

STUDY

Requested by the CONT Committee



Due Diligence in EU Institutions' Own-Account Procurement: Rules and Practices



Policy Department for Budgetary Affairs
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Due Diligence in EU Institutions' Own-Account Procurement: Rules and Practices

Abstract

This study, commissioned by the European Parliament's Committee on Budgetary Control (CONT), investigates whether EU institutions implement human rights and sustainability due diligence when they purchase goods and services. Based on documentary analysis and interviews, this study finds that sustainability due diligence is lacking in procurement carried out by the European Parliament, the European Commission and the EU agencies. Accordingly, it makes recommendations to promote better integration of due diligence into the procurement of goods and services by the EU institutions.

This document was requested by the European Parliament's Committee on Budgetary Control (CONT).

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CONTENTS

LIST OF ABBREVIATIONS	5
LIST OF BOXES	6
LIST OF FIGURES	6
EXECUTIVE SUMMARY	7
1. INTRODUCTION	10
1.1. Context for the Study	12
1.2. Scope and limitations	13
1.3. Aims and objectives	14
1.4. Research questions	15
1.5. Methodology	15
1.5.1. Desktop analysis including scholarly literature review	15
1.5.2. Case study selection	15
1.5.3. Expert interviews	16
1.5.4. Peer review and input from European Parliament services	16
1.5.5. Research ethics	16
1.5.6. Data management	17
1.5.7. Terminology and glossary of key terms	17
1.6. Outline of the study	19
2. LEGAL AND POLICY FRAMEWORK FOR EU INSTITUTIONS' OWN-ACCOUNT PROCUREMENT	20
2.1. EU procurement law: rules on purchasing by public authorities in Member States	20
2.2. EU institutions' own-account procurement: legal framework	21
2.2.1. General principles and link to EU Procurement Directives	21
2.2.2. EU decentralised Agencies	23
2.3. Sustainable procurement: international and EU legal and policy frameworks	23
2.3.1. International policy: a turn towards sustainable public procurement	23
2.3.2. Sustainable procurement in the EU: An evolving regulatory framework	25
2.3.3. Specific provisions of the 2014 Procurement Directive relating to sustainability and their application in practice	29
3. DUE DILIGENCE AND PUBLIC PROCUREMENT	40
3.1. Human rights due diligence	40
3.2. Due diligence and responsible business conduct	40
3.3. Corporate due diligence standards: EU law and policy	41
3.4. Due diligence in public procurement law and policy	43
4. CASE STUDIES	47
4.1. European Parliament	47
4.1.1. Institutional and procurement activity overview	47

4.1.2. Legal and policy framework	48
4.2. European Commission	56
4.2.1. Institutional and procurement activity overview	56
4.2.2. Legal and policy framework	57
4.2.3. Current practices concerning SPP and due diligence	57
4.3. EU Agencies	61
4.3.1. European Union Agency for Fundamental Rights (FRA)	62
4.3.2. FRONTEX	64
4.3.3. European Union Agency for the Space Programme (EUSPA)	66
4.4. GPP Helpdesk	68
5. EVALUATION AND RECOMMENDATIONS	69
5.1. Supply chain due diligence for EU institutions	70
5.2. Extending EU institutions' recourse to sustainable procurement approaches available under the existing legal framework	72
5.2.1. Exclusions of suppliers from EU institutions' tenders	72
5.2.2. Monitoring suppliers' compliance with minimum standards during contract performance	73
5.2.3. Accessible whistleblowing and remedial mechanisms	74
5.2.4. Contract clauses	75
5.3. Aligning EU procurement law with EU sustainability and due diligence standards	76
5.3.1. Integrating due diligence and binding sustainable procurement goals into the EU Financial Regulation	77
5.3.2. Keeping rules for EU institutions' own-account procurement up to date with EU sustainable procurement law	78
5.3.3. Strengthening mandatory exclusions of tenderers from procurement by EU institutions	79
5.3.4. Integrating sustainable procurement into general budgetary control mechanisms	80
5.3.5. EU institutions' own-account procurement and the EU CSDDD	81
5.3.6. Updating the EU Procurement Directives	82
5.4. Strengthening efforts and capacity across EU institutions	82
5.4.1. Guidance, training and exchange of good practices	82
6. CONCLUSIONS	84
REFERENCES	88
ANNEX I: COMPARATIVE TABLE OF EU LEGISLATION	96
ANNEX II: STATE OF THE ART AND STAKEHOLDER VIEWS	106
ANNEX III: SCHEDULE OF INTERVIEWS	112
ANNEX IV: INTERVIEW QUESTIONNAIRE	113
ANNEX V: TERMS OF REFERENCE (EXCERPT)	117

LIST OF ABBREVIATIONS

BREEAM	Building Research Establishment Environmental Assessment Method
CONT	European Parliament Committee on Budgetary Control
CSDDD	Proposed EU Corporate Sustainability Due Diligence Directive
DG	Directorate General (of the EC or EP)
EC	European Commission
EMAS	(EU) Environmental Management System
EMS	Environmental Management System
EP	European Parliament
EU	European Union
EUSPA	European Union Agency for the Space Programme
FRA	European Union Agency for Fundamental Rights
FRONTEX	European Border and Coast Guard Agency
GPP	Green Public Procurement
ILO	International Labour Organisation
KPIs	Key Performance Indicators
LEED	Leadership in Energy and Environmental Design
MEAT	Most Economically Advantageous Tender
NGO	Non-governmental Organisation
OECD	Organisation for Economic Co-operation and Development
OSCE	Organisation for Security and Cooperation in Europe
SDGs	UN Sustainable Development Goals
SFDR	EU Sustainable Finance Disclosure Regulation
SMEs	Small and medium-sized enterprises
SPP	Strategic Public Procurement
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNEP	United Nations Environment Programme
UNGPs	United Nations Guiding Principles on Business and Human Rights

LIST OF BOXES

Box 1:	EU Procurement rules segment the procurement cycle into four phases	21
Box 2:	Procurement stages relevant for SPP	27
Box 3:	Summary of EU case law requirements	28
Box 4:	Example: Redevelopment of a former hospital complex into a technological campus in Strasbourg (FR)	30
Box 5:	Example: Purchase of IT by the central contracting authority providing computer workstation and server services for Estonia's Ministries (RIK)	30
Box 6:	Example: Construction of the headquarters of the Supreme Audit Office in Prague (CZ)	31
Box 7:	Example: Circular Economy in the City of Tampere (FI)	31
Box 8:	Example: Reforestation in Lazio (IT)	32
Box 9:	Example: Using LCC to calculate CO2 emissions from indoor lighting	32
Box 10:	Example: Abnormally low tenders in Walloon Region (BE)	33
Box 11:	Example: Procurement for events and meetings, such as receptions, dinners, openings, and lunch buffets by Hague municipality (NL)	33
Box 12:	Electronics Watch contract clauses	76

LIST OF FIGURES

Figure 1:	OECD risk-based due diligence process and supporting measures	70
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EXECUTIVE SUMMARY

Background

Public procurement is the acquisition by public bodies of the goods and services they need to accomplish their government mission, in a timely and efficient manner. Across the EU, public procurement accounts for 13.3% of Gross Domestic Product (GDP) (EC 2019b). Given this economic significance, the EU legislators have for decades sought to regulate public procurement as a mechanism for realising the EU internal market.

