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The more recent wave of mandatory public procurement rules: sustainability rhymes with resilience.

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Abstract

At the close of the present legislature, the EU institutions reached a compromise on a number of new legislative instruments that will leave a mark on public procurement. While not having procurement as their main object, they include provisions related to it. Often these instruments introduce new provisions making sustainable requirements mandatory for contracting authorities. The focus in this chapter will be on the Construction Product Regulation (CPR), the Net Zero Industry Act (NZIA) and the Corporate Sustainability Due Diligence Directive (CSDDD). The three legislative measures analysed in this article bear witness to both the relevance and the adaptability of public procurement to achieve societal goals, including the fight against climate change but also resilience.

Keywords

SPP, Green Deal, Resilience, Due Diligence, Construction.

1. Introduction.

At the close of the present legislature, the EU institutions reached a compromise on a number of new legislative instruments that will leave a deep mark on public procurement. While not having procurement as their main object, they include provisions related to it. Often these instruments introduce new provisions making sustainable requirements mandatory for contracting authorities. The focus in this chapter will be on the Construction Product Regulation (CPR), the Net Zero Industry Act (NZIA) and the Corporate Sustainability Due Diligence Directive (CSDDD aka CS3D). This article complements the one by Alexandru Buftic in this issue as he investigates legislative instruments that were already published in the OJEU such as the Energy Efficiency Directive (EED) and the Energy Performance for Buildings Directive (EPBD) (Buftic, 2024). Unlike the latter article, the present one must acknowledge a small margin of uncertainty as to the details of how the final provisions will be worded. Also, articles and recitals numbers are bound to change in most cases. Still, the compromise texts are worth discussing by themselves as they reveal some interesting patterns developing at the EU level in structuring mandatory Sustainable Public Procurement (SPP).

After sketching the current trend in imposing mandatory SPP rules (§ 2), this article will analyse the CPR in the wider context of the Sustainable Product Initiative (§ 3). The NZIA will be instead read in the light of the growing importance resilience is acquiring in reference to public procurement within a wider framework of a more cautious trade policy (§ 4). In turn, the CSDDD will be taken as an attempt to shed light on ethical issues in global supply chains (§ 5). The conclusions will highlight the different public procurement tools relevant in different contexts (§ 6).

2. Towards mandatory SPP.

The 2014 procurement and concession directives went some way in enabling contracting authorities and entities to prefer products and services with sustainable characteristics. These directives, however, stopped well short of mandating or even nudging SPP. The Commission was of the opinion that mandatory SPP rules were best confined to sectoral legislation. The position has some merits concerning sustainability standards and requirements for products and services, much less so when dealing with minimum ethical standards required from suppliers, as it will be discussed below (§ 5).

However, the Commission position started changing with the Communication on the European Green Deal. The Commission avowed that "Public authorities, including the EU institutions, should lead by example and ensure that their procurement is green." (EU Commission, 2019). In 2020 the shift became tectonic. The Commission's Circular Economy Action Plan moved beyond an exemplary role for SPP. The

Action Plan referred to both the untapped potential for SPP, and the "limitations of voluntary approaches" (EU Commission, 2020, para 2.1). The Commission therefore committed to proposing, "minimum mandatory green public procurement (GPP) criteria and targets in sectoral legislation" and also to "phase in compulsory reporting to monitor the uptake of Green Public Procurement (GPP) without creating an unjustified administrative burden for the public buyers" (EU Commission, 2020, para 2.2.; see Tátrai and Diófási-Kovács, 2021).

As already anticipated, the Commission followed suit, tabling a large number of sectoral reforms including specific SPP provisions. While not amending the 2014 procurement and concessions directives, the new proposals - and the ensuing legislation - much strengthened the links between those directives and sectoral legislation by expressly referring to the former when dictating specific procurement provisions. One instance in point is Article 7 of Directive (EU) 2023/1791 on energy efficiency and amending Regulation (EU) 2023/955 (recast), on public procurement, which refers to contracting authorities and entities (through Article 2(14) and (15)) as defined in, and to the thresholds as set in the 2014 directives.

A veritable legislative tour de force followed and came to its climax in the Autumn/Winter of 2023. While, as just indicated, sectoral provisions now are conceptually aligned with the 2014 procurement and concession directives, for the first time a very high number of rules about how contracting authorities and entities purchase goods and services - construction services included - find themselves outside those directives putting pressure on practitioners to keep abreast with their legislative environment.

3. Minimum mandatory GPP criteria in the new CPR.

The Sustainable Product Initiative (SPI) is one of the flagships of the European Green Deal, being also linked with the Circular Economy Action Plan (CEAP). Its main outcome was the 2022 Proposal for a Regulation of the European Parliament and the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC (EU Commission, 2022b). The proposed regulation is to contribute to making products fit for a climate-neutral, resource-efficient and circular economy, reducing waste and ensuring that the performance of frontrunners in sustainability progressively becomes the norm (Backes & Boeve 2023). A provisional agreement was approved by Coreper on 22 December 2023 and by the ENVI Committee in the European Parliament on 11 January 2024 and is in the process of being finally approved. According to Recital 43 of the Proposal, the Ecodesign Regulation should address construction products when the obligations created by the CPR which was being revised in the same period and its implementation are "unlikely to sufficiently achieve the environmental sustainability objectives pursued by this Regulation".

