated acts essentially aim at establishing the desired level of harmonisation of sustainability for the entire EU, across which significant disparities in terms of national environmental performance and pertinent aspirations among Member States or even within one Member State are quite apparent.¹¹⁶ Moreover, within the process of adopting delegated acts, the European Parliament, as the only directly democratically elected EU institution, is rather sidelined.¹¹⁷ Criticism therefore emerges as to the problems of democratic legitimacy, the lack of transparency, limited parliamentary oversight, and a lack of public awareness and engagement.¹¹⁸

2.2.6 Towards a more strategic and outcome-oriented approach

The legislative initiatives described above certainly signify a move towards a more strategic and outcome-oriented approach to achieve broader sustainability goals, including those for GPP. In this paradigm, the focus involves a *change from a mere transactional and economic mindset to a more strategic and results-based one*. It rests on the premise that contracting authorities identify their actual needs and objectives, followed by an alignment of their procurement decisions with broader policy goals of sustainability. Instead of merely following a procedurally set process under Directive 2014/24, contracting authorities are called upon to play a *more proactive role in identifying environmentally informed solutions about 'what to purchase'*. This concept of *'what to buy'* therefore entails that public procurement will become more results-driven and will encourage a *more holistic and long-term perspective*.

Against this background, some authors have argued that there is a shift in approach of the EU initially focusing on *'how to buy'* under Directive 2014/24 towards creating an innovative framework of *'what to buy'*.¹¹⁹

¹¹⁵ See, for example, K Bradley, 'Delegation of Powers in the European Union: Political Problems, Legal Solutions?' in C F Bergström and Dominique Rittleng (eds), *Rulemaking by the European Commission: The New System for Delegation of Powers* (Oxford Academic 2016) ch 4.

¹¹⁶ A Iurascu, 'How Will the Adoption of Mandatory GPP Criteria Change the Game? Lessons from the Italian Experience' (2023) 18(1) *European Procurement & Public Private Partnership Law Review* 8.

¹¹⁷ See to that effect Article 290(2) TFEU.

¹¹⁸ These will not be further discussed due to the scope of this paper.

¹¹⁹ Andhov (n 18) 13; Caranta (n 11) 46.

However, this is to be argued against for two particular reasons: first, as identified in section 1, the Commission already proposed this idea of specifically prescribing '*what to buy*' years ago. Second, it was initially based on the premise of introducing mandatory GPP criteria through sectoral legislation specifically prescribing '*what to buy*'.

Nonetheless, what could be considered as a new paradigm shift is the concept of moving towards a *general* obligation on '*what to buy*'. This would certainly put two layers of obligations to be followed, one to be found within sectoral legislation, and the other potentially established under the horizontal framework of Directive 2014/24. Crucially, this poses the question of whether such an approach of generally mandating GPP under the horizontal framework of public procurement law can actually accomplish effective operationalisation of mandating GPP. This idea will be examined in the following section.

2.3 From green vision to legal obligation: why the sectoral approach is more efficient in enforcing mandatory GPP

On the basis of the foregoing observations, we can deduce a gradual, yet inexorable, law-making trend towards a 'sectoral approach' regarding the integration of environmental parameters in public procurement processes. As already identified, this concept in itself is not a novelty. Nevertheless, the current debate on rendering GPP mandatory is seen both from the point of view of the general horizontal reforms of Directive 2014/24 and from a sectoral point of view mandating GPP through sector-specific legislation. Even though the vast majority of contributions argues in favour of such horizontal reforms, this section attempts to shed light on the possible weaknesses of the key proposals and puts forward a number of claims in favour of a sectoral approach instead.

To this end, the present section seeks to demonstrate why the proposals of *reinforcing Article 18(2) of Directive 2014/24 by mandating GPP* (sec 2.3.1), *rendering the common EU GPP criteria mandatory* (sec 2.3.2.) and *removing the link to the subject matter* (sec 2.3.3) are hardly reconcilable with the system of fundamental principles of EU public procurement. Building on this analysis, the section aspires to indicate why the ongoing trend of mandating GPP within sectoral legislation is deemed to be a more effective strategy towards an operative, as well as unruffled, transition of integrating the objectives of environmental policies in the public procurement set of pertinent legislation (sec 2.3.4).