More recently, the EU has also recognised public procurement's potential to contribute to other EU strategic goals. In particular, a wave of recent EU policy instruments has sought to harness public procurement as a driver for sustainable production and consumption, in line with the EU Green Deal and other EU sustainability commitments. On the other hand, aspects of the current legal regime present challenges for public buyers seeking to engage in green or socially sustainable procurement. Specifically, EU procurement rules can make it difficult for government buyers to exclude companies responsible for harms to human rights or the environment from access to public contracts. They can also impede the preferential selection by public buyers of more sustainable products and services, and the allocation of public contracts to companies that produce them.

This is important because, in the EU and internationally, companies are increasingly expected to act responsibly and sustainably. According to UN and OECD standards, for example, companies have a responsibility to respect human rights and the environment. Further, they are expected to operationalise that responsibility by implementing due diligence processes. Due diligence processes, in this context, are means by which businesses should identify, assess, prevent, cease or mitigate and remediate harms to human rights and the environment which are the result of their own activities or to which they are directly linked through the activities of business partners.

Under UN and OECD standards, moreover, governments should take appropriate steps to control business-related human rights abuses through effective policies, legislation, regulations and penalties, including where they engage businesses in commercial transactions. In line with this duty, the EU and national legislators have recently enacted new laws establishing statutory requirements for large businesses to perform human rights and environmental due diligence, with various penalties in default. In some national laws, such penalties include measures to exclude companies from access to public contracts.

EU institutions, including the European Parliament, European Commission and EU agencies, undertake procurement to fulfil their statutory missions. In aggregate, this procurement is financially significant. Consequently, if it respects human rights, labour and environmental goals, EU institutions' procurement has the potential to contribute to achieving EU sustainable production and consumption goals and targets in practice. Given their public profile and political prominence, EU institutions may also 'lead by example' by adopting good procurement practices. Equally, sustainable procurement by EU institutions may play a role in advancing EU strategic autonomy, supply chain resilience and effective legal, reputational and operational risk management. A further advantage of incorporating sustainability measures into EU institutions' procurement is the promotion of policy coherence, and hence the efficiency and effectiveness of EU expenditure in areas including international development assistance.

The legal framework for EU institutions' procurement includes the EU Financial Regulation, as well as the EU Procurement Directives that regulate the acquisition of goods and services amongst public authorities in EU Member States. As noted, however, that framework has not yet been fully aligned with

EU sustainability goals and commitments, nor with current or envisaged EU regulatory requirements regarding the performance of due diligence by businesses.

Aims

In this context, at the request of the EP CONT Committee, this study aims to investigate if EU institutions' rules and practices for the procurement of goods and services on their own account currently integrate corporate due diligence requirements. It further aims to identify gaps, challenges and best practices regarding the integration of due diligence into EU institutions' procurement, in line with UN and OECD standards, taking account of the possibilities and constraints entailed by the existing legal framework. Besides, this study aims to establish what data on EU institutions' procurement due diligence is presently collected and available, publicly as well as internally. A further focus is to contextualise EU institutions' approaches with reference to 'best practices' from EU Member States and OECD countries, whether driven by mandatory minimum standards or a motivation to 'lead by example'. Finally, the study analyses the potential impacts of envisaged regulatory developments, such as the European Commission's proposals for a Directive on corporate sustainability due diligence and for a Regulation on the placing on the market of products made using forced labour.

To address these questions, this study has undertaken desktop legal and policy analysis, as well as a range of interviews with EU officials. In particular, this study has considered own-account procurement by the European Parliament, European Commission and three selected EU decentralised agencies, namely, the EU Fundamental Rights Agency (FRA), the European Border and Coast Guard Agency (FRONTEX) and the EU Agency for the Space Programme (EUSPA).

Based on these data, the study finds that sustainability due diligence, as defined by international and EU instruments adopted since 2011, is presently lacking across EU bodies' procurement rules and practices. EU bodies appear generally to carefully adhere to the EU Financial Regulation¹ and 2014 Procurement Directives in their procurements. However, these rules do not require public buyers to engage in human rights or environmental due diligence themselves. Neither do they require public buyers' consideration of prospective or contracted suppliers' due diligence during the procurement process. Indeed, aspects of the current EU procurement regime, such as the requirement for a 'link to the subject matter', rather tend to constrain public buyers' from considering suppliers' due diligence processes during the tender process. Due diligence practices are not currently integrated into EU institutions' procurement frameworks or practices; it follows that data on sustainability risks in EU procurement are not gathered or reported, either.

Against this baseline, and taking into account the role and competences of the European Parliament, this study presents recommendations intended to promote the achievement of more fully sustainable EU institution procurement, via the incorporation of due diligence practices.

- **Firstly, within the existing legal framework, such recommendations encompass EU institutions establishing their own supply chain sustainability due diligence processes** (section 5.1); measures to **secure compliance by EU institutions' suppliers with minimum legal obligations**, including via supplier exclusions (section 5.2.1); monitoring of suppliers

¹ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (henceforth the 'Financial Regulation'). It should be noted that the Financial Regulation has recently been recast; relevant changes are discussed in Chapter 5. The political agreement reached on this text in December 2023 however remained subject to confirmation by the EU co-legislators at the time of this study's publication.

during contract performance (section 5.2.2); accessible whistleblowing and remediation mechanisms (section 5.2.3); and SPP contract clauses (5.2.4).

- **Secondly, this study makes recommendations to revise the law applicable to EU institutions' own-account procurement so as to better align it with EU sustainability and due diligence standards.** In this connection, recommendations highlight the need to integrate due diligence and binding sustainable procurement goals into the EU Financial Regulation (5.3.1); to ensure that the Financial Regulation is continuously updated to articulate it with EU sustainable procurement requirements (5.3.2); to extend the basis for mandatory exclusions (5.3.3); to integrate sustainable procurement into general EU budgetary control mechanisms (5.3.4); to take measures to link EU institutions' own procurement with the anticipated adoption of the EU Corporate Sustainable Due Diligence Directive (CSDDD) (5.3.5); and finally, to revise the 2014 Procurement Directives (5.3.6).
- **A third set of recommendations aim to strengthen the efforts and capacity of EU institutions in the area of due diligence and sustainable procurement** (section 5.4). This is an immediate imperative, in terms of both securing compliance with existing law and supporting the effectiveness and impact of any future legislative or policy changes. While some horizontal initiatives to support sustainable procurement among EU bodies are already underway, a more coordinated effort is needed to secure cross-institutional policy coherence, capture synergies and boost cost-effectiveness, as well as sustainability impacts. Developing and rolling out guidance, training and the exchange of good practices figure amongst the requirements here.

1. INTRODUCTION

Public bodies undertake procurement to “deliver...[the] goods and services necessary to accomplish government mission in a timely, economical and efficient manner” (OECD, 2015, 6). Public procurement, consequently, can be viewed as ‘the process of identifying what is needed; determining who the best person or organisation is to supply the need; and ensuring what is needed is delivered to the right place, at the right time, for the best price and that all this is done in a fair and open manner’ (OECD 2015). Accounting for 13.3% of Gross Domestic Product (GDP) in the European Union (EU) (EC 2019b, table 2) and approximately 15% of GDP across OECD countries, globally, US\$13 trillion is spent via public procurement each year (Open Contracting Partnership and Spend Network 2020).

