

Deploying the European Green Deal

Protecting the Environment Beyond the EU Borders

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10

The European Green Deal and Public Procurement Law

Its extraterritorial reach beyond
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1 Introductory remarks

Public procurement is “the process whereby government bodies purchase from the market the goods, works and services that they need” (Arrowsmith and Kunzlik 2009, p. 9). It accounts for more than 14% of the GDP of the European Union (EU) (EU Commission 2016, p. 4). Environmental protection, enshrined in Article 11 of the Treaty on the Functioning of the EU (TFEU), obliges its integration into all policies and activities. Therefore, it is no surprise that in achieving the European Green Deal (EGD) objectives, public buyers are asked to “lead by example” and use their purchasing power to buy green products, services and works (EU Commission 2019b, p. 8).

Ever since *Beentjes* (ECJ 1988), the possibilities and limits of sustainable public procurement (SPP) have been extensively debated. From the SPP perspective, the rules introduced with the 2014 reform (Directive 2014/23/EU on concessions (EU 2014a), Directive 2014/24 on public procurement (EU 2014b) and Directive 2014/25/EU procurement of utilities (EU 2014c)) allow for more discretion to procure with climate change in mind than their predecessors did. Sustainability considerations are required to be linked to the subject matter (LtSM) of the contract, which also covers processes and production methods (PPMs). This broad scope, which is the codification of the case law of the European Court of Justice (ECJ), permits criteria concerning supply chains, such as lawful working conditions and climate-friendly PPMs that public buyers can observe in their purchasing decisions (ECJ 2002, 2012).

In addition to Directive 2014/24/EU (Public Sector Directive) (EU 2014b), the potential of public procurement in achieving sustainability goals has also been reflected in various areas of *acquis* such as waste, energy efficiency and minimum wage. The use of public procurement as a policy instrument also appears in the proposals following the EGD. As a consequence, Green Public Procurement (GPP) is moving from “allowing” to “requiring” sustainability as a consideration in procurement. The question is no longer *whether* contracting authorities can make green and socially responsible purchasing decisions; the question is now *how* they can do this in light of the climate emergency while including their partners beyond the borders of the EU.

Even though the public procurement rules apply generally to public authorities in their role as “contracting authorities” on the internal market, it is clear that the achievement of the EGD’s objectives requires a discussion of this field of law beyond the EU’s borders. As the extraterritorial effects of public purchasing are often scrutinized for human rights and labour rights in public supply chains, the regulatory gap that reigns over supply chains potentially also frustrates the effectiveness of the fight against climate change. Accordingly, this chapter will explore the extraterritorial influence of EU public contracts beyond the EU’s borders in the light of the EGD in two distinct categories: the focus on the life cycle in deciding on the characteristics of each purchase (including conditions prevalent in supply chains), and sanctioning economic operators for illegitimate conduct taking place outside the EU. In addition to highlighting ongoing issues in both categories, the EGD also employs a proactive approach by introducing mandatory conditions instead of voluntary ones.

The chapter starts by analysing the EU public procurement regime with a particular focus on GPP in Section 2. In Section 3, it investigates how the EGD is transforming public procurement. In an attempt to provide an understanding of this topic, it then explores in Section 4 the extraterritorial effects of public procurement under the EGD with reference to supply chains, the requirement of the link to the subject matter and the life cycle of a procurement beyond the EU (Section 4.1) and the exclusion of economic operators and rejection of tenders due to failure to comply with environmental law (Section 4.2). The chapter also addresses the underlying issue of contract compliance, given that extraterritoriality represents an additional challenge to contract monitoring (Section 4.3). The last Section 5 contains some brief concluding thoughts.

2 EU public procurement law and green procurement

Public procurement regulation focuses on the acquisition of goods, services and works by public bodies to carry out their functions. Nevertheless, it is not detached from other policy areas. GPP is the procurement of “goods, services and works with a reduced environmental impact throughout their life-cycle” (EU Commission 2008, p. 4). Combined with Socially Responsible Public Procurement (SRPP) – incorporating social conditions such as employment opportunities, decent work, social inclusion including persons with disabilities, equal opportunities and ethical trade – it comprises the concept of SPP (EU Commission 2011a).