2.3.1 Reinforcing Article 18(2) of Directive 2014/24 by mandating GPP

One of the prominent proposals put forward to give effect to GPP is to reinforce the normative force of Article 18(2) of Directive 2014/24 by

explicitly mandating GPP.¹²⁰ First of all, it should be stated that this provision constitutes a 'special case'. On the one hand, it is perhaps the most straightforward declaration of the incorporation of environmental (and, generally, of secondary) considerations into public procurement procedures. On the other hand, it is argued that the *ambiguity as regards its binding nature* and the legal consequences attached thereto *deprives it of any normative content*. In fact, if this provision serves one function, it is that it limits the discretion of Member States to disregard environmental, social, and labour law concerns altogether.¹²¹ Yet, one might well ask: *Is this sufficient to push towards or, even more, to force a 'greener' approach to public procurement?* If not, and for the purpose of this contribution, one may ask further: *Would there be any tangible benefit in making this provision mandatory, thus establishing a general mandate for GPP?*

Before examining the prospects for strengthening the binding nature of Article 18(2) of Directive 2014/24, it is necessary to point out that its binding scope remains unclear. First of all, according to the literal interpretation of this provision, the legal obligations arising from the wording '*shall take the appropriate measures*' are addressed to the Member States and not to the contracting authorities. Besides that, given the nature of the instrument as a Directive, the Member States are only bound as to the end result, which is confined to (vaguely and without any prescribed specific standard) ensuring compliance with the applicable obligations in the field of, *inter alia*, environmental law. Moreover, the binding content of the provision is further limited, since its wording does not prescribe any specific action or particular measure to be taken by the Member States in that regard.¹²²

The most critical point in this respect is the relationship of Article 18(2) with the other general principles of EU public procurement stipulated in Article 18(1), as originally formulated by the CJEU and subsequently incorporated in Directive 2014/24. In this context, it is observed that for the elaboration of the principle of equal treatment or for the principle of transparency, the Court has used the strong language of mandatory nature.¹²³ In contrast, the rationale that has been used with regard to the principle of incorporation of strategic considerations under the public procurement framework is much more permissive.¹²⁴ For example, by holding that '*the procurement law does not preclude the contracting*

¹²⁰ K Pouikli, 'Towards Mandatory Green Public Procurement (GPP) Requirements under the EU Green Deal: Reconsidering the Role of Public Procurement as an Environmental Policy Tool' (2021) ERA Forum 715-716.

¹²¹ C Hamer and M Andhov, 'Article 18 Public Procurement Principles' in R Caranta and A Sanchez-Graells (eds), *European Public Procurement Commentary on Directive 2014/24/EU* (Edward Elgar Publishing 2021) 199.

¹²² *ibid* 205-206.

¹²³ See, for example, Case C-454/06 *pressetext Nachrichtenagentur GmbH v Republik Österreich and Others* ECLI:EU:C:2008:351; and Case C-496/99 P *Commission v CAS Succhi di Frutta* ECLI:EU:C:2004:236.

¹²⁴ Hamer and Andhov (n 121) 205-207.

authority from applying strategic considerations, as long as procurement principles are respected,¹²⁵ the CJEU seemed to initially draw a *distinction* between the 'original' public procurement principles (equal treatment, non-discrimination, transparency, and proportionality) and the more recent, weaker, principle of incorporating secondary considerations (environmental, social and labour law). However, in its recent *Tim SpA* judgment, the Court, in a Delphic way, aspired to equalise the principles,¹²⁶ yet, this is still in its infancy.

Furthermore, even if we set aside the practical point of view, the principles from Article 18(2) of Directive 2014/24 must not be a compromise of the 'original' procurement principles.¹²⁷ Thus, one could not infer that there is a certain kind of hierarchy between the principles. This is all the more crucial because treating all principles equally ensures that economic operators are subject to the same criteria in the public procurement procedure, simultaneously promoting fairness and transparency, and preventing potential discrimination and arbitrary treatment. Where there is no predictability in terms of legal clarity and legal certainty about the application of these principles in tender procedures, the imposition of a horizontal 'green' mandate on the basis of this provision may therefore potentially result in legal uncertainty for economic operators and arbitrary decisions of the contracting authorities. Consequently, it is of utmost importance for the legislature to clarify the relation between those principles stipulated in Article 18(1) and 18(2) of Directive 2014/24. Subsequently, even if Article 18(2) were to acquire sound normative content, this would have little legal effect if it were not accompanied by strengthened implementation of its normative content in the referring provisions of Directive 2014/24.