Consequently, the CPR is linked to and part and parcel of the SPI, but maintains its autonomy. Actually, the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products, amending Regulation (EU) 2019/1020 and repealing Regulation (EU) 305/2011 (EU Commission, 2022c) presented as a concurrent - and at times prevalent objective - a more traditional aim of market harmonisation. The Commission's explanatory memorandum clearly indicated that the proposal was pursuing two general objectives, namely "to (1) achieve a well-functioning single market for construction products and to (2) contribute to the objectives of the green and digital transition, particularly the modern, resource-efficient and competitive economy". Specifically concerning procurement, amendments from the European Parliament contributed decisively to strengthen the latter dimension enhancing an originally weak preoccupation with SPP (Caranta, 2022a).

The agreed text was endorsed on 2 February 2024 by Member States' ambassadors in COREPER and was approved by the IMCO Committee of the European Parliament on 13 February 2024. What is at this stage Recital 90 has been very heavily redrafted and today reads "***Public procurement amounts to 14% of Union's GDP.*** In order to enhance the use of sustainable construction products***, which would contribute to the objective of reaching climate neutrality, improve energy and resource efficiency and in the transition to a circular economy that protects public health and biodiversity*** and to reach alignment with the [Ecodesign for Sustainable Products] Regulation, Member States' public procurement ***practices*** should ***comply with mandatory minimum performance requirements on environmental sustainability for construction products*** set out by ***delegated acts. The Commission*** should ***decide the essential characteristics to be addressed and its implementation in the form of one o[r] more of the following:***

technical specifications, selection criteria*, contract performance clauses or contract award criteria. The mandatory minimum performance requirements on environmental sustainability deal with essential characteristics only and do not pre-empt the possibility for Member States to be more ambitious in their contracts by requesting better performances for the relevant essential characteristics while respecting the harmonised zone*." Present Recital 91 indicates that "*Contracting authorities and entities should, where appropriate, be required to align their procurement with specific green* public procurement *criteria, to be set out in the delegated acts adopted pursuant to this Regulation. The criteria for specific product families or categories, should be complied where contracts require mandatory minimum environmental sustainability performance for construction products as regards their essential characteristics covered by harmonised technical specifications. These minimum requirements* should *be established according to transparent, objective and non-discriminatory criteria. When developing delegated acts related to* green public procurement*, the Commission should take due account of the Member States different geographical, social and economic circumstances. When considering the effect on the market situation, the Commission should take into account, among others, the effects of the requirements on competition, SMEs and the best environmental* products *and solutions available on the market. When considering the economic feasibility for contracting authorities, the Commission should take into account that different contracting authorities in different Member States might have different budgetary capacities. In duly justified cases, contracting authorities should be able to derogate from the requirements such as when there is only one supplier, there are no suitable tenders or its application would lead to a disproportionate cost*".

The parts in bold represent changes/additions compared to the proposal and it is clearly a lot. The most important changes envisaged compared with the proposal submitted by the Commission all turn around a novel understanding that there are differences among the Member States including, but not limited to, their spending capacity. This has led to different measures of flexibility in designing and applying SPP criteria which were instead designed as a rigid one size fits all in the proposal that was in line with the original internal market harmonisation frame of mind.

The rules relevant for SPP are in what is presently Article 84, part of Chapter XI - Incentives and public procurement. The provision too has been heavily reworded and made lengthier during the legislative procedure. A new first paragraph makes it a duty for the Commission to *"adopt delegated acts specifying mandatory minimum environmental sustainability requirements for construction products*". What is expected to become paragraph 3 indicates that those mandatory minimum environmental sustainability requirements may, as appropriate to the product family or category concerned, take the form of technical specifications, selection criteria, performance clauses or award criteria as defined under the procurement directives. This encompassing approach does not only follow the directives but is in line with the articulation of the voluntary GPP criteria developed by the Commission in the past many years.

Contracting authorities and entities must apply those harmonised 'sustainability performance requirements' in procurements covered by Directives 2014/24/EU and 2014/25/EU. The concessions directive is not mentioned. However, this shall not preclude contracting authorities and contracting entities from establishing "more ambitious environmental sustainability requirements" or "additional environmental sustainability requirements" compared to those laid down by the Commission. The lawmakers have taken the lead from scholarly works about the need for minimum harmonisation rather than total harmonisation to avoid more advanced contracting authorities or entities having to walk back from their buying practice and to adapt to less ambitious SPP practices (Andhov et al, 2020).

Article 84 sketches the procedure the Commission has to follow to establish the criteria referring to the need to consult experts designated by each Member State and relevant stakeholders and to carry out an impact assessment and lists a large but not closed number of relevant criteria to be followed. Among the latter are the "environmental benefits entailed by the uptake of products in the highest two performance classes", "the need to ensure sufficient demand for more environmentally sustainable products" but also the possibility to buy more environmentally sustainable products, without entailing disproportionate costs, "the effects of the requirements on competition" and "the impact on, and needs of, SMEs". Finally, an account needs to be taken of the Member States' "regulatory needs and different climate conditions". The list is not closed and is a mix match of different policy preferences or worries, ranging from the environmental to the budgetary, going through more traditional concerns for competition and SMEs.