Given such figures, it is clear why public procurement has been identified as a ‘crucial pillar of strategic governance and service delivery for governments’ (OECD 2015, 1). Indeed, in European Union (EU) policy instruments, public procurement is consistently identified as a mechanism for achieving important Community and societal goals (EC 2011, 33) including the Internal Market (Article 114 TFEU). Successive EU Directives have established rules to regulate the award of public contracts and concessions in EU Member States. These rules, and specifically those set out in Directive 2014/23/EU² and Directive 2014/24/EU³, are also relevant for procurement and concessions undertaken on their own account by EU institutions including the European Parliament (EP), European Commission (EC) and the decentralised EU agencies (EU Financial Regulation, Recital 96).

In general, procurement laws aim to achieve the best ‘value for money’. Historically, this term was often seen as synonymous with the goal of acquiring the maximum quantity (or quality) for the lowest price, while taking advantage of the widest competition possible. Yet procurement laws and policies, including in the EU, have increasingly abandoned such a narrow understanding of public ‘value’. Rather, recent reforms in Europe as well as other world regions have sought to integrate ‘non-price’ or ‘horizontal’ objectives, alongside price, as guiding parameters for public procurement processes. Such ‘horizontal’ policy goals can include, for example, ‘sustainable green growth, the development of small and medium-sized enterprises (SMEs), innovation, standards for responsible business conduct or broader industrial policy objectives’ (OECD 2015, 6). In the EU, this trend has manifested inter alia in ‘strategic procurement policies’ (SPP) that identify public procurement as a tool that governments can use to help address new social, labour and environmental challenges (p. 10).

Given its scale and economic significance, public procurement indeed has clear potential to contribute to achieving the needed global transition to sustainable production and consumption, in line with the United Nations 2030 Agenda and Sustainable Development Goals (SDG Target 12.7; Dimand 2023) as well as international and EU climate objectives (EC, 2020b). If government buyers were systematically to integrate sustainability considerations into their purchasing activity, this would undoubtedly help to address the present triple planetary crisis, encompassing climate change, environmental pollution and loss of biodiversity (UN Climate Change 2022). It would also help to advance the delivery of the obligations and commitments of the EU, its Member States and EU companies in the areas of human and labour rights, diversity, inclusion and gender equality (UNEP 2022, iii).

² Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

³ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

One specific mechanism that public buyers can use to integrate sustainability considerations into their purchasing practice is 'due diligence'. Advocated by the UN, the OECD and the EU since 2011, due diligence is a process for identifying and controlling human rights and environmental risks and impacts associated with commercial products and services, including in the supply chain context (UN 2008, 2011; OECD 2011, 2023; EU 2011).

Under international standards, all businesses should apply due diligence to operationalise their responsibility to respect human rights and to advance wider 'responsible business conduct', environmental and governance objectives (EC 2011b, OECD 2019, 2023). Recently, certain EU Member States have enacted laws establishing statutory due diligence duties for businesses (République Française, 2017; Deutscher Bundestag, 2021) while EU due diligence legislation is foreseen (EC 2022b).⁴

Yet EU law and policy remain ambiguous about what the role of public buying should be in promoting the uptake of due diligence by companies in the marketplace, while clear expectations on public authorities themselves to undertake supply chain due diligence are also lacking.

For example, the 2014 EU Procurement Directives were enacted after the EU and other international bodies adopted policies counselling businesses to perform due diligence (EC 2011). Nevertheless, the 2014 EU Procurement Directives do not encourage consideration by European public authorities of whether prospective suppliers have adopted due diligence policies or practices at corporate level when awarding public contracts. On the contrary, the 2014 Directives in fact disallow that public tenders should mention "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" (Directive 2014/24, Recital 97).

In other words, EU procurement law only permits government buyers, when deciding how to allocate public contracts, to consider matters that are 'linked to the subject-matter' of the specific contract in hand, and not to the sustainability policy, practices or performance of the supplier in any other area. This is also true for EU institutions in undertaking procurement on their own account under the EU Financial Regulation (see further section 2.3.2.d below).

There is thus a marked divergence between the EU legislator's expectations of companies, on one hand, and of public buyers in EU Member States and within EU institutions, on the other. In legal terms, this presents a paradox. After all, under international law, it is governments, not companies, that are first and foremost responsible for safeguarding human rights and the environment and regulating business to that end (Methven O'Brien and Martin Ortega 2019).

Equally, if public buyers allocate public contracts to suppliers that do not behave responsibly or sustainably, this undermines the EU's established green and social objectives, international human rights and climate commitments. Whereas this represents a significant source of 'policy incoherence', in turn it risks diminishing value for money for EU taxpayers. For instance, where EU institutions' supply chains include commodities or products made with labour exploitation, this may run counter to the goals of EU development assistance programmes seeking to address related issues. In some cases, it may also jeopardise supply chain resilience and the EU's strategic autonomy (EP 2023). Penultimately, and crucially, it risks denying EU companies that do operate responsibly and sustainably their

⁴ As for the EU Financial Regulation, political agreement reached on the draft text of the proposed EU Corporate Sustainability Due Diligence Directive in December 2023 however remained subject to confirmation by the EU co-legislators at time of this study's publication.

legitimate competitive advantage and undermining the ‘level playing field’. After all, companies supplying to the private sector, rather than to public authorities, should not be penalised for it. Finally, in the case of EU institutions’ procurement specifically, there are issues of political credibility and reputational risk at stake.

According to the EP’s New Industrial Strategy for Europe, the EU “needs...an overarching due diligence framework for industry so as to identify, trace, prevent, mitigate and account for environmental and social risks, impacts, abuses and harm, in its domestic and global activities and across supply chains, in order to ensure minimum standards and create a level playing field” (EP 2020). Investigating how EU public procurement can be harnessed to accelerate the widespread integration of due diligence, responsible business conduct and sustainability into the policies and practices of business in the EU and beyond is therefore a pressing task.

In pursuit of this aim, this Study explores the status quo of procurement by EU institutions on their own account. This Study identifies the international laws and policy standards that underpin the responsibility of businesses to perform corporate sustainability due diligence, and the duties of governments to regulate in this regard. As observed above, procurement by EU institutions proceeds under legal rules that are materially the same as those applicable to public authorities in the EU Member States under EU procurement law. Consequently, while this Study’s factual scope is restricted to EU institutions’ own-account procurement, its analysis of EU procurement law and policy, and how its role in promoting responsible business conduct can be extended, has wider application.

Further, this study considers how sustainability due diligence can be implemented by public authorities themselves, as well as how public bodies can promote companies’ uptake of due diligence via their purchasing rules and practices. Hence, the Study analyses how far public buyers can go in including due diligence requirements in contracting governed by current EU procurement law. It investigates to what extent due diligence or analogous practices are, within this framework, today used by EU institutions in their procurement of goods and services on their own account. It appreciates how EU institutions’ approach to integrating sustainability considerations into their own-account purchasing has developed and seeks to identify possible drivers of change. The Study highlights lessons learned from national and other ‘good practices’ in sustainable public procurement and their engagement with due diligence. In addition, it identifies changes in praxis legal reforms and to lead EU institutions to extend the use and impact of sustainability-related measures in their procurement activity. In approaching these issues, this Study draws on relevant EU legislation, case law and scholarship, international legal and policy frameworks, guidance and best practices amongst EU Member States and other jurisdictions. Finally, the Study takes stock of foreseen legislative developments, notably the EU Corporate Sustainability Due Diligence Directive and recast EU Financial Regulation.