This ambition to use procurement for the broader public good is situated within the broader context of the internal market. Public procurement is subject to harmonized rules in the internal market to avoid national preferences in the procurement process. However, as SPP practices have improved, the legislation followed the level of ambition in line with the ECJ’s judgements (ECJ 2002, 2012, 2020a). Apart from increasing the simplicity and flexibility of public purchasing, the rules introduced with the 2014 public procurement reform aimed to promote SPP by introducing rules on this practice or by clarifying them further (Sjåfjell and Wiesbrock 2015).

At present, the Public Sector Directive empowers public authorities to include sustainability in contracts within limits, mostly by application of the public procurement principles of equality, non-discrimination, transparency and proportionality. Though directed at the Member States in a rather vague language, Article 18(2) even requires “appropriate measures” to be implemented to ensure compliance with environmental, social and labour law at national, European and international levels in the performance of the contract. More importantly, the Court acknowledged that this provision was of “cardinal value” in the *Tim* case, even though the exact meaning of this seemingly substantive statement remains unclear even today (ECJ 2020a, para. 38, Janssen 2023a).

Traditionally, public procurement rules regulate “how to buy”, while contracting authorities have the freedom to decide “what to buy” (Janssen and Caranta 2023). The legal possibilities for including SPP in a public procurement procedure are multi-fold, including technical specifications, award criteria, labels, exclusion and selection criteria and contract performance conditions. For instance, in setting the characteristics required for their purchase, public buyers can draft their technical specifications or include special environmental conditions in the public contract. The characteristics that come under technical specifications may include (among many others) quality levels, environmental and climate performance levels, and packaging (EU 2014b). Emissions offsetting can also be incorporated as a contract performance condition (EU Commission 2011b, p. 38). While technical specifications (Article 42) and contract performance conditions (Article 70) establish minimum mandatory criteria in a public procurement procedure, the award criteria (Article 67) are based on competition and can further spur innovation. Ultimately, award criteria aim to ensure that the contract will be granted to the most economically advantageous tender (MEAT)¹ based on the criteria established by the contracting authority.

The determination of the MEAT is, however, not necessarily confined to purely economic conditions (ECJ 2002, para. 55). From the perspective of the public buyer, the MEAT can be determined according to “the price or cost, using a cost-effectiveness approach, such as life-cycle costing” and “may include the best price-quality ratio”. The best price-quality ratio can be determined based on the quality including environmental characteristics, while life-cycle costing (LCC) comprises all costs over the life cycle of the purchase. These include the cost of use such as consumption of energy and other resources; end-of-life costs such as collection and recycling costs; environmental externalities such as the cost of emission of greenhouse gases (GHGs) and other pollutant emissions, and other climate change mitigation costs. Besides, contracting authorities are free to determine the weighting of the non-economic criteria (ECJ 2003, para. 39).

Under Article 43, public buyers may also avail themselves of the option of using corresponding labels for the aspects required under technical specifications, award criteria and contract performance conditions. Using eco-labels is feasible, especially in cases where the underlying criteria cannot be easily verified by the contracting authorities such as detailed conditions of manufacturing. For instance, the underlying criteria in labels, such as *Blaue Engel* and *Nordic Swan*, may concern

PPMs. The legality of labels referring to PPMs was confirmed by the ECJ in *Max Havelaar* (ECJ 2012).

Often used in practice and subject to the principles of public procurement, the grounds for exclusion and selection criteria provided under the Public Sector Directive allow public buyers to select their tenderers. With reference to Article 57(4) (a), contracting authorities can exclude economic operators in breach of their obligations listed in Article 18(2). The latter provision covers both international agreements, such as the Vienna Convention for the Protection of the Ozone Layer (UN 1985) and EU environmental law, such as the rules concerning the shipment of waste arising from Regulation 1013/2006 (EU 2006, ECJ 2021b, para. 53). Therefore, the failure to abide by the rules arising therefrom can lead to the exclusion of a tenderer. Since the ground for exclusion provided for the breach of obligations falling under Article 18(2) is not mandatory, the fate of an economic operator in breach is left to the discretion of the public buyer, which decides whether or not to apply the ground for exclusion. In the same vein, under Article 56, contracting authorities have the option to not award the contract to the tenderer who submitted the MEAT, if the tender is not in compliance with the obligations provided under Article 18(2).