In view of these observations, it is apparent that this provision, as it stands, cannot be considered a solid basis for establishing specific obligations. It is also doubtful whether the further strengthening of its binding nature can achieve the 'ambition' of transforming it into a clear and unequivocal general provision that imposes the obligation upon contracting authorities to enforce GPP requirements in practice. Given its wording, legal nature, and position within the system of public procurement principles, attaching a clear legal obligation to Article 18(2) to integrate environmental requirements in public procurement procedures is therefore *not expected to enhance its enforceability*.

¹²⁵ Case C-448/01 *EVN AG and Wienstrom GmbH v Republik Österreich* ECLI:EU:C:2003:651, para 34.

¹²⁶ Case C-395/18 *Tim SpA* ECLI:EU:C:2020:58, para 38.

¹²⁷ For a more elaborated overview on the interconnection of horizontal policies (green, social, innovation) with the principle of competition, see also A Sanchez-Graells, 'Truly Competitive Public Procurement as a *Europe 2020* Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?' (2016) 22(2) *European Public Law*.

2.3.2 Rendering the common EU GPP criteria mandatory

The proposal of making voluntary common EU GPP criteria mandatory has been formulated in the academic debate,¹²⁸ and lately also in legislative instruments such as the CEAP or the EDSP.¹²⁹ However, this approach appears disputable due to the possible legal and political shortcomings, as shown below.

First of all, the political implications of rendering GPP criteria mandatory should not be disregarded. This is mainly because the uptake of general mandatory green specifications varies across Member States.¹³⁰ There are considerable cross-country variations regarding the existing levels of environmental considerations on national political agendas as well as diverging priorities of contracting authorities headed by political appointees. For a Member State opting for higher mandates of GPP,¹³¹ the 'one-size-fits-all' approach of rendering GPP mandatory across the entire EU would certainly compromise the existing national system¹³² and contradict the very nature of Directive 2014/14.¹³³ Moreover, due to the lack of environmental considerations in national policies and the lack of expertise of contracting authorities,¹³⁴ this would potentially lead to undesirable results.

Since the incorporation of GPP in public tenders normally entails higher costs for the budget of the corresponding authority, the different levels of economic developments among Member States are expected to put pressure on the national budgets of those with more limited resources. This is one of the main reasons why the way in which the establishment of mandatory environmental criteria is envisaged appears to be highly controversial. The priorities realised through specific adopted options of public expenditure and the way in which public resources are allocated and further managed lie at the 'heart' of democratic functions. Therefore, any decision that imposes an additional burden on the state budget by mandating the incorporation of certain environmental criteria must be democratically legitimised.

Besides the fact that Member States with a more robust economic status are better 'equipped' to encompass environmental criteria in

¹²⁸ See, for example, Pouikli (n 120) 716.

¹²⁹ EDSP (n 83) Recital 87; Commission (n 2) 4.

¹³⁰ CEPS and College of Europe (n 20).

¹³¹ *ibid.* For example, stressing the 'four top performers' Belgium, Denmark, the Netherlands and Sweden.

¹³² Andhov (n 18) 64.

¹³³ See Recital 95 of Directive 2014/24 acknowledging the important differences between individual sectors and markets.

¹³⁴ See to that effect CEPS and College of Europe (n 20) empirically identifying the varying uptake of GPP among Member States and the perceived difficulties of contracting authorities to incorporate green criteria in public tenders.

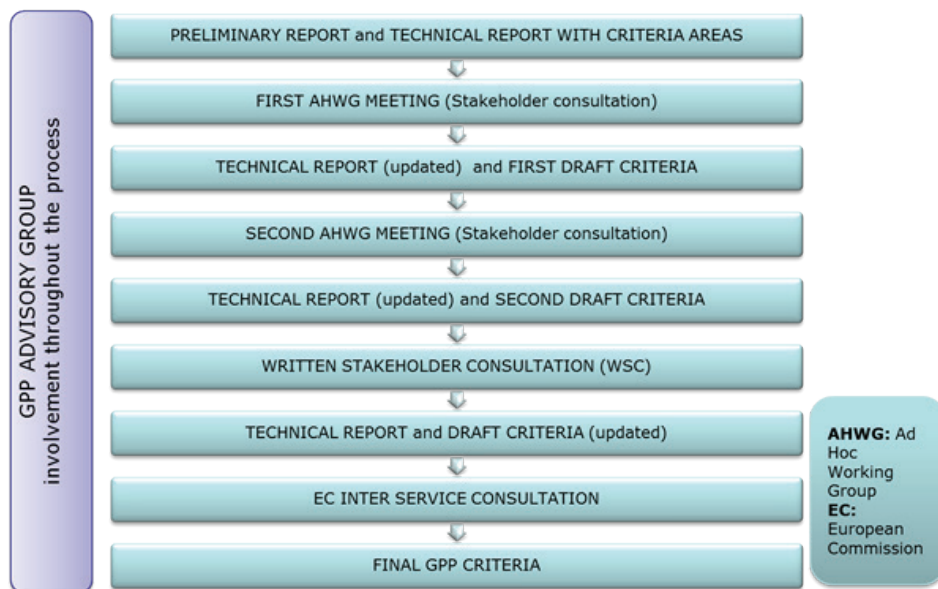
their tenders,¹³⁵ the long-term positive environmental impacts of procuring 'greener' are often at odds with national short-term political biases. This is mainly because more expensive solutions in public procurement procedures are connected to more spending of taxpayers' money. Consequently, these solutions are likely to be highly controversial in the political sphere, ultimately leading to unprofessed non-noble aims resulting in corruption and political dependencies.