1.1. Context for the Study

As the 2023 EC work programme recalls, “...Europe and the world have been confronted by a collision of crises ...[that] cannot be met with a business-as-usual approach” (EC 2022, 1). The global financial crisis, the COVID-19 pandemic, Ukraine’s invasion and related energy crises, along with associated economic upheavals and successive social dislocations, and incipient climate change and associated policy recalibrations, embody profound challenges for ordinary Europeans and their national governments as well as EU institutions. In response to such adverse conditions, the EU has applied unprecedented measures and resources as included, for instance, in the Recovery Plan for Europe, NextGeneration EU, and the European Green Deal (EC 2022a).

Nevertheless, in the last 15 years public authorities and companies alike have experienced fiscal turbulence, supply chain disruptions, acute workforce and service delivery pressures. From 2020, the crises already mentioned further underlined EU supply chains' vulnerabilities to external shocks, while critical dependencies were clarified. At the same time, sustainability and human rights requirements for businesses have started to tighten. Only 10 years ago, the Rana Plaza disaster provoked fresh demands in the EU and beyond to tackle abusive labour conditions in transnational value chains, with new laws enacted to this end and a proliferation of standards, guidance, initiatives and tools. While this is positive, challenges remain: both awareness of new requirements and the skills needed to respond to them are patchy, while public buyers juggle complex and often competing policy and budgetary imperatives.

Against this background, this study seeks to investigate EU institutions' own-account procurement activity and its alignment with important cross-cutting EU political goals (EC 2021b). It seeks to analyse what changes might meaningfully be made, in law, policy and practice, to optimise the role and influence of EU institutions' procurement in advancing the green energy transition, respect for human rights, achievement of a level global playing field for business activity, strategic autonomy and contributing to achieving the SDGs, while sustaining EU internal market realisation as a constant goal.

1.2. Scope and limitations

This Study explores the role and practices of sustainability due diligence in the purchasing of goods and services on their own account by EU institutions, specifically the European Parliament, European Commission and three selected EU decentralised agencies (FRONTEX, FRA and EUSPA).

It takes its primary point of departure in the legal framework governing EU institutions' procurement, specifically Articles 160 ff of the EU Financial Regulation. Also relevant are provisions of the EU Procurement and Concessions Directives applicable to award procedures in the Member States above given thresholds and the associated case law. However, this Study also takes account of pertinent elements and trends in wider EU law, particularly EU regulations in the environmental, labour and social domains, as well as specific developments concerning corporate sustainability due diligence requirements.

In addition, the Study considers EU institutions' own procurement policies and guidance, as well as evidence gathered for the Study concerning EU institutions' procurement practices and experiences. The Study addresses all the stages in the procurement cycle, however, with emphasis on selection, technical specifications, award and the definition of performance conditions as areas where references to due diligence bear greatest potential relevance. The Study further draws on international policies, good practices and scholarship concerning social and environmental sustainability challenges, tools and approaches to address them, in both public and private supply chains.

As a further important point in terms of scope, the EU procurement Directives only regulate procurements by Member State public authorities over certain monetary thresholds. However, according to its TOR, the scope of this Study is not so limited. This is appropriate in any event because, firstly, contracts falling below such thresholds are still regulated under the EU Financial Regulation (Annex I, point 14); and secondly, because EU institutions' sustainable procurement rules apply to all procurements, albeit in simplified form and on a voluntary basis for contracts below EUR 15000 in value, as for instance highlighted in the EP GPP Guide (EP 2020, p. 2).

With this scope, the Study requires two types of analysis. First, legal analysis of the EU procurement Directives, EU Financial Regulation and other rules applicable to EU institutions, agencies and bodies. Such analysis is needed to identify whether, consistently with existing EU legal rules, such entities may

themselves apply due diligence, and what steps they can take to require or promote the performance of due diligence by their tenderers and contractors. At the same time, legal analysis should indicate what changes might be required to establish for EU institutions a sufficient mandate to adopt such approaches, if currently lacking.

Secondly, factual analysis is required to assess if due diligence or analogous practices are currently applied by EU institutions in their purchasing activity, and if so, how EU institutions' approach to due diligence compares to that of other public authorities, particularly within EU Member States, as well as how it relates to sustainable procurement guidance from authoritative bodies. Consequently, primary and secondary EU legal rules, EU policies, international and regional non-binding or soft law norms, EU institutional standards, practices, and operating conditions are all within the scope of this study. Such elements are moreover relevant to reflecting on how due diligence might be integrated into EU institutions' own-account procurement in future, which also lies within the sight of this Study.

In terms of limitations, this Study does not undertake comprehensive analysis of procurement practices within EU Member States, with regard to due diligence or otherwise. Neither does this Study present economic or quantitative analysis of EU institutions' current procurement practices or as they might be reformed. As a further limitation, in terms of non-price objectives of public procurement, this study focuses on environmental and social sustainability goals and human rights, from within the broader range of horizontal objectives identified by the OECD which, besides green growth and responsible business conduct, includes in its definition "the development of small and medium-sized enterprises, innovation...or broader industrial policy objectives" (OECD 2016). Finally, as noted earlier, while this study takes account of the main contours of foreseen EU legislation with specific relevance to its concerns, in particular the EU Corporate Sustainability Due Diligence Directive and recast EU Financial Regulation, in neither case has it been possible to engage with their finally enacted terms, which were not yet determined at the time of this Study's publication. This limitation is significant, in that the latest political agreement between the co-legislators regarding the EU Corporate Sustainability Due Diligence Directive, reached in December 2023, for the first time during the legislative process has canvassed measures linking elements of the Directive to public procurements governed by EU law. Nevertheless, by January 2024, the terms of relevant draft provisions had not yet been published.

1.3. Aims and objectives

Under its Terms of Reference (TOR), the primary aim of this Study is to provide, for the EP and specifically its Committee on Budgetary Control (EP CONT), a detailed assessment of the integration of due diligence in procurement rules and practices implemented by EU institutions, beyond EMAS policies, with a specific focus on due diligence undertaken as regards the fulfilment and promotion of environmental and human rights standards and objectives, based in particular on OECD standards" (TOR, p 2). Second and relatedly, the Study will identify gaps and illustrate how due diligence could be incorporated into EU institutions' buying rules and practices, including through changes to "policy frameworks such as an interinstitutional agreement or guidelines" (TOR 2.2).

Thirdly, this Study seeks to "provide concrete policy recommendations" that can inform "EU decision-making, with a particular focus on the role and competences of the European Parliament" concerning EU institutions' procurement (TOR 2.1). Finally, the current Study will contribute to academic debate and the knowledge base for EU policy-making on public procurement and sustainability due diligence, by taking stock of the current implementation of the EU procurement legal framework and practices amongst EU institutions, with particular focus on horizontal objectives concerning human rights and environmental sustainability.