The only exception under the Directive mandating rejection for failure to observe the said obligations is Article 69(2)(d) related to abnormally low tenders. Even though this provision reflects a more stringent approach, the fact that the concept of “abnormally low” is not defined and that even tenders valued at zero euros are not automatically considered as such challenges the effectiveness of the provision (ECJ 2020b, para. 36). Furthermore, this provision also appears difficult to meet due to the need for a causal link between the violation and the existence of an abnormally low bid, or the difficulty of establishing a violation. The latter requirement is similarly unclear for the facultative ground for exclusion mentioned above since it can be proven by “any appropriate means necessary”. Nonetheless, the ECJ has confirmed in *Sopra Steria Benelux* that abnormally low bids cannot simply be ignored by contracting authorities and require an investigation, which could similarly apply to cases under Article 69(2)(d) (ECJ 2023).

Article 58 allows selection criteria that relate to the operators’ suitability to pursue the professional activity, their economic and financial standing and their technical and professional ability. Supply chain management and tracking systems or environmental management measures can be used as evidence of technical ability, provided that they only concern the performance of the contract to be awarded. For instance, technical requirements concerning pollution emissions from vehicles can be classified as selection criteria which relate to technical and professional ability (ECJ 2021a, para. 86). Pursuant to Article 62, environmental management systems can be verified through the production of certificates, provided that they refer to Eco-Management and Audit Scheme (EMAS) (EU 2009b) or equivalent management systems.

Finally, pursuant to Article 70, contracting authorities may incorporate special contractual clauses into their public contracts to be complied with by the successful tenderer in the performance of the contract. As illustrated by Recital 97 of the Directive, these clauses can require that manufacturing of the supplies is free of toxic chemicals or that services be provided only with energy-efficient machines. As will

be seen in Section 4.3, special clauses can also be used to monitor compliance and to deter non-compliance in performance (EU Commission 2016). All in all, then, the Public Sector Directive offers a toolbox to public buyers wishing to buy green.

As will be discussed below in Section 4, the use of these legal possibilities by public buyers will inevitably ensure that the rules on public procurement have an extraterritorial effect – not just through the participation of bidders from outside the EU in public procurement procedures but also (and above all) because the performance of a public contract, described in the corresponding bid, often requires foreign production processes with long supply chains that will mean that the arm of public procurement law will stretch beyond the internal market into the global market.

3 Public procurement in the EU Green Deal

As the use of public procurement as a policy tool increases, it has in recent years almost become customary under the EGD that each legislative proposal in the EU should also embrace the potential of GPP. Going beyond GPP as it currently stands, the Deal promotes climate-friendly public procurement (EU Commission 2019b, p. 21). However, it does not necessarily answer the question of how it can perform this duty. When the European Commission (EC) supplemented its guidance on GPP, it also took necessary steps to introduce GPP-specific rules in legislative proposals. Whilst considering the impact of the EGD, the role of the Commission in providing assistance (Section 3.1) will be continued, but the legislative approach will change significantly by adding mandatory sustainability requirements to the existing body of law that provides the legal possibility to SPP in public procurement procedures discussed above (Section 3.2).

3.1 Nudging the Member States towards GPP

Prior to the EGD, EU-level GPP-specific obligations were scarce. The limited number of mandatory requirements were either purchase-specific, such as the Clean Vehicles Directive (EU 2009a), or they covered only central government authorities, such as the Energy Efficiency Directive (EU 2012). Except for these limited mandatory criteria, the Commission has always aimed to uphold green purchases by providing guidance to public buyers. The Commission's guidance documents, such as Buying Green Guides (EU Commission 2004, 2011c, 2016) and Buying Social Guides (EU Commission 2011a, 2021d) aim to raise awareness. By means of its soft law powers, the Commission provides a toolbox for environmentally friendly and socially responsible criteria at various stages of procurement within the limits of the underlying framework. However, they ultimately only contain a collection of good practices and disseminate SPP experiences from public buyers. The underlying assumption seems to have been that this approach would “nudge” public buyers towards sustainable procurement.

The assistance approach in buying green continues with the EGD. Under the Deal's objectives, the Commission urged buyers that labels and LCC should be used when possible (EU Commission 2020a, p. 12). As clean public procurement

is key in the single market, public buyers are also asked to push for the creation of a market for clean technologies (EU Commission 2018c, p. 19, 2020c, p. 3). The “Energy Efficiency First Principle” promotes a level of energy efficiency that is greater than that originally provided for in the Energy Efficiency Directive (EU Commission 2021b). The use of Level(s) to assess and report the performance of buildings will also facilitate life-cycle assessment in public procurement (EU Commission 2020b, p. 14, 2020i).