Budget and insufficient supply are further articulated - and constrained - in the last paragraph of Article 84. The provision bears the hallmarks of hasty last-minute negotiations in trialogue. On an exceptional basis and in specific circumstances, contracting authorities and entities may decide not to apply the

minimum mandatory requirements when after a preliminary market consultation it was either found that (a) "the required construction product can only be supplied by a specific economic operator and no reasonable alternative or substitute exists" or (b) "no suitable tenders or no suitable requests to participate have been submitted in response to a previous public procurement procedure" or (c) "its application or incorporation in construction works would oblige that contracting authority or contracting entity to have disproportionate costs, or would result in incompatibility or technical difficulties". An estimated value difference above 10% may be presumed to be disproportionate if it is "based on objective and transparent data". It is again a mixed match of disparate grounds that in two out of three cases recall grounds for negotiated procedures that look very clumsy in this different context. The condition under (a) would exist only if the Commission did a very lousy job in analysing the market before setting out the requirements. The condition under (b) is most out of place as it is not at all clear why a contracting authority would need a market consultation to find out that there was no suitable tender or request in a previous procurement. To make some sense, it is assumed that the market consultation is needed here to assess whether the dismal result of an early procedure was indeed due to the high sustainability requirements rather than to some other clumsy decisions in the drafting of the procurement documents. The most interesting proviso is the one under (c). Adding to the Commission proposal but in line with recent legislative trends, the lawmakers have introduced an escape valve for more budget-constrained contracting authorities and entities. What may be criticised is the very low percentage (10%) sufficient to allow public buyers to forgo sustainable goods and services. At least, however, the need for market research is expected to limit abuses of the derogation simply motivated by the desire to avoid the possible additional work required by sustainable buying. Moreover, the Member States shall report every three years to the Commission about the use of this provision, thus providing the Commission with information about possible excessive recourse to these exceptions.

4. SPP and beyond: Resilience in the NZIA.

The NZIA proposal (EU Commission, 2023c) was tabled last year soon afterwards the Commission launched the Green Deal Industrial Plan for the Net Zero Age (EU Commission, 2023a). The Plan was a response to massive support packages adopted by other third countries such as the US Inflation Reduction Act. It avowed that "Russia's weaponisation of energy was a major wake-up call for security of supply and tackling dependencies. The competitiveness of many companies has been severely weakened by high energy prices and the disruptions in several supply chains" (EU Commission, 2023a, pp. 6). In this framework, the NZIA aims at promoting investments in the production capacity of products that are key in meeting the EU's climate neutrality goals. The NZIA covers eight technologies, and their components, ranging from solar photovoltaic and solar thermal technologies to grid technologies. Along with the NZIA, the Commission also proposed the Critical Raw Materials Act (CRM Act) to ensure EU access to a secure and sustainable supply of critical raw materials, enabling Europe to meet its 2030 climate and digital objectives (EU Commission, 2023b).

The NZIA was approved at lightning speed by Bruxelles standard. The Parliament and Council found a provisional agreement on 6 February 2024, the COREPER endorsed the agreement on 16 February 2024 and the ITRE Committee of the European Parliament approved the agreement on 22 February. The agreed text is now undergoing the usual clerical corrections and translations before going into the OJEU.

The NZIA is to include provisions specific to public procurement. As what is presently Recital 39a indicates that, "Considering the Union's goal to reduce strategic dependencies on third countries for Net Zero technologies, it is crucial that public support mechanisms, such as procurement and auctions, do not exacerbate such dependencies".

More specifically, what is presently Recital 25 recalls that under the present EU directives contracting authorities and entities may base their award decision on factors other than the price, including sustainability, to stress that when awarding procurement contracts for net zero technology they "should duly assess the tenders' contribution to environmental and social sustainability and resilience in relation to a series of criteria relating to the tender's environmental sustainability, innovation, system integration and to resilience". Concerning social aspects, the following recital stresses the need for compliance with applicable obligations in the fields of Union and national social and labour law established by Union law, national law, as well as in collective agreements or by the international environmental, social and labour law provisions.

Article 19 of the NZIA is dedicated to *Sustainability and resilience contribution in public procurement procedures*. As was the case with the CPR, it has been much rewritten during the legislative process. While respecting the WTO Agreement on Government Procurement (GPA) and other sectoral legislation contracting authorities and contracting entities shall base the award of contracts for the purchase or use of net-zero technologies "on the most economically advantageous tender, which shall include the best price-quality ratio, comprising at least the environmental and social sustainability and resilience contribution of the tender". The tender's environmental and social sustainability and resilience contribution shall be based upon five cumulative criteria. Of particular interest are those listed under (a) and (d), namely (a) environmental sustainability going beyond the minimum requirements in applicable legislation and (d), added during the legislative process, "the tender's contribution to decent wages and working conditions, including where relevant the offering of apprenticeships as well as well-defined objectives in terms of skilling, reskilling and upskilling, to increase the attractiveness of employment in net-zero industry sectors". Inputs from the European Parliament have led to widen the original scope of the proposal that referred to environmental sustainability only to include social aspects.

The most interesting development with the NZIA is however the reference to resilience. This is not totally new in EU public procurement. In *EVN AG and Wienstrom GmbH*, one of SPP's early cases, the Court of Justice held that "the reliability of supplies can, in principle, number amongst the award criteria used to determine the most economically advantageous tender" (CJEU Case C-448/01, *EVN AG and Wienstrom GmbH v Republik Österreich*, ECLI:EU:C:2003:651 para 70). This specific aspect was however not, and *pour cause*, codified in later legislative enactments. In the NZIA, instead, resilience is a centrepiece along with sustainability. The relative novelty forced the co-legislator to try spelling out in more detail the resilience criterion. As indicated in Recitals 30 and 31, the application of this criterion must be without prejudice to the obligations flowing from international trade law, such as the WTO GATT and GPA.