1.4. Research questions

In line with its TOR and the scope as described above, this study seeks to answer the following research questions:

- What recommendations are made by international guidance concerning the exercise of due diligence in and through public procurement?
- What does EU law already permit by way of references to sustainability or responsible business conduct due diligence in EU institutions' own-account procurement and in procurement by the contracting authorities of Member States, and how could foreseen changes in the EU legal framework facilitate recourse to due diligence in those procurements?
- To what extent is due diligence presently used in EU institutions' procurements, how has this use changed in recent years and what have been the drivers of any such change (such as international guidance, policy or normative changes at EU or domestic level, peer dynamics or imitation)?
- What are the specific modalities of the use of due diligence in the procurement practice of EU institutions, agencies and bodies, and what practical lessons may be drawn from national or other relevant 'good practices', including as regards monitoring and evaluation?
- What changes, whether in legal or policy norms, or practice, could support EU institutions to extend the exercise of due diligence in their procurements?

By answering these questions, the Study will provide a detailed assessment of the present extent and approaches to the integration of sustainability due diligence in public procurement rules and practices implemented by EU Institutions, while also identifying gaps, challenges and best practices. The study will also consider changes to EU law, and EU institutions procurement policies and practices that could help to extend alignment between EU institutions' procurement with established EU environmental, social and human rights objectives while remaining consistent with the principle of effective and efficient use of EU funds.

1.5. Methodology

1.5.1. Desktop analysis including scholarly literature review

This Study has undertaken desktop research using general and subject-specific online search tools to identify legal and policy documentation published by international organisations including the EU, OECD, UN and relevant UN agencies (such as UNEP and the ILO), OSCE, Council of Europe, EU Member States, and relevant think tanks, multi-stakeholder initiatives and NGOs. Concerning the EU, materials considered include legislation but also case law, 'grey' and academic literature in English, French, Spanish and Italian.

1.5.2. Case study selection

According to its TOR, this Study was required to address the procurement rules and practices of the EC and EP as well as the EU's decentralised agencies. Regarding the latter, in consultation with the EP, three agencies were identified for study, namely, the European Union Agency for Fundamental Rights (FRA), the European Border and Coast Guard Agency (Frontex) and the European Union Agency for the Space Programme (EUSPA). These three bodies were selected to reflect the diversity of EU decentralised agencies in terms of geographical location, function, scale and character of their procurement.

1.5.3. Expert interviews

Semi-structured online interviews were undertaken with officials from the EP, EC, FRA, Frontex and EUSPA. The purpose of interviews was to obtain direct evidence regarding EU institutions' current procurement practices and engagement with sustainability due diligence or analogous processes in that context. Semi-structured interviews were chosen by the Study authors to facilitate a freer flow of information than fully standardised interview formats permit (Thomas and Harden 2008). Individual interviewees were identified via a combination of online search, existing contacts and dialogue with the services of the European Parliament. Applying the 'snowball' method, besides the identified EU bodies themselves, interviews were undertaken with officials from the European Court of Auditors, the EC and EP EMAS and Sustainability Units, and the Green Public Procurement (GPP) Helpdesk for EU Institutions and Bodies. Within the EC, EP and three agencies under study, interviewees were generally selected on the basis of their responsibility for or involvement in the procurement practices of the respective entities, whether by virtue of holding a role in a centralised procurement function, or as a procurement officer within an operational unit, for instance. A schedule of interviews undertaken is included at Annex III and the interview questionnaire appears at Annex IV.

Interviews were an essential element of the Study's methodology because EU institutions' internal procurement rules, manuals and guidelines are not generally publicly available. Moreover, EU institutions' procurement practice has not been investigated by scientific literature and only limited information on it can be extracted from EU case law. Questions posed during interviews consequently explored EU institutions' existing procurement systems, institutional frameworks and the application of sustainability-related terms in their purchasing practices. Besides, interviews investigated what measures are applied by EU institutions to monitor performance and impact of relevant conditions during specific contracts, as well as to assess monitoring and reporting on sustainability across institutions' aggregate purchasing activity. Interviews further provided an opportunity to discuss potential changes to EU law, policy and practices concerning due diligence with personnel directly involved in purchasing for EU institutions. Their views were also sought on any obstacles that reforms linked to due diligence might encounter, as well as supporting measures that might help to overcome them. During interviews, officials were requested to disclose sample contracts, contract clauses and contract management reports illustrating their purchasing frameworks and practices.

Interviewees received a semi-structured interview questionnaire and participant information sheet in advance. Informed consent was obtained from all interview participants and recorded. Summary notes were shared by the Study authors with interviewees for their review.

1.5.4. Peer review and input from European Parliament services

A draft of this Study was peer reviewed by Professor Olga Martin Ortega, University of Greenwich (UK). In addition, the research team received input from EP services via feedback on an inception report, interim deliverable and full draft of the Study.

1.5.5. Research ethics

Research for this Study was conducted in line with the ethical principles and standards set out in the European Code of Conduct for Research Integrity (Allea 2023). Accordingly, this Study has fully taken into account the available evidence, without omission, misrepresentation or deception and sought to rely on the most recently available information and data.

1.5.6. Data management

For the purposes of research, this Study has collected and processed data obtained from officials of EU contracting authorities in the form of interviews on their organisations' procurement behaviours. Research data from semi-structured interviews focused on legislation, policies and practice. As such, the research neither required nor involved collection or disclosure of personal data going beyond identifying persons interviewed acting in their official capacity. All personal data collected by interviewers were secured in compliance with Article 9(1) of the GDPR and the procedures defined by the European Code of Conduct for Research Integrity.

1.5.7. Terminology and glossary of key terms

Notably, organisations including the EU, OECD and UN apply different terminology in the procurement context. In particular, while the OECD refers to 'primary' and 'secondary' procurement objectives (OECD 2015) these labels have increasingly been abandoned by other organisations, including the EU and UN, given that achieving social or environmental goals via procurement may be equally or more important to government buyers than the primary objectives of individual contracts (Arrowsmith and Kunzlik 2009, 14). Consequently, this Study refers to "horizontal" or "cross-cutting" goals, rather than to 'secondary' objectives in the context of strategic public procurement (SPP) (ibid, 12 ff).

Likewise, in the past, the term "value for money" in the public procurement context was generally synonymous with 'cheapest possible price' or 'lowest bid'. Under current EU law, however, "value for money" is defined as the 'most economically advantageous tender' or 'MEAT' (Article 67 of Directive 2014/24/EU and Article 167 of the Financial Regulation). In turn, MEAT has been elaborated as meaning the "most advantageous combination of cost, quality and sustainability to meet defined requirements" (OECD 2020, 15). Further, value for money and MEAT are increasingly assessed on a full life-cycle basis (Article 68 of Directive 2014/24 and Article 167 of the Financial Regulation). In the EU setting, besides, environmental and social objectives of procurement reflect primary and secondary legal instruments that may be as binding as the requirement to secure a competitive contract price. Other key terms used in this Study may be defined as follows:

Award criteria: The various elements a contracting authority (or entity within utilities procurements) evaluates to select the tender that provides the best value for money, such as price and quality.

Award procedure/pre-award phase: The series of steps a contracting authority must take to select a contractor to be awarded the procurement or concession contract.

Contracting authority: A public organisation under a duty to apply public procurement and concession rules when acquiring works, goods or services.

Contracting entity: A public or private entity active in the utilities sectors (water, energy, transport and postal services sectors) that is called on to apply public procurement and concession rules when acquiring works, goods or services.

Contract performance conditions: Specific contractual terms included in a public procurement contract that define how the contract should be performed, and which may include economic, innovation-related, environmental, social or employment-related considerations (Article 70 of Directives 2014/24/EU).