Dissemination of best practices will allow guidance and training to be transferred to public buyers, and remains an important line of activity. In addition to public procurement-specific guidance, the professionalization of GPP through the development of green skills among public officials is also prioritized (EU Commission 2020f). “Public Buyers for Climate and Energy” will also disseminate good practices (EU Commission 2020b). Finally, the Commission has noted that it plans on introducing guidance on nature-based solutions in public procurement (EU Commission 2020d).

3.2 Mandating GPP through sectoral legislation

In addition to the guidance in GPP which predates the EGD, the Commission is now also committed to introducing minimum mandatory GPP criteria through sectoral legislation, funding or product-specific legislation combined with compulsory monitoring (EU Commission 2020a, p. 12, 2020b, p. 5, Janssen 2020). As the Commission states, the aim is to make sustainable products the norm and to use public spending as leverage (EU Commission 2022a, p. 6).

The mandatory GPP criteria can be found in proposals for different sectoral legislation, such as the Proposal for Eco-design for Sustainable Products Regulation (EU Commission 2022c) or the Proposal on the revision of the Construction Product Regulation (EU Commission 2022d). Without prejudice to the principles of public procurement, the Net-Zero Industry Act prompts public buyers to assess the “sustainability and resilience contribution” of the tender when awarding contracts for net-zero technologies (EU Commission 2023b). Additionally, sector-specific temporary exclusion from public contracts, along with other types of penalties, will also be applied for any breach of the obligations introduced. Examples of specific exclusions can be found in the new Regulation on Deforestation-free Products (EU 2023a) or the Proposal for a Green Claims Directive (EU Commission 2023a). With the recast Directive on Energy Efficiency Directive, which was recently adopted (EU Commission 2021e, EU 2023c) and the Proposal for a recast Energy Performance of Buildings (EU Commission 2021f), the limited scope of the existing Directives is to be extended.

Apart from the recently renewed voluntary GPP criteria, food is one of the sectors where mandatory GPP criteria will also be introduced (EU Commission 2021a, p. 8, Schebesta and Plana Casado 2023). The priority will be the promotion of healthy and sustainable diets in schools and public institutions (EU Commission 2020e, p. 13). As part of the EU Strategy for Sustainable and Circular Textiles (EU Commission 2022b, p. 4), mandatory criteria for textiles will also see the light by 2024 (Koszevska and Ligte 2023).

Interestingly, while the EU's approach to GPP is transitioning from voluntary to mandatory, there is no precise technique that marks the way forward (Janssen 2023b). The proposals prescribing mandatory criteria opt for different approaches to leveraging public procurement. On the one hand, some proposals introduce obligations concerning what to buy (EU Commission 2020g); others empower the Commission to adopt delegated acts to establish mandatory technical specifications, selection criteria, award criteria, contract performance clauses or targets to introduce sustainability requirements (EU Commission, 2022d). However as seen in the Batteries Regulation, recently entered into force, the approach may change during the legislative process (EU 2023b). Besides, sector-specific grounds for exclusion aim to remedy the lack of mandatory exclusion for breaches of the obligation provided by Article 18(2) of the Public Sector Directive.

In summary, the move to mandatory requirements is still unfolding, but it is likely to impact many green legislative instruments in the EU. Clearly, the move towards mandatory requirements takes away the discretion to procure sustainably or non-sustainably, and thereby emphasizes the need to consider the extraterritorial effects of the EGD.

4 The extraterritorial effects of public procurement under the Green Deal

With the EGD as a driving force for SPP, the extraterritorial effects of public procurement law appear to come in two categories.

Firstly, if the supply chains of the economic operator go beyond the borders of the EU, the production processes of this operator may result in these effects. The limitation to include Corporate Social Responsibility (CSR) policies in the criteria of a procedure is also relevant in this case. Extraterritorial effects derive, thus, from the set-up of a public procurement procedure which ultimately leads to a contractual agreement between a contracting authority and an economic operator (Section 4.1). In a broader, more academic scope, this category falls within the remit of discussions on the so-called "Brussels effect" in which the influence of EU law may lead to compliance with EU law across the globe (Bradford 2020).