According to a paragraph mostly drafted by the Council, the tender's resilience contribution shall be based on three in principle cumulative criteria, namely: "(a) where applicable, the tender's contribution to the energy security of the Union; (b) the tender's contribution to the resilience of the Union, taking into account the security of supplies by considering the proportion of the products originating from a single source of supply, as determined in accordance with Regulation (EU) No 952/2013. The supply shall be deemed insufficiently secured where a single source supplied, in the last year for which data is available, more than 50% of the total demand within the Union for a specific net-zero technology or the components primarily used for the production of these technologies; (c) where applicable, contribution to innovation by providing entirely new solutions or improving comparable state-of-the-art solutions". While (a) and (c) are rather vague - and one might well be forgiven for thinking that they will hardly meet the requirement stated in the same provision of being "objective, transparent and non-discriminatory" - it is believed that the criterion having more bite is the one spelt out under lett. (b). The first aspect worth mentioning is that, compared to the Commission's proposal, the trigger percentage has been lowered to 50% from the original 65%. The EU lawmakers do not expect individual contracting authorities or entities to determine on their own whether the single source threshold is met. Instead, under what is presently Article 22 the Commission is tasked not just to provide guidance on the application of the resilience criterion but to "make available and regularly update a list of each of the net-zero technology final products listed in the Annex, broken down by the share of Union supply originating in different third countries in the last year for which data is available".

The tender's sustainability and resilience contribution must be weighted between 15% and 30% of at least 30% of the award criteria for the net-zero technology part of a tender, taking into account both the sustainability and the resilience contribution in a balanced way. Recital 32 further stresses that 30% is a threshold. As in the CPR, contracting authorities and entities may go beyond the 30% in requiring sustainability and resilience. Both aspects must be taken into account and reference to a 'balanced' way, coupled with the minimum requirement of 15%, seems to indicate that the two aspects cannot be weighted in a too dissimilar way unless they are cumulatively weighted far more than 30%. minimum threshold. Recital 32 is out of touch with the final text as it indicates a wider freedom to differentiate the weighting of the individual criteria, simply requiring not to ignore 'one completely' and stressing, in its final version, the need to "pay significant attention to the resilience contribution".

In any case, the provisions in the 2014 directives requiring the relative weighting of the criteria chosen by the contracting authority or entity will also apply here (e.g. Article 67(5) of Directive 2014/24/EU).

Social and environmental sustainability are further spelt out in Recitals 26 and 27. Recital 26 avows that social sustainability criteria can already be applied under existing legislation and includes working

conditions and collective bargaining. Going beyond Article 18(2) of Directive 2014/24/EU and the corresponding provision in the other two 2014 directives, the recital places directly on contracting authorities and entities the burden to take appropriate measures to ensure that contractors live up to their social and labour obligations. Concerning environmental sustainability, Recital 27 encourages contracting authorities and contracting entities to take into account elements such as "the durability and reliability of the solution; the ease of repair and maintenance; the ease of upgrading and refurbishment; the ease and quality of recycling; the use of certain substances; the consumption of energy, water and other resources in one or more life cycle stages of the product; the weight and volume of the product and its packaging; the incorporation renewable materials or of used components; the quantity, characteristics and availability of consumables needed for proper use and maintenance; the environmental footprint of the product and its life cycle environmental impacts; the carbon footprint of the product; the microplastic release; emissions to air, water or soil released in one or more life cycle stages of the product; the amounts of waste generated; the conditions for use".

A new provision added to Article 19 during the legislative process doubles down on resilience introducing "prequalification conditions for procurement procedures". More specifically, no more than 50% of the financial value of net-zero technology part of the tender shall originate from third countries which are not signatories of the GPA (a); "all equipment supplied under the net-zero technology part of the tender shall be certified in terms of cyber security insofar as a Union or national cyber security certification framework exists for the equipment" (b) and suppliers must not hail from countries having been the subject of to an IPI measure under Article 6 of Regulation 2022/1031/EU, on the access of third country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument - IPI) (c). However, if this would lead to no suitable offers, the procurement procedure may be restarted including only cyber security as an insurmountable threshold. As indicated by Recital 27, indeed, in line with the Union's Cybersecurity Strategy, contracting authorities and entities are called to "reject offers which have not been certified under the relevant cyber security certification scheme". In itself, the possibility to dispense with the exclusion grounds set in lett. (a) and (c) is a first instance of limited flexibility allowed to contracting authorities and entities in a quite stringent framework.

More derogations are foreseen when the application of the sustainability and resilience contribution criteria would 'clearly' oblige that authority or entity to acquire "equipment having disproportionate costs, or technical characteristics different from those of existing equipment, resulting in incompatibility, technical difficulties in operation and maintenance". "Cost differences shall be calculated only for the cost of the equipment, excluding related services, and may be presumed by contracting authorities and contracting entities to be disproportionate when they are above 30%, compared to a tender without the sustainability and resilience contribution". Unlike with the CPR, there is no express requirement of a prior market consultation, but reference to clear hindrances would seem to demand a robust market analysis to the least. Moreover, the threshold value for 'disproportion' is much higher. This is totally consistent with the aim of reducing or evening out the huge competitive advantage currently enjoyed by non-EU producers, as 10% would have been in most cases not sufficient for the task. Arguably such clear provision and evident aim should not be revoked into doubt by a rather redundant and muddled provision added in the course of the legislative process referring again to technical incompatibility and unreasonably high costs.