Another point worth mentioning is the way in which GPP criteria are currently adopted. In the procedure, the Commission's Joint Research Centre's Institute for Prospective Technological Studies (JRC) plays a leading role by providing all relevant information. The JRC is in consultation with the GPP Advisory Group¹³⁶ composed of representatives of the Member States and various stakeholders. Even though this ensures diverse perspectives, there are some drawbacks that need to be acknowledged. Namely, the formulation and revision of the common GPP criteria aimed at harmonising technical specifications is an onerous, bureaucratic, and time-consuming task. Consequently, there is a risk that they may already be outdated from the moment of their adoption until their incorporation into tender notices. Indeed, since the 2008 Communication until today, the Commission has adopted 21 common GPP criteria, seven of which are already outdated and not yet revised, while there are only two newer ones, dating from 2021.¹³⁷ It can therefore be assumed that, as the range of the criteria expands and once they become mandatory, the enterprise of keeping them up to date will be more demanding, more complicated, and, sometimes, muddling and highly contentious. This is especially to be contrasted with the current situation where the criteria are set forth as mere 'templates' for contracting authorities.

¹³⁵ J Rossel, 'Getting the Green Light on Green Public Procurement: Macro and Meso Determinants' (2021) 279 *Journal of Cleaner Production* 3.

¹³⁶ Commission, 'Process for Setting Criteria', <https://ec.europa.eu/environment/gpp/gpp_criteria_process.htm> accessed 30 May 2023.

¹³⁷ Commission, 'EU GPP Criteria' <https://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm> accessed 3 June 2023.

Figure 1. Procedure for the development and revision of EU GPP criteria¹³⁸

This brings back the already mentioned points of criticism of the potential emergence of double standards within the same sectors if there are GPP criteria adopted as just described (common GPP criteria) and those established via delegated acts within sectoral legislation. As identified above, GPP criteria are simultaneously adopted via delegated acts, for example under the BWBR or the PPWR, without any reference to the common GPP criteria. So far, only the EDSP refers to the common GPP criteria. It is therefore indispensable to streamline and unify the existing (or future adopted) GPP criteria to avoid double standards. The EDSP could therefore serve as a leading example to incorporate references to common GPP criteria within *all* pieces of sectoral legislation mandating GPP.

In a nutshell, the establishment of mandatory common EU GPP criteria may *disproportionately burden a country's economic planning and may lack the necessary political support and legitimacy*. Besides the fact that a Member State may struggle to live up to those standards, such mandatory prescriptions might well create considerable barriers to the public procurement market, at least for a period of adjustment, and prevent companies from participating in tendering procedures and thereby limit competition. In other words, such a development could possibly bring about distorted market dynamics, thereby undermining the strate-

¹³⁸ Commission, 'Procedure for the development and revision of EU GPP criteria' <https://ec.europa.eu/environment/gpp/gpp_criteria_procedure.htm> accessed 3 June 2023.

gic use of public procurement towards greener public purchases.¹³⁹

This has *significant consequences regarding the fundamental principles of fair competition and equal treatment*.¹⁴⁰ As eloquently put by the CJEU in the *Concordia Bus Finland* case, the duty to observe the principle of equal treatment lies at the very heart of Directive 2014/24 which is intended, in particular, to promote the development of effective competition.¹⁴¹ This is to suggest that compliance with the principle of non-discrimination is not just a matter of conformity with the fundamental public procurement principles, but rather serves the very *telos* of the public procurement framework. In addition, the mandatory inclusion of GPP criteria in calls for tenders essentially compels the contracting authorities to *unintentionally favour economic entities from countries with higher environmental standards*, thereby compromising the general principle of non-discrimination.¹⁴² Since compliance with environmental standards across the EU is not homogeneous, the imposition of uniform mandatory GPP criteria leads to the discrimination of economic entities on the basis of their nationality.