Secondly, extraterritorial effects could take place when the said economic operator violates environmental law outside the EU and is, as a consequence, excluded from participation in a public procurement procedure in the EU, or when an economic operator submits an abnormally low bid that is in breach of environmental law and the bid is rejected for a similar violation. Extraterritorial effects derive, thus, from a violation of law that influences a public procurement procedure (Section 4.2). In this light, the proposal for a Corporate Sustainability Due Diligence Directive (CSDD) concerns an important development for the future. More fundamentally, this category links up with discussions about the expansion of jurisdiction beyond the EU (Cremona and Scott 2019). It is clear that contract compliance is essential for all these effects to actually materialize (Section 4.3).

4.1 Extraterritorial effects of PPMs of an economic operator's supply chain: relevance of the link to the subject matter of the contract and life-cycle thinking

As a first category, extraterritorial effects come to the fore through the set-up of the public procurement procedure, and the relevance that is given to PPMs in this procedure. Accordingly, for instance, technical specifications set characteristics of the works, services or supplies, whereas contract performance conditions introduce special conditions to be complied with during the performance of the contract, and award criteria allow submitted tenderers to be evaluated based on the weightings of each criterion to determine the MEAT from the perspective of the public buyer. Nevertheless, the underlying conditions to be included under technical specifications, award criteria and contract performance conditions are still required to be LtSM. This requirement, which arises from the ECJ case law, operates as a “glass ceiling” for SPP (Semple 2015, p. 74), and thereby also for the extent to which extraterritorial effects can exist.

The requirement was initially introduced for award criteria in *Concordia Bus*. The decision of the city of Helsinki to set reductions in emissions and noise levels as award criteria for determining the MEAT for urban bus transport services was challenged (ECJ 2002, paras. 43–44). The ECJ provided that the MEAT need not be decided on a purely economic basis; however, this does not give the contracting authority unlimited freedom of choice (ECJ 2002, paras. 55–59). Though the Court did not define what the subject matter of a contract means, it specified that any award criteria should be LtSM of the contract (ECJ 2002, p. 69).

The scope of the requirement was clarified by a subsequent preliminary question referred to the ECJ concerning a public contract for the supply of electricity. In *EVN Wienstrom*, the MEAT was to be determined based on the impact on the environment (ECJ 2003, para. 15). The award criterion was “the amount of energy that can be supplied from renewable energy sources in excess” of the expected annual consumption (ECJ 2003, para. 18). The Court ruled that it was not LtSM, because the criterion concerned “the amount of electricity produced from renewable energy sources in excess of the expected annual consumption” (ECJ 2003, para. 68).

The requirement was then incorporated in the 2004 Public Sector Directive. The new provision did not explain the concept further, but provided examples of criteria that were LtSM, such as quality, environmental characteristics and cost-effectiveness. Unlike the then-applicable Directive, the Commission's soft law extended the requirement to cover technical specifications and contract performance conditions (EU Commission 2001, 2004). In its first guide on how to buy green, the Commission provided that PPMs can indeed be LtSM. While the requirement of electricity produced from renewable energy sources was deemed to be LtSM, a requirement that a furniture manufacturer was to use recycled material was deemed to lack the necessary link (EU Commission 2004, p. 23). Later, in *Max Havelaar*, though the presence of the LtSM was challenged by the Commission, both organic production and fair trading were found to be in compliance with the law (ECJ 2012, paras. 89–90).

With the 2014 Directive, the requirement was formally extended to technical specifications and contract performance conditions as well. In addition, with regard

to the award criteria, a definition was provided. According to Article 67(3), a condition is LtSM if it relates to works, supplies or services to be provided under that contract in “any respect and at any stage of their life cycle”. This includes a “specific process of production, provision or trading” or “a specific process for another stage of their life-cycle” even if the conditions do not alter the material substance. The scope of the requirement is the same for technical specifications and contract performance conditions under Articles 42 and 70, respectively.

The life-cycle approach in defining the subject matter is also in line with the concept of LCC, one of the ways in which the MEAT can be identified. In the determination of the economic advantage of tenders and monetization of the total cost, LCC allows consideration of the cost relating to the acquisition, cost of use, cost of maintenance, end-of-life cost and the cost of environmental externalities during the life cycle. Pursuant to Article 68, to the extent that monetary value can be determined and verified, externalities such as “cost of emissions of GHGs and other pollutant emissions and other climate change mitigation costs” can be used to determine the economic advantage of each tender.