With a dose of a wicked sense of humour, Article 19 now provides that the "Member States may adjust their overall budgets allocated to public procurement procedures as well as the related maximum bid levels in order to accommodate the implementation of non-price criteria". More often than not, increasing the budget would be much more a necessity than an option and anyway, there is no legal basis in the Treaties for EU lawmakers to tell the national contracting authorities and entities how to design their procurement budget. But again, the NZIA was negotiated and approved at record speed, so it should be no surprise that it ended up encumbered by some useless but also harmless provisions.

Totally reasonably, Article 19 further indicates that all mechanisms set up to boost sustainability and resilience do not exclude the application of the rules on abnormally low tenders, calling for the exclusion of tenders below market price, including because of the effect of subsidies or because of breaches of "applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions" (Article 18(2) of Directive 2014/24/EU).

Undeniably the NZIA is going to put much pressure on contracting authorities and entities. It requires knowledge of the EU international trade obligations, fine judgment and changes to contract requirements and award criteria. A limited deferral in the application of Article 19 and a higher threshold are therefore foreseen in Recital 33. Moreover, the NZIA provides for guidance from the Commission. Under what should become Article 20, by six months from the entry into force of the regulation, the Commission shall provide clear guidance on the concrete implementation of Article 19 by providing: "(a) a catalogue of concrete and technology-specific potential non-price criteria for renewable energy auctions, which shall differentiate between non-price criteria suitable for competitive bidding processes and non-price criteria suitable as prequalification requirements in renewable energy auctions; (b) a methodology on how to assess a tender's contribution to environmental and social sustainability and resilience referred to in Article 19 (2), points (a) and (d); (c) a methodology on how to assess the cost differences referred to in Article 20(3)". Recital 29 indicates that the Commission is to publish a yearly list of the distribution of the origin of net zero technology final products, broken down by the share of Union supply originating in different sources in the last year for which data is available.

More generally, the Commission is tasked with evaluating the contribution of non-price criteria in achieving the Union's 2030 and 2050 energy and climate targets. It is also empowered to "modify the contribution of non-price criteria in order to foster manufacturing in the Union, ensuring high environmental and sustainability standards, developing value chains across the Union and increasing the competitiveness of Union businesses at global level".

Moreover, under Article 19 the Net-Zero Europe Platform may issue recommendations to the contracting authorities and entities "regarding appropriate higher thresholds for defining disproportionate costs in light of the market circumstances for specific net-zero technologies" (see also Recitals 37 ff). The Net-Zero Europe Platform, established under what is now Article 29, is composed of the Member States and of the European Parliament and is chaired by the Commission. It therefore resembles a Committee, but the European Parliament is involved. The Net-Zero Europe Platform is tasked with advising and assisting the Commission and Member States on specific questions and constitutes a 'reference body', in which the Commission and Member States coordinate their action and facilitate the exchange of information.

Recital 37 further highlights the need for "both the contracting authorities or contracting entities and the producing companies have a clear understanding of each of the sustainability and resilience criteria". Therefore, the Commission should, in close collaboration with the Net-Zero Europe Platform, adopt an "implementing act specifying the criteria to assess the resilience and sustainability contribution, with a particular attention for SMEs, who should have a fair chance to participate in the substantial market for public procurement". The implementing act should also clarify the derogations to the application of the sustainability and resilience criteria. Guidance, to be updated every six months, should be issued on how to link the sustainability and resilience criteria with future legislation and provide "concrete and specific examples and best practices".

Finally, a specific article in the NZIA is dedicated to pre-commercial procurement and public procurement of innovative commercial solutions. The Member States are invited to use pre-commercial procurement for pre-commercial innovative net-zero technologies and public procurement of commercial innovative net-zero technologies and might benefit from EU funding.

The NZIA is part of a wider array of recent measures muscularly addressing the EU external dimension of public procurement and this specific collocation is made plain in the recitals. The first phrase in Recital 31 indicates that the application of the provisions on resilience in public procurement procedures set out in Article 19 should be without prejudice to the application of the already recalled Regulation 2022/1031/EU (IPI). The last phrase of what is presently Recital 39a indicates that both the just recalled Regulation (EU) 2022/1031 and Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market (FSR) should be used to their fullest extent in order to ensure that Union companies do not face unfair competition for public contracts. Article 19 expressly refers to those two regulations and to the WTO GPA as constituting outside margins to the discretion contracting authorities and entities enjoy when applying the NZIA to public procurement and concessions. Both the NZIA and the FSR are instances of a trend to protect EU industries and tenderers from unfair competition from abroad, while the IPI act a bit as a carrot to entice trading partners to agree on mutually beneficial and fair procurement trade agreements.

5. CSDDD for ethical supply chains

As indicated in its Article 1, the NZIA aims at shortening some specific supply chains out of a preoccupation with their resilience. This preoccupation is doubled by the desire to repatriate some production and to strengthen the European industrial base (see also Recital 64). Climate neutrality is a core objective and many of the possible criteria listed in Recital 27 discussed above are linked to circular economy aspects. However, wider sustainability has also a more instrumental role to play at least in so far as public procurements are concerned. Significant shares of the competitive advantage enjoyed by far-flung manufacturers are due to their relative ease in externalising environmental, social and labour costs (Caranta 2023). The use of minimum sustainability award criteria under Article 19 of the NZIA are meant to offset at least partially that advantage.