Due diligence: A cyclical process or group of processes that is undertaken to identify, prevent, mitigate and account for actual and potential adverse impacts on human rights or other matters in a business' own operations, supply chain or commercial relationships (OECD 2019, 15).

EMAS: The EU Eco-Management and Audit Scheme.⁵

Exclusion: The impossibility to be retained as a contractor of an economic operator having been found guilty and sanctioned for a series of crimes or being unreliable for a number of reasons listed in legislation (Recitals 101 and 102 and Articles 56 and 57 of Directive 2014/24/EU).

Green Public Procurement (GPP): A process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life-cycle when compared to goods, services and works with the same primary function that would otherwise be procured (EC 2008).

Labels: Any document, certificate or attestation confirming that the works, products, services, processes or procedures in question meet certain requirements (Article 2(1)(23) of Directive 2014/24/EU).

Life-cycle: “[A]ll consecutive and/or interlinked stages, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of the product or the works or the provision of the service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilisation” (Article 2(1)(20) of Directives 2014/24/EU).

Life-Cycle Costing: Evaluation of all costs entailed over the life-cycle of works, supplies or services. This includes internal costs, such as research to be carried out, development, production, transport, use, maintenance and end-of-life disposal costs. It also includes costs attached to environmental externalities, such as pollution caused by extraction of the raw materials used in the product or caused by the product itself or its manufacturing, provided they can be monetised and monitored (Recital 95 of Directives 2014/24/EU).

Post-award phase: Activities following the conclusion of a procurement or concession contract, including its implementation.

Procurement and concessions: The acquisition of works, goods or services by a contracting authority or entity through contracts. In the case of ‘concessions’, the contractor shares the exploitation risk of the works or services concerned.

Selection criteria: Pre-conditions that economic operators must meet as a condition of their participation in public tenders, that are set for each award procedure by the contracting authority in question. These may relate to matters such as bidders’ suitability to pursue the professional activity in question, their economic or financial standing, technical and professional ability.

Socially Responsible Public Procurement (SRPP): Procurement that aims to address the impact on society of the goods, services and works purchased by the public sector. SRPP recognises that public buyers may not be concerned exclusively with purchasing at cheapest price or best value for money, but also in ensuring that procurement achieves social benefits and prevents or mitigates adverse social impacts during the performance of the contract (EC 2021b).

Strategic procurement: Procurement aiming to achieve policy objectives that go beyond best financial value for money, such as environmental or social goals, innovation, industrial policy, and resilience.

⁵ Regulation (EC) No 1221/2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC.

Sustainable public procurement (SPP): Procurement that considers both financial and environmental and social aspects.

Technical specifications: The totality of the technical prescriptions contained in procurement documents that define the characteristics of a required material, product or supply, so that it fulfils the use for which it is intended by the contracting authority. Such characteristics may include, for instance, levels of environmental and climate performance, or accessible design requirements (Annex VII (1) to Directive 2014/24/EU).

1.6. Outline of the study

Following the Introduction, **Chapter 2** of this Study analyses the EU legal framework applicable to procurement on their own account by EU institutions and agencies, with an emphasis on SPP and due diligence. First, the general legal and policy framework for EU procurement is identified. Secondly, rules applicable to EU institutions' own procurement are identified most notably under the EU Financial Regulation and the 2014 EU Procurement Directives. Next, scope under EU procurement law for sustainable procurement is examined. Besides primary legal standards, relevant EU case law is considered, as well as policy guidance and good practice materials addressing both EU and national levels.

Chapter 3 focuses on due diligence. First, it addresses the origins, definition and intended functions of due diligence in the context of growing global concerns and international standards relating to human rights, labour exploitation and 'responsible business conduct'. Next, it examines the implications of due diligence standards for corporate supply chains. Finally, it considers how emerging due diligence requirements may apply to government as opposed to private sector procurement, taking into account good practices internationally and in EU member states.

Chapter 4 of the Study relates to current procurement practices by EU institutions and EU decentralised agencies, specifically, the European Parliament, European Commission, FRA, FRONTEX and EUSPA. With respect to each of these bodies, the Study outlines in turn the main features of its purchasing activity; applicable legal and policy frameworks; how sustainability considerations and due diligence are reflected in its procurement practice; and, where relevant, observations regarding any perceived obstacles to implementing due diligence and sustainable procurement, and how these may be overcome.

Chapter 5, synthesising the Study's legal and factual analyses, presents its evaluation of EU institutions' current procurement practices from point of view of sustainability, and recommendations. These recommendations embrace both measures that can be effected within the existing legal and policy framework, and proposals for changes to it. In terms of the former, firstly, it is proposed that EU institutions establish their own supply chain due diligence processes; and adopt a range of measures to secure their suppliers' compliance with existing minimum social and environmental requirements. Regarding the latter, a number of specific legal reforms are advocated, including proposals for changes to the EU Financial Regulation and to establish linkages to the EU Corporate Sustainable Due Diligence Directive, as well as for the revision of the 2014 EU Procurement Directives. Lastly, recommendations are made to reinforce the collective and individual efforts and capacity of EU institutions on due diligence and sustainable procurement.

Chapter 6 presents the Study's main Conclusions, highlighting the urgency of bringing public procurement and the EU's declared commitments to responsible business conduct, sustainable development and the green energy transition into convergence, as well as the potential value to EU economies and societies, as well as the global commons, of doing so.

2. LEGAL AND POLICY FRAMEWORK FOR EU INSTITUTIONS' OWN-ACCOUNT PROCUREMENT

2.1. EU procurement law: rules on purchasing by public authorities in Member States

Since 1971, the EU has sought to regulate public purchasing in its Member States with a view to realising the goal of European market integration. As the Court of Justice of the European Union (CJEU) subsequently affirmed, “the principal objective of the Community rules in the field of public procurement is to ensure the free movement of services and the opening-up to undistorted competition in all the Member States” (Case C-454/06 *pressetext Nachrichtenagentur* ECLI:EU:C:2008:151, paragraph 31; see also Case 26/03 *Stadt Halle and RPL Lochau* ECLI:EU:C:2005:5, paragraph 44).

At the same time, EU procurement rules, Member State legislation and practices linked to them must “comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency” (Recital 1 and Art 18(1) Directive 2014/24/EU; Risvig 2021). Importantly, given the focus of this Study, the requirement that EU procurement law aligns to the EU’s founding treaties further entails EU duties to uphold human rights and environmental protection in the procurement context (Articles 2, 6, 11, 207(1) TFEU).

In terms of specific rules, the EU’s current legal framework on public procurement comprises three principal instruments: Directive 2014/24/EU on public procurement (the EU ‘Procurement Directive’); Directive 2014/23/EU on concessions (the ‘Concessions Directive’); and Directive 2014/25/EU (the ‘Utilities Directive’).⁶ Each of these applies to the award of contracts above given thresholds that are set by the Commission every two years.⁷

Together these three Directives seek to advance the EU Internal Market via three main mechanisms: the prohibition of improper discrimination between economic operators who are competing for public contracts; transparency requirements; and the dismantling of barriers to the accessibility of public tenders to potential bidders (Article 114 TFEU; Arrowsmith 2012; Sabockis, 2023, pp. 59 f).

Aiming at market integration, these Directives moreover focus on the first phase of the procurement process, whereby contracts are allocated amongst economic operators who bid for them, i.e. the tendering (or award) procedure.