In this light, it is also worth noting that the life-cycle thinking underlying the Public Sector Directive *does* allow externalities relating PPMs – even when they take place beyond the EU borders – to be taken into consideration in deciding what to buy, even though the limits of the LtSM are also clearly visible. Various conditions concerning production, such as the controlled use of pesticides in the production of cotton in textiles procurement (EU Commission 2018d) or the use of paper from sustainably managed forests or recycled sources for cleaning services (EU Commission 2020h) can be included among the criteria that are LtSM. Considering the objectives of the EGD, public buyers can lead by example by observing the environmental externalities throughout the life cycle, particularly also outside the EU. However, whether the regulation of public procurement under the EGD will ultimately affect PPMs depends heavily on how public buyers apply the mentioned options to include PPMs, and also depends on the GPP criteria to be adopted in the future.

For instance, construction procurement has a substantial role to play in the journey to net zero (Mosey *et al.* 2022). The proposal for the Revision of a Construction Products Regulation lays down harmonized conditions for the marketing of construction products. The aim is to encourage the demand for “better-performing products” (EU Commission 2022d). In addition, the proposal empowers the Commission to develop GPP criteria for construction products, which can take the form of technical specifications, selection criteria, award criteria, contract performance clauses or targets. However, it does not establish the stage of the life cycle that such criteria and targets may refer to, which is a key element in the determination of their extraterritorial effects. As such, mandatory criteria can have an extraterritorial effect provided that they establish requirements concerning PPMs.

At the moment, though, the scope of the GPP requirements to be introduced can only be assessed speculatively based on the content of the provisions of the proposal and on the existing voluntary GPP criteria in the construction sector. Pursuant to the aforementioned proposal, environmental sustainability in the construction sector includes steps to be taken from the procurement of the raw material to its

final disposal, covering a wide range of economic operators, such as manufacturers, distributors and suppliers. Product requirements are provided in Annex I of the Proposal, in which Part C, concerning inherent product environmental requirements, states that products shall be designed, manufactured and packaged in a way that the requirements are in accordance with the state of the art. These requirements include maximizing durability in terms of the expected average life span, minimizing whole-life-cycle GHG emissions or energy use and energy efficiency.

All in all, the product requirements relating to PPMs will have an extraterritorial effect if the PPMs of the products made available in the EU market are carried out, either fully or partially, outside the EU. Accordingly, if the GPP criteria to be adopted – for instance, award criteria – concern the whole-life-cycle GHG emissions, the criteria may have an extraterritorial effect if the PPMs take place in a third country. However, if the criteria concern energy use and efficiency, this will not necessarily alter the environmental externalities associated with PPMs, but rather those associated with consumption. In that case, it can only work as a demand-pull effect, encouraging the manufacturing of products with higher performance but without intrinsically changing the production externalities. A considerable impact is likely if product-specific mandatory GPP criteria adopt a specific LCC methodology.

Apart from the mandatory criteria to be adopted, several different tools may also facilitate LCC in award criteria. The building sector is responsible for roughly half of all energy consumed in Europe based on the full life cycle; this is so particularly because the increased focus on high energy performance leads to a rise in embodied emissions and as a result, embodied carbon levels in buildings may be two to four times higher than the emissions in the operational stage (EU Commission 2021c).² The use of Level(s) to assess and report the performance of buildings will facilitate life-cycle assessment in public procurement (EU Commission 2020b, 2020i). These Level(s) will work as a common language to measure the global warming potential by also accounting for the embodied carbon. Therefore, if used in public procurement, this will likely also have an extraterritorial effect.

4.2 Extraterritorial effects of an economic operator's violation of environmental law: the relevance of CSDD and the Public Sector Directive

The second category concerns the violation of environmental law *outside* the EU by economic operators and the subsequent exclusion or rejection that may follow in a public procurement procedure *in* the EU. Particularly relevant here is Article 18(2) of the Public Sector Directive, which obliges Member States to take “appropriate measures” to ensure that tenderers comply with environmental, social and labour laws in the “performance of public contracts”. Nevertheless, the provision does not impose any explicit obligation for public buyers or their suppliers and contractors. Accordingly, the national implementation would necessarily contain conditions to give effect to this provision. Most importantly, from an extraterritorial perspective, it would be necessary to establish at least that an international

environmental law treaty has been violated. A broader interpretation would be to conclude that the reference to “national law” also includes the national law of a third country instead of only the national laws of the EU Member States, but such an interpretation might prove far-fetched if relied upon before the courts.