The CSDDD (EU Commission, 2022a) instead revolves around a more ethically-centred approach aiming at making supply chains more sustainable (Martin-Ortega & Methven O'Brien 2019). Its first recital recalls Article 2 TEU and reiterates that the "Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights as enshrined in the EU Charter of Fundamental Rights". Like other legislative measures discussed above, the CSDDD specifically targets climate change, as it aims to set out a horizontal framework to foster the contribution of businesses towards the achievement of the Union's transition to a climate-neutral and green economy in line with the European Green Deal (EU Commission, 2019) and the UN Sustainable Development Goals - SDGs. It is also to contribute to the European Pillar of Social Rights promotion of decent work worldwide, including in global value chains.

The CSDDD lays down due diligence obligations for companies regarding actual and potential human rights and environmental adverse impacts extending to operations carried out by their business partners in those companies' chains of activities, including supply chains. It also foresees liability for violations of those obligations and an obligation "to adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, compatibility of the business model and strategy of the company with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C".

Unlike the legislative measures discussed above, the CSDDD was at the centre of fierce political fights, with some political parties and Member States strongly opposed to measures requiring ethical efforts from companies (Treviño-Lozano & Uysal, 2023). The COREPER approved a watered-down compromise text on the 15 of March 2024 which was finally greenlighted by the JURI Committee of the European Parliament four days later.

In the all debate, the potential of the CSDDD for reducing the competitive advantage enjoyed by companies operating in less sustainably oriented territories was mostly lost (Uysal & Janssen, 2024). However, under its Article 2(2), the CSDDD clearly applies to third-country companies and this will make it more burdensome for some of them accessing the internal market.

The focus here is on the public procurement provisions of the CSDDD which were not present in the original proposal but were introduced following an amendment from the European Parliament. Article 24 - as it is now numbered - is entitled 'Public support, public procurement and public concessions' but actually only deals with the last two. Under the provision, which is somewhat clumsily drafted, the Member States shall ensure that contracting authorities (a) may lay condition the performance of public and concession contracts on compliance with the obligations resulting from the national measures transposing the Directive or (b) may qualify their voluntary implementation as an environmental or social aspect to be taken into account as part of the award criteria.

The provision is somewhat lax as, besides not including contracting entities, it does not go beyond the mere power of contracting authorities to require compliance with national legislation implementing the CSDDD. This weak approach is confirmed by the first phrase in what is now Recital 63.

The latter part of Recital 63 basically paraphrases the non-EU mandatory exclusions grounds in Article 57(4)(a) and (c) of Directive 2014/24/EU, which are mirrored in the other 2014 directives, and concern the breach of environmental, social and labour law obligations and grave professional misconduct respectively. In doing so the CSDDD replicates the weak method of enforcing sustainable provisions through public procurement followed in the 2014 directives (Andhov et al 2020). Article 18(2) of Directive 2014/24/EU provides that "Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of

environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions". However, and save for the mandatory exclusion in case of child labour and other forms of trafficking in human beings (Article 57(1)(f)), the directive leaves the Member States discretion on whether or not to make mandatory the exclusion for breaches of obligations linked to sustainability. This choice leads to very different enforcement of those obligations among the Member States (Turudić & Dragojević, 2023) and this is in spite of the Court of Justice holding in the *TIM* case that the sustainability principle constitutes a cardinal value of Directive 2014/24/EU (CJEU, Case C-395/18, *Tim*, ECLI:EU:C:2020:58).

The CSDDD is aware of this inherent weakness. The last phrase in Recital 63 indicates that "To ensure coherence within EU legislation and support implementation, the Commission should consider whether it is relevant to update any of these directives, in particular with regards to the requirements and measures the Member States are to adopt to ensure compliance with the sustainability and due diligence obligations throughout procurement and concession processes".

Still, it is argued that the CSDDD already significantly impacts SPP in the EU as it opens the doors to consider the corporate social and environmental policies of economic operators. The last phrase in Recital 97 of Directive 2014/24/EU indicates that "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" (Semple, 2015). The CSDDD instead requires and allows contracting authorities to require economic operators to have exactly one of such policies in place. Under Article 5(1) of the CSDDD, "Member States shall ensure that companies integrate due diligence into all their relevant policies and risk management systems and have in place a due diligence policy that ensures a risk-based due diligence". Those laid down by CSDDD are "applicable obligations in the fields of environmental, social and labour law established by Union law" under Article 18(2) of Directive 2014/24/EU. This is a very significant development, as either it widens what may be considered 'linked to the subject matter of the contract' to include environmental and social corporate policies or it must be read as finally disposing of the requirement (Caranta, 2022b).

Historically, this goes full circle in effacing the neoliberal approach to public procurement narrowly focusing on price or purely economic aspects of what is bought, an approach that was started by Margaret Thatcher forbidding UK public buyers to discriminate against companies doing business with Apartheid South Africa (Kunzlik, 2013).

6. Conclusions: A toolbox for strategic and resilient public procurement.

The three very recent legislative texts analysed in this article are most relevant in showing the paths taken by the EU in the use of public procurement to achieve sustainability and resilience (Caranta & Janssen, 2023).

As already indicated, these developments stem firstly from the desire to achieve climate neutrality which is at the centre of both the CPR and the NZIA but is also one of the preoccupations at the root of the CSDDD as shown by the obligation for covered companies to adopt and put into effect a transition plan for climate change mitigation. The consistent use of public procurement in the fight against climate change is called for by the gravity of the climate crisis and the need to use all available resources, including the huge budgets earmarked for public procurement, to fight it. The EU and its Member States do not come anywhere close to the massive resources mobilised by the US through the Inflation Reduction Act (IRA). Whatever is available must be mobilised.