Accordingly, it can be said that EU procurement law focuses on *how* Member State public authorities go about purchasing goods and services, rather than *what* they buy or *when* (procurement planning). Likewise, EU procurement law has not sought to regulate what happens during the fulfilment of contracts by suppliers or, subsequently, to assess the efficiency and effectiveness of public buyers’ contracts relative to the expenditure of resources (contract monitoring and evaluation). In principle, then, the other three of the four main phases of the public procurement process remain for Member States to regulate via non-harmonised national rules.

⁶ 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.

⁷ For the 2024-2025 thresholds, see the [Commission Delegated Regulation \(EU\) 2023/2510](#) of 15 November 2023 amending Directive 2009/81/EC of the European Parliament and of the Council in respect of the thresholds for supply, service and works contracts.

Box 1: EU Procurement rules segment the procurement cycle into four phases:

1. Procurement planning
2. Tendering (award) procedure
3. Contract management and execution, and
4. Contract monitoring and evaluation.

The **tendering (or award) procedure** is articulated into four further steps:

1. Selection
2. Technical specifications
3. Award, and
4. Contract performance clauses.

Each step of the **tendering (or award) procedure** above fulfils a specific function in the process whereby public buyers decide to which supplier of goods or services a given public contract should be awarded. The **'selection'** stage identifies suppliers that comply with basic governance standards and that possess the experience and means needed to perform the contract. **'Technical specifications'** describe the characteristics of the goods or services sought for purchase. **Award criteria** aim to achieve the best value for money, by balancing price against any other permissible factors that the public buyer deems relevant in the given case and which may, depending on the case, include social or environmental considerations. Finally, **contract performance clauses** set out both general and specific terms applicable to a given supply contract. In line with the objective of **transparency**, all the elements that will be treated as material by a government buyer in the course of the tender process are required to be publicly advertised before the procedure commences.

2.2. EU institutions' own-account procurement: legal framework

2.2.1. General principles and link to EU Procurement Directives

EU institutions must abide by the EU treaties while in principle they are also bound by EU Regulations (Article 288, first phrase). In terms of procurement by European institutions, this is directly governed by rules contained in the EU Financial Regulation. As set out in Recital 96, "Procurement rules and principles applicable to public contracts awarded by Union institutions on their own account should be based on the rules set out in Directive 2014/23/EU ... and Directive 2014/24/EU".

In other words, EU institutions' own-account procurement is indirectly governed by the 2014 EU Procurement Directives that also regulate purchasing by public authorities in EU Member States. Given this direct link between the EU Financial Regulation and the EU Public Procurement and Concession Directives, case law on the latter, as well as policy materials and practices developed under the 2014 EU Procurement Directives are relevant in identifying the law applicable to EU institutions' own-account procurement and evaluating their purchasing practices.

On the other hand, **EU institutions' own-account procurement must also comply with various 'general principles' specific to the EU Financial Regulation.** Article 6 of the Financial Regulation, concerning *Respect for budgetary principles* provides that,

“The [EU] budget shall be established and implemented in accordance with the principles of unity, budgetary accuracy, annuality, equilibrium, unit of account, universality, specification, sound financial management and transparency as set out in this Regulation.”

Amongst these principles, the most relevant to procurement are sound financial management and transparency.

According to Article 33(1) of the EU Financial Regulation, ‘sound financial management and performance’ encompasses three further principles, namely:

- (a) the “**principle of economy** which requires that the resources used by the Union institution concerned in the pursuit of its activities shall be made available in due time, in appropriate quantity and quality, and at the best price;”
- (b) the “**principle of efficiency** which concerns the best relationship between the resources employed, the activities undertaken and the achievement of objectives;” and
- (c) “the **principle of effectiveness** which concerns the extent to which the objectives pursued are achieved through the activities undertaken”.

Under Article 33(2) of the EU Financial Regulation, the principle of effectiveness in turn requires a focus on **performance**. This further entails a requirement that public buyers develop **key performance indicators (KPIs)**. Under Article 33(3) of the Financial Regulation, such KPIs must be “relevant, accepted, credible, easy and robust”. Similarly, **ex post evaluation** by public buyers of fulfilment of individual contracts is required by the principle of sound financial management and performance.

Evaluation is in tandem required as a corollary of the principle of effectiveness. According to Article 34(1) of the Financial Regulation, “Programmes and activities which entail significant spending shall be subject to **ex ante and retrospective evaluations, which shall be proportionate to the objectives and expenditure**”. Reinforcing this, Article 36 (*Internal control of budget implementation*) of the Financial Regulation requires that the EU budget is “implemented in compliance with the effective and efficient internal control appropriate to each method of implementation, and in accordance with the relevant sector-specific rules”.

Concerning the principle of **transparency** referred to by Article 6 (*Respect for budgetary principles*) of the Financial Regulation, Article 38 (*Publication of information on recipients and other information*) explicitly duplicates the publicity requirements for award notices that are also found in Point 2.4. of Annex I of the Financial Regulation.

Such additional elements as just described reflect the different scope and function of the EU Financial Regulation, as compared to the 2014 EU Procurement and Concession Directives. While the latter, as seen above, focus on the award phase of public contracting, **the Financial Regulation encompasses all four phases of the procurement cycle, from planning to contract implementation, disbursement and assessment**, reflecting that EU institutions, bodies and agencies are using EU resources to fulfil prescribed missions.

Turning from general principles to specific legal rules regulating EU institutions’ procurement, these are mostly found in **Annex I of the Financial Regulation**. Under Article 161 of the Financial Regulation, power to revise the Annex is delegated to the European Commission (Art 290 TFEU). Importantly, according to the EU legislator, a delegation of the power to revise the Annex is necessary to balance the requirements of transparency and coherence of EU procurement law, on one hand, with the need for technical flexibility, and continuous ‘alignment’ between the Annex and the EU’s general

Procurement Directives on the other (Recital 123; see also Article 161 *Annex on procurement and delegation of powers*).

In addition, the requirement that EU institutions in their own-account procurement 'apply the same standards as those imposed [on Member States public authorities]' is explicitly set down in Article 161. This is significant because it entails that the EU Procurement and Concession Directives and associated case law are directly material in interpreting the Annex to the Financial Regulation; in regulating matters that are not explicitly addressed by the Financial Regulation itself; and generally for mapping the legal space for EU institutions' own-account procurement rules and practices. To illustrate, Article 20 of the Public Procurement Directive 2014/24/EU on sheltered workshops does not find a parallel in the Financial Regulation. Nevertheless, given Article 161, this does not prevent EU institutions prioritising social economy companies 'if the object of the contract objectively justifies it... through the application of relevant award criteria or contract requirements', as foreseen in the 2022 *Guide for Socially Responsible Public Procurement at the European Parliament* (EP 2022, 27).

Besides this legal basis, policy materials suggest that EU institutions and agencies should adhere to SPP rules set by EU Directives for the Member States, amongst others, in order to be seen to 'lead by example' (see e.g. European Green Deal Communication (EC 2019b, 8)).

2.2.2. EU decentralised Agencies

In general, own-account procurement by EU decentralised agencies and bodies falls under the regime outlined above for EU institutions. However, Recital 173 of the Financial Regulation permits further adaptation of the Rules in Annex I to reflect EU agencies' specific needs and contexts. Hence, for instance, besides the EU Financial Regulation itself, procurement by EUSPA is addressed by Regulation (EU) No 2021/696 establishing the European Union Space Programme and the European Union Agency for the Space Programme (Recital 28; see further Section 4.3.1. below).