2.3.3 Removing the link to the subject matter

Another proposal that is currently being discussed is the removal of the 'link to the subject matter of the contract' (L2SM) throughout Directive 2014/24 and to *replace it by a link to the life cycle of relevant goods or services*.¹⁴³ To recall, the CJEU established the concept of the L2SM in its *Concordia Bus Finland* case where it explicitly allowed the possibility to include environmental considerations in award criteria of a public contract provided that certain conditions are fulfilled, as described in section 2.1.3. Since then, reference to the L2SM has been incorporated in numerous Articles of Directive 2014/24.¹⁴⁴ However, despite Article 67(3) of Directive 2014/24 requiring the L2SM 'to be understood with reference to the life cycle as defined with reference to award criteria', this does not necessarily mean that the L2SM should be replaced by a link to the life cycle of relevant goods or services entirely.

First of all, the L2SM ensures that public procurement procedures are *efficient and deliver value for money*. In this sense, it helps to *prevent wasteful spending* as it clearly defines the boundaries for contracting au-

¹³⁹ Sanchez-Graells (n 127) 378.

¹⁴⁰ Joined Cases C-21/03 and C-34/03 *Fabricom SA v Belgian State* ECLI:EU:C:2005:127, para 27 with reference to Case C-434/02 *Arnold André* ECLI:EU:C:2004:800, para 68 and Case C-210/03 *Swedish Match* ECLI:EU:C:2004:802, para 70: 'It is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified'.

¹⁴¹ Case C-513/99 *Concordia Bus Finland* ECLI:EU:C:2002:495, para 81.

¹⁴² See Article 18(1) of Directive 2014/24.

¹⁴³ See, for example, Andhov (n 18) 58-59.

¹⁴⁴ See, for example, Articles 42, 43, 45, 67, 68 and 70 of Directive 2014/24.

thorities of what can be purchased and therefore enables them to focus only on the procurement of goods and services that are directly linked to its mission. This also prevents environmental considerations being used to discriminate among economic operators,¹⁴⁵ or arbitrary purchases more generally, and thereby serves as a *safeguard against corruption and collusion*. Simultaneously, the L2SM encourages *fair competition* by allowing only qualified bidders with expertise in the relevant subject matter to participate in a tender. If the L2SM were to be removed, this would potentially open the door to unqualified or unrelated candidates compromising the quality of the purchased goods or services. Furthermore, the L2SM ensures compliance with the fundamental principle of *transparency*. In that vein, it provides for legal certainty and predictability as it sets clear parameters both for economic operators and contracting authorities to understand the requirements and expectations in advance. Finally, the L2SM is anchored in case law and in the common practice of public procurement procedures that have been used for decades now. The creation of the new life cycle link would then without doubt require a long transitional and adjustment period to prove itself first.

2.3.4 Favouring a sectoral approach towards accomplishing better operationalisation of GPP requirements

When it comes to accomplishing better operationalisation of mandating GPP, the sectoral approach stands out as the clear favourite over general horizontal reforms to Directive 2014/24. Regarding the points that have been observed and the legal implications of implementing the above proposals, a sectoral approach towards mandating GPP has significant advantages.

Most importantly, by focusing on specific sectors and products, it allows for tailored strategies addressing specific characteristics of different industries, including those with the most significant environmental impact.¹⁴⁶ It recognises that each sector has its own set of environmental concerns, market dynamics, and technological advancements. In that way, by customising GPP requirements to specific sectors, effective competition and innovation can be fostered and sustainable practices can be driven that are relevant and feasible for each particular sector or industry. Besides, a sectoral approach is also favourable since it provides for clear signals and criteria to both public authorities and private businesses operating within a given sector. It thereby creates a transparent framework that facilitates compliance as all actors know exactly what is expected of them. This also minimises the burden on economic operators and contracting authorities as they can focus their efforts on meeting sector-specific GPP criteria rather than navigating a complex net of generalised horizontal rules.

¹⁴⁵ Andhov (n 18) 58.