This naturally leads to the second motive, at the centre of the NZIA, that is resilience. To secure the products - and the materials, thanks to the forthcoming Regulation establishing a framework for ensuring a secure and sustainable supply of critical raw materials definitively approved in March this year - necessary for the climate transition, the EU needs both reliable - and thus shorter - supply chains and to boost its internal production. The latter in turn makes enlisting public procurement inevitable because of scarce resources otherwise available. Moreover, the NZIA is part of a wider set of measures aimed at protecting EU companies from 'unfair' competition by regulatory arbitrage through such recent pieces of legislation as the CBAM, the FSR (Regulation 2022/2560; Blažo,2021; Benvenuti, 2024) and the IPI

(Regulation 2022/1031). It is worth noting in passing that such competition was until recently considered a physiological part if not even a benefit from the liberalisation of international trade.

Protecting EU companies from unfair competition is also a side effect of the CSDDD. Here, however, the main goal is making trade ethical rather than shortening supply chains.

While the focus on public procurement is a shared character of the three legislative measures analysed here, how they instrumentalise procurement is nuanced. The CPR is having recourse to minimum technical specifications, award criteria and contract performance conditions. This approach requires huge efforts on the side of the Commission to draft those contract requirements. As shown by the experience in Italy, that approach is helpful for contracting authorities which need no more than to apply a toolbox they can easily familiarise with (Botta, 2023; Iurascu, 2023). The market too can be expected to adapt fast to uniform requirements that are the same all over the EU. The choice to have 'minimum' mandatory criteria that was pushed through in the legislative process by the European Parliament will allow more ambitious contracting authorities or entities to raise the bar and develop a market for even more sustainable construction products. Overall, this will lead to accrued sustainability benefits, including in the fight against climate change (Caranta & Janssen 2023).

In the course of time, the NZIA will build on product criteria eventually developed under the CPR and the SPI. However, it will go beyond them, including a resilience perspective and leveraging both sustainability and resilience through award criteria needing to have considerable weight. Moreover, a somewhat flexible exclusion regime is foreseen for tenderers and products hailing from some countries. For contracting authorities, award criteria are more complex to manage than standard technical specifications and contract performance clauses. The NZIA foresees guidance from the Commission but also gives a role to the newly established Net-Zero Europe Platform. As for the 'provenance' condition for participation in the award procedures, the Commission will have to make information readily available for contracting authorities and entities.

Award criteria are used by the CSDDD as well, but only to reward economic operators voluntarily adopting due diligence. For those economic operators bound under the CSDDD, compliance with the obligations provided therein is part of performance conditions of the contract. Moreover, Member States may direct contracting authorities and entities to exclude from the procurement economic operators found in breach of the obligations flowing from the CSDDD and public buyers might provide the same under Article 57(4)(a) and/or (c). Here the problem might be one of information, but it will very much depend on how efficiently the European Network of Supervisory Authorities will be capable of disclosing information about sanctions following what is now Article 21(9) CSDDD. In principle, the all system might be easier to operate and more effective than the list of economic operators found in breach of the Deforestation Regulation (Regulation (EU) 2023/1115). Article 25 thereof indeed requires a final judgment which might take years to be handed down (Falvo & Muscaritoli, 2024).

The three legislative measures analysed in this article bear witness to both the relevance and the adaptability of public procurement to achieve societal goals, including the fight against climate change (Lichère, 2022; Lazo Vitoria 2022). Now much will depend on the implementing rules and guidance from the Commission and other actors but, as it is clear from the recent Communication *Securing our future Europe's 2040 climate target and path to climate neutrality by 2050 building a sustainable, just and prosperous society*, the wider relevance of SPP is here to stay (EU Commission, 2024). The Communication stresses that "As the Green Deal must also be an industrial decarbonisation deal, an enabling framework for decarbonised industry should complement a strengthened EU industrial policy with resilient value chains, notably for primary and secondary critical raw materials, and increased domestic manufacturing capacity in strategic sectors and principle of competitive sustainability fully incorporated in public procurement. This would require well-resourced funding mechanisms at the EU level and the creation of lead markets, including through public procurement rules, market-based incentives, standards and labels to steer consumption towards sustainable, near-zero carbon materials and goods" (EU Commission, 2024, pp. 27). The reference to 'competitive' together with sustainability means that the EU industry will be helped to become competitive again. Along with sustainability, resilience is expected to acquire a wider role in public procurement.

References

Andhov, M., Caranta, R., Stoffel, T., Grandia, J., Janssen, W.A., Vornicu, R., Czarnezki, J.J., Gromnica, A., Talbo, K., Martin-Ortega, O., Mélon, L., Edman, Å., Göthberg, P., Nohrstedt, P. and Wiesbrock, A., (2020). Sustainability through Public Procurement: The Way Forward Reform Proposals. *SSRN Electronic Journal*, *25*, 1–58.

Backes, C. and Boeve, M. (2023). Regulating the Producer instead of the Procurer: The EU Sustainable Product Initiative and Extend Producer Responsibility as Ways to Foster the Transition to a Circular Economy. In W. Janssen and R. Caranta (Eds.), *Mandatory Sustainability Requirements in EU Public Procurement Law* (pp. 95-109). Hart Publishing.

Benvenuti, G. (2024). The FSR and Public Procurement. *European Journal of Public Procurement Markets*, *5*(1), …

Blažo, O. (2021). A New Regime on Protection of Public Procurement Against Foreign Subsidies Distorting the Internal Market: Mighty Paladin or Giant on the Feet of Clay?. *International and Comparative Law Review*, 21(2), 138–161.