Regarding the other two EU agencies considered by this Study, procurement by FRONTEX is addressed by Articles 89 and 90 of the FRONTEX Management Board Decision n° 19/2019 of 23 July 2019 adopting the Frontex Financial Regulation, which further regulates service level contracts and joint procurement with the Member States (FRONTEX 2019). No specific additional rules have been enacted regarding procurement by FRA.

2.3. Sustainable procurement: international and EU legal and policy frameworks

To understand the specific approach to sustainability adopted by EU procurement rules, it is first necessary to consider wider global trends in public procurement and sustainability regulation.

2.3.1. International policy: a turn towards sustainable public procurement

As mentioned earlier, the core or 'primary' objective of procurement can be framed as "delivering goods and services necessary to accomplish government mission in a timely, economical and efficient manner" (OECD, 2015, 6). Similarly, in basic terms, obtaining 'best value for money' can be understood as securing the maximum quantity or quality for the lowest price, while taking advantage of competition among the widest possible base of suppliers.

Yet market pressures or other factors can lead economic operators to cut costs, not only by capturing efficiencies, but by disregarding their legal obligations concerning, for instance, workers, the environment and good governance, or by selecting subcontractors who fail to adhere to minimum statutory requirements. Likewise, an exclusive focus on cheapest price by public buyers can divert attention from social or environmental harms associated, directly or indirectly, with products or services they buy, or with the suppliers they select to provide them.

Internationally, procurement laws have long recognised this risk (ILO 1949a, 1949b; Martin-Ortega and Methven O'Brien 2017). With the extension since the 1980s of transnational production systems, however, the scale of harms linked to 'offshoring' and the awareness of them grew (EC 2021 58 ff; Gimeno Feliu 2022; Murgo 2019). More recently, appreciation of intra-EU risks to human rights connected to price pressures, particularly in services, has also risen (Lietonen Jokinen and Pekkarinen, 2020; FRA, nd (c)).

These trends have prompted moves to articulate more clearly the duties of governments, under international and EU law, to prevent businesses from harming human rights and the environment, including in the context of their supply chains, globally and locally (Methven O'Brien 2018, Methven O'Brien and Martin-Ortega 2019). Consequently, attention has come to focus on the supply chain impacts of governments themselves, and the integration of sustainability considerations in public procurement (Methven O'Brien and Martin-Ortega 2020, Caranta and Janssen 2023, Caimi and Sansonetti 2023).

As a result, procurement reforms worldwide have increasingly rejected a simplistic equivalence between cheapest contract price and best value for public money. In other words, it is widely accepted today that public procurement laws and policies should permit, and indeed encourage, public buyers to consider alongside the price of an offer, how a specific contract award may meet non-price objectives such as 'sustainable green growth, the development of small and medium-sized enterprises, innovation, standards for responsible business conduct or broader industrial policy objectives' (OECD 2015, 6).

This is a crucial normative development because, in tandem, understanding has grown of the unique contribution sustainable public procurement can make to addressing the triple planetary crisis, human and labour rights, as well as salient socio-economic issues such as diversity, inclusion and gender equality.

Accounting for approximately 15% of GDP across OECD countries and US\$13 trillion globally, public procurement has potential to contribute **directly** to securing sustainable consumption, in line with the United Nations 2030 Agenda and Sustainable Development Goals [SDG Target 12.7] as well as global and EU climate objectives (EC, 2020b).

In step with such legal and policy developments, most national governments, international organisations and multilateral development banks have developed "policy frameworks conducive to sustainable procurement and/or have integrated SP in their circular, green economy or sustainable development agendas, while the diffusion of SP to private organisations is rapidly accelerating" (UNEP 2022, iii). Likewise global data "confirm that sustainable procurement is becoming a mainstream practice across all organisational types" (ibid).

Even the World Bank now requires borrowers by default to apply award criteria going beyond price for most international procurements, on the grounds that "[c]ombined with price and life cycle cost formulas...[these] provide a truer assessment of value that focuses on quality, sustainability, and other key criteria," (World Bank 2023). At the same time, it is believed, this approach "will...contribute to successful contract outcomes and effective risk management, including managing issues around environmental, social, supply chain disruption, cybersecurity, and global health emergencies" (ibid).

Yet, public procurement also has potential to contribute **indirectly** to sustainable consumption. By demonstrating demand for goods and services that meet social and environmental criteria, public procurers may influence suppliers and the wider market actors to adopt new or enhance existing measures to advance environmental and social objectives.

As stated in the Communication on the European Green Deal, "**Public authorities, including the EU institutions, should lead by example and ensure that their procurement is green.**" (EC 2019b, 8).

Accordingly, the OECD has for some years recommended that public buyers balance the primary procurement objective with 'use of the public procurement system to pursue secondary policy objectives' (OECD, 2015, 6). In addition, it is urged that government bodies develop sustainable public procurement (SPP) strategies; engage staff to work on sustainable public procurement (SPP); and assess the results of SPP to evaluate its performance (OECD Recommendation V 2015, 9), in the context of "the effectiveness of the public procurement system...as a whole, at all levels of government..." (Recommendation X, OECD, 2015, 11; see also UNEP Sustainable Public Procurement Implementation Guidelines (UNEP 2021). In a similar vein, the UN Guiding Principles on Business and Human Rights exhort public buyers to respect human rights, while latterly OECD policy has come to a more explicit recognition of the interdependency of effective procurement and responsible business conduct policies and practices (OECD 2020).

2.3.2. Sustainable procurement in the EU: An evolving regulatory framework

Since 2007, with adoption of the Lisbon Treaty, the EU's foundational values include respect for human rights including the rights of women and persons belonging to minorities alongside human dignity, freedom, democracy, equality, the rule of law.⁸

The TEU as amended now further provides that these values shall be upheld by the EU "In its relations with the wider world", which moreover "shall contribute to peace, security, the sustainable development of the Earth, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter", alongside the goal of international "free and fair trade". These objectives must be pursued by the EU "by appropriate means commensurate with the competences which are conferred upon it in the Treaties".

Thirdly, under the Lisbon Treaty, the EU "recognises the rights, freedoms and principles" set out in the [EU Charter of Fundamental Rights]...which shall have the same legal value as the Treaties" (Art 6).

Regarding the environment, under Article 11 TFEU, "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development."

These duties are binding on EU institutions and Member States when implementing EU law. This entails that the Procurement Directives, EU Financial Regulation, as well as additional agency-specific instruments and procurement conducted under them must conform to these overarching standards.

Such general duties arising from the EU treaties are reinforced by other specific EU legal rules. Under Article 114(3) TFEU, for example, EC proposals "...concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective". Moreover, under Articles 7ff TFEU, EU policies and activities must be consistent with horizontal policies in matters such as social rights and environmental protection (Article 114(3)).

Nevertheless, the path towards alignment of EU procurement law with transversal EU social, human rights and environmental commitments has not been without diversion. For many years, particularly

⁸ Art 1a inserted into TEU by the TFEU, provides: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

EC policy sought to prioritise market access and integration over non-price factors. On the other hand, decisions by the Court of Justice gradually extended the margin for their consideration (Serrano Chamizo 2022; Lichère 2022b). Eventually, in 2014, prompted by decisive demand from EP, the Court