When discussing extraterritorial effects in this category, two provisions in the Public Sector Directive with specific reference to Article 18(2) are relevant: the facultative ground for exclusion provided by Article 57(4) and the provision on abnormally low tenders in Article 69(3), which were already discussed in the light of their interpretative difficulties in Section 3. If we add the imprecision of Article 18(2) discussed in the previous section as well, it appears that little can be said about extraterritorial effects as they appear ineffective in practice. Interestingly, however, the long-awaited proposal for a CSDD has opened up the discussions on due diligence requirements in public procurement and might indeed circumvent some of the issues mentioned above regarding these provisions on exclusion and rejection.³

Unlike the Parliament’s initial recommendation which suggested that failure to comply with due diligence obligations might be sanctioned with temporary or indefinite exclusion from public procurement procedures, the Commission’s proposal was silent on the matter (EU Commission 2022e). While the text adopted by the Council stipulated that this legislation does not prejudice the application of the exclusion grounds provided under the Public Sector Directive, it did not include any procurement-specific provision (EU Council 2022). Notably, however, the final text adopted by the Parliament considerably altered the role of public procurement in the proposal (EP 2023). Not only did it introduce a public procurement-specific penalty for failure to appoint an authorized representative, it also provided that (non-) compliance with due diligence obligations can be taken into account “as one of the environmental and social aspects” in the award of public contracts (EP 2023). It also urged the Commission to review the public procurement rules in order to determine if new rules on due diligence call for amendment of the Public Sector Directive. At the time of writing this contribution, the trilogue is ongoing, meaning that the text is yet to be finalized.

As established in Section 3, requirements taking into consideration CSR or prescribing that tenderers must have general social and environmental policies in place are unlawful as selection criteria (EU 2014b). However, the proposal for a CSDD Directive might be able to circumvent this restriction to an extent. Though referring to CSR policies as economic undertakings remains illegal as it lacks the necessary LtSM, Caranta argues that with the CSDD, compliance with corporate sustainability will “be checked in order to assess the reliability of tenderers” (Caranta 2022, p. 162). Nevertheless, assessing the reliability of tenderers with regard to their compliance with due diligence obligations for their conduct or more specifically in their tender would still be voluntary for contracting authorities, respectively, under Articles 57(4)(a) and 56.

Nevertheless, to the extent that the mandatory exclusion for breach of obligations concerning environmental law is provided for in the upcoming legislation, decisions concerning the choice of supplier may have an impact on the conduct of

the economic operators intending to submit tenders for future contracts. Accordingly, whether the rules introduced with the EGD that assess an economic operator's compliance with environmental law have an extraterritorial effect depends again on the obligations that buyers must observe if they are to avoid exclusion and/or rejection of their tenders.

For instance, the Regulation on deforestation-free products aims to constrain deforestation and forest degradation (EU 2023a).⁴ In addition, it specifies that temporary exclusion from public procurement procedures will be applied in case of the infringement of provisions by operators and traders. While the operator is the person who places the commodity and products on the EU market or exports from the EU market as part of a commercial activity, the trader is any person in the supply chain other than the operator in the course of a commercial activity. Whether the provision on exclusion due to the breach of the obligations introduced with the Regulation has an extraterritorial effect can as such only be determined based on the content of the obligation breached by a potential tenderer.

Pursuant to the new Regulation, only the commodities and products fulfilling the following criteria can be made available in the EU market: those that are deforestation-free, produced in compliance with the legislation in the country of production and covered by the due diligence statement. Therefore, to the extent that operators are required to carry out due diligence to ensure compliance with the rules on placing the commodities and products in the EU market, the scrutiny over deforestation-free PPMs will, thus, bring about extraterritorial effects. As a result, the breach of obligations on PPMs and failure to carry out due diligence call for the exclusion of the said economic operator. This condition is not limited to the performance of the contract, but also pertains to the prior conduct of the economic operator. In this case, even if the subject matter of the contract to be awarded does not carry any risks, public procurement can be used to ensure compliance with obligations introduced with the EGD initiatives beyond EU borders.