Botta, G. (2023). Italy: Leading the Way towards Mandatory Sustainable Public Procurement through Minimum Environmental Criteria. In W. Janssen and R. Caranta (Eds.), *Mandatory Sustainability Requirements in EU Public Procurement Law* (pp.189-204). Hart Publishing.

Buftic, A. (2024). Directive 2023/1791 EED: A Step Closer to Mandatory Green Public Procurement Criteria Through Sectorial Legislation. *European Journal of Public Procurement Markets*, *5*(1), …

Caranta, R. (2022a). Towards Mandatory SPP for Buildings/Works. *European Journal of Public Procurement Markets*, *4*(1), 9-22.

Caranta, R. (2022b) Towards socially responsible public procurement. *ERA Forum, 23*, 149–164.

Caranta, R. (2023). Sustainability takes centre stage in public procurement. *Ruch Prawniczy Ekonomiczny i Socjologiczny, 85*(1), 41-54.

Caranta, R. and Janssen, W. (2023). Collective Reflections on the Future of Mandatory Sustainable Public Procurement. In W. Janssen and R. Caranta (Eds.), *Mandatory Sustainability Requirements in EU Public Procurement Law* (pp.255-271). Hart Publishing.

Directive 2014/24. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive Directive 2004/18/EC. http://data.europa.eu/eli/dir/2014/24/oj

Directive 2014/25. Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC. http://data.europa.eu/eli/dir/2014/25/oj

Directive 2023/1791. Directive (EU) 2023/1791 of the European Parliament and of the Council of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955 (recast). http://data.europa.eu/eli/dir/2023/1791/oj

EU Commission. (2019). European Green Deal, COM(2019)640 final.

EU Commission. (2020). A New Circular Economy Action Plan: for a cleaner and more competitive Europe, COM(2020)98 final.

EU Commission. (2022a). Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final.

EU Commission. (2022b). 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.

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

EU Commission. (2023a). Green Deal Industrial Plan for the Net Zero Age, COM(2023) 62 final.

EU Commission. (2023b). Proposal for a Regulation of the European Parliament and of the Council establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) 168/2013, (EU) 2018/858, 2018/1724 and (EU) 2019/1020, COM (2023) 160 final. (Critical Raw Materials Act)

EU Commission. (2023c). Proposal for a Regulation of the European Parliament and of the Council on establishing a framework of measures for strengthening Europe's net-zero technology products manufacturing ecosystem, COM (2023) 161 final. (Net Zero Industry Act)

EU Commission. (2024). Securing our future Europe's 2040 climate target and path to climate neutrality by 2050 building a sustainable, just and prosperous society, COM(2024) 63 final.

Falvo, C. & Muscaritoli, F. (2024). Towards Deforestation-free Procurement? Reflections on the interplay between the new Deforestation Regulation and Public Procurement in the EU. *SAPIENS Working Paper* January/2024.

Iurascu, A (2023). How Will the Adoption of Mandatory GPP Criteria Change the Game? Lessons from the Italian Experience. *European Procurement and Public Private Partnership Law Review, 18*(1), 6-16.

Kunzlik, P. (2013). Neoliberalism and the European Public Procurement Regime. *Cambridge Yearbook of European Legal Studies* 15, 283-356.

Lazo Vitoria, X. (2022). Compra pública verde: una herramienta estratégica de la lucha contra el cambio climático. In Lazo Vitoria, X. (Ed.), *Compra Pública Verde y Cambio Climático* (pp.11-31). Atelier.

Lichère, F. (2022). La Loi Climat et Résilience et la Commande Publique: Lutte Contre le Réchauffement Climatique ou Renforcement de la Résilience Face à ses Effets?. *Actualité Juridique Droit Administratif*, 142-148.

Martin-Ortega, O. and Methven O'Brien, C. (2019). *Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer.* Edward Elgar Publishing.

Regulation (EU) 2022/1031. Regulation (EU) 2022/1031 of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries. http://data.europa.eu/eli/reg/2022/1031/oj

Regulation 2022/2560. Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market. http://data.europa.eu/eli/reg/2022/2560/oj

Regulation 2023/1115. Regulation 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010. http://data.europa.eu/eli/reg/2023/1115/oj

Semple, A. (2015). The link to the subject matter: a glass ceiling for sustainable public contract?. In B. Sjåfjell and A. Wiesbrock (Eds.), *Sustainable Public Procurement Under EU Law* (pp.50-74). Cambridge University Press.

Tátrai, T. and Diófási-Kovács, O. (2021). European Green Deal – the way to Circular Public Procurement. *ERA Forum*, *22*, 523–539.

Treviño-Lozano, L. and Uysal, E. (2023). Bridging the gap between corporate sustainability due diligence and EU public procurement. *Maastricht Journal of European and Comparative Law,* 1.

Turudić, M. and Dragojević, M. (2023), Discretionary Exclusion Grounds in Directive 2014/24/EU. A Missed Opportunity for Socially Responsible Public Procurement?. *European Procurement and Public Private Partnership Law Review*, *18*(1), 27-39.

Uysal, E. and Janssen, W.A. (2024). The European Green Deal and Public Procurement Law Its extraterritorial reach beyond the EU's borders. In M. Campins Eritja and X. Fernández-Pons (Eds.), *Deploying the European Green Deal Protecting the Environment Beyond the EU Borders* (pp. 177-194). Routledge.