¹⁴⁶ See Recital 95 of Directive 2014/24.

Moreover, the sectoral approach generates momentum by creating visible and measurable progress, inspiring other sectors to follow suit which potentially results in great spill-over effects accelerating the transition towards green procurement practices across the entire economy.¹⁴⁷

The sectoral approach also acknowledges the interconnectedness of various industries and their supply chains. By addressing specific sectors, collaborations between different actors can be stimulated. This also facilitates the exchange of best practices, the development of innovative solutions, and the creation of synergies.¹⁴⁸

Lastly, the main argument for a sectoral approach is that mandating GPP under horizontal reforms would certainly mean that GPP becomes mandatory overnight without ensuring that contracting authorities and business operators are prepared to comply with such high premises.¹⁴⁹ Instead, establishing binding GPP criteria through the 'backdoor' of sectoral legislation allows for a smooth transition, given also the fact that the respective legal acts often allow for a time of transposition or adaptation. This potentially allows for targeted training, awareness measures, and the sharing of best practices in the meantime.

3 Conclusion

As shown in this paper, the 'Greening' of public procurement practices marks a significant shift in the objectives attached to EU public procurement law.¹⁵⁰ The development of the public procurement framework has apparently departed from the establishment of a solid internal market by eliminating protectionist practices across the EU as regards public purchases. In light of the general public procurement legal framework and the environmental considerations informing all EU policies, we are witnessing a shift, or, to be more precise, an urge to shift from an enabling instrument of the internal market to a strategic instrument for achieving broader EU policy goals of sustainability,¹⁵¹ including the EU's environmental targets. It is expected that this transformation in the functioning of the public procurement framework cannot be without legal contradictions, especially if it is taken into account that the economic logic, ie, the narrow sense of value for money that governs the award of public contracts, is not always compatible with environmental considerations. At the same time, the establishment of GPP as common practice in the EU requires the conducting of new assessments (beyond those

¹⁴⁷ See Schoenmaekers (n 9) 390, 392 in the context of sustainable reporting obligations and M Andhov and R Caranta, 'Sustainability through Public Procurement: The Way Forward – Reform Proposals' (SMART Project Report 2020) 43, 47 speaking of a 'race to the top'.

¹⁴⁸ L Mélon, 'More Than a Nudge? Arguments and Tools for Mandating Green Public Procurement in the EU' (2020) 12 Sustainability 16-17.

¹⁴⁹ Pouikli (n 120) 714.

¹⁵⁰ Commission, 'Barriers to the take-up of GPP' <https://ec.europa.eu/environment/gpp/barriers_en.htm> accessed 2 June 2023.

¹⁵¹ Mélon (n 148) 4.

incorporated in the existing public procurement framework) to reconcile the fundamental principles governing public contracts with those of environmental policy. It cannot be expected that this will happen overnight and neither can it be expected that it will be achieved without fostering the knowledge and allocating the resources required to take a step further in public procurement law in order to purchase 'green'.¹⁵²

As can be concluded from the analysis above, there certainly needs to be some element of 'mandatoriness', but the main question is '*what needs to become mandatory*' and '*how far*' can it be realised? For more than a decade now, the focus has primarily been on *whether* GPP needs to become mandatory. While this now constitutes a rather uncontroversial part of the debate, controversies remain about '*to what extent*' it can be realised. As shown above, the current proposals for mandating GPP throughout the current legislative framework, namely by (i) reinforcing Article 18(2) of Directive 2014/24, (ii) rendering the common EU GPP criteria mandatory, and (iii) replacing the L2SM with a link to the life cycle of goods or services, potentially entail legally contentious consequences and various political stumbling blocks which cannot be ignored and which for now do not seem to serve as the 'silver bullet' of 'green' purchasing.

Instead, this contribution has opted for favouring a sectoral approach to accomplishing better operationalisation of GPP requirements rather than horizontal reforms of Directive 2014/24 in the realm of a broader reform package. It has argued that a sectoral approach duly considers the specific characteristics of different industries and relieves the administrative burden of contracting authorities as well as the expenses of business operators as they can focus on meeting sector-specific GPP criteria rather than navigating a complex net of generalised horizontal rules. Additionally, it has demonstrated that such an approach can result in great spillover effects, accelerating the transition towards green procurement practices across the entire economy. Lastly, it has identified that a sectoral approach allows for a smooth transition of mandating GPP, ensuring that contracting authorities and business operators can adapt to the high premises.



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¹⁵² Andhov (n 18) 63.