4.3 Ensuring that extraterritorial effects materialize: contract compliance

Even if we could establish that extraterritorial effects exist *de jure*, they would not exist *de facto* without proper contract compliance. Unless monitored, green commitments in public contracts are ineffective (EU Commission 2016, p. 66). Failure to monitor compliance with contractual obligations allows contracts to be awarded to disingenuous tenderers, whereas honest tenderers are disadvantaged because of their sincerity (Andhov *et al.* 2020, p. 25). Moreover, the inability and/or unwillingness of the contracting authority to verify the commitments of a tenderer could infringe the principle of equal treatment (ECJ 2003, paras. 51–52). In addition, contract monitoring becomes imperative not only to ensure value for money but also to prevent the risk of illegal contract modification.

Whether a criterion concerns the EU or territory beyond the EU borders does not alter the need for contract monitoring. However, ensuring compliance becomes more complex in the case of the latter. The Public Sector Directive does not provide how contracts can be monitored to verify the contractual commitments of

successful tenderers. Nevertheless, voluntary GPP criteria provide different monitoring tools that can be incorporated as contract clauses depending on the consideration and the subject matter of the contract.

The importance of contract monitoring can be found in many initiatives under the EGD, for instance, in the Circular Economy Action Plan (EU Commission 2020b, p. 8). Nevertheless, they refer to monitoring at the Member State level whereas compliance monitoring requires verification to ensure that what is delivered corresponds to what has been promised. Still, monitoring for contract compliance depends on the professionalization of public procurement and capacity-building, which is one of the goals of GPP under the EGD. In particular, mandatory GPP criteria and targets to be adopted under the proposals should include contract performance conditions that address different types of performance monitoring as the voluntary GPP criteria.

Contract monitoring tools can be categorized based on the person carrying out the monitoring duties: self-monitoring, monitoring by the public buyer and third-party monitoring (EU Commission 2016, p. 66, Cafaggi and Iamiceli 2015, p. 358). The fitness of each tool depends on the contract, the subject matter and the underlying condition monitored. For instance, a successful tenderer may be required to record the necessary documents and report compliance itself (EU Commission 2018b, p. 22, 2019a, p. 15). Suppliers can be asked to evaluate and, if necessary, correct the measures taken for environmental management over the duration of the contract (EU Commission 2019a, p. 36). The monitoring can be conducted by the contracting authority, which may take the form of spot checks (EU Commission 2018a, p. 13). Alternatively, monitoring can be carried out by an independent third party that will certify compliance (EU Commission 2018b, p. 46). Various combinations of these tools can be used. For instance, carbon footprint calculation methodology commissioned by the public buyer and carried out by experts based on the information provided by suppliers can be used to measure the global warming potential of the purchase (EU Commission 2014). The most suitable tool can be found in the sector-specific GPP criteria based on the condition monitored. This is also true of the mandatory contract performance conditions to be introduced.

5 Final remarks

It has become clear that the EGD has re-emphasized the importance of SPP, and more particularly GPP, in the EU. It continues to nudge contracting authorities in this direction, which is vital in the fight against climate change. The legislative approach under this Deal has also become more aggressive by focusing on mandatory rather than only voluntary sustainability requirements in order to procure sustainable outcomes. In doing so, it is also increasing the existence of extraterritorial effects for procurements that fall under the Public Sector Directive.

In this chapter, we have argued that there are two categories of extraterritorial effects: those on the PPMs in an economic operator's supply chain or those due to the violation of environmental law, resulting in the potential exclusion or rejection from a procurement procedure. The legislative acts resulting in the EGD related to

procurement appear to foster these two categories in different ways, but much will ultimately depend on how the mandatory regulations are developed. Of particular interest here is the concept of CSDD, because it opens the door to assessment of supply chains beyond the EU. Finally, regardless of the potential of GPP beyond the EU's borders, GPP criteria applied by public buyers do not serve their purpose unless the performance of the contract is monitored, meaning that, without it, extraterritorial effects would cease to exist entirely. The next step in this line of discussion will be how to consider such effects from a normative perspective. Are these effects (un)desirable, and, should they be expanded or curbed in the future?

Notes

- 1 This acronym is rather unfortunate in hindsight, given the unsustainable connotation of excessive meat consumption in the fight against climate change.
- 2 For CBAM, see Chapter 2.
- 3 See Chapter 12.
- 4 See Chapter 5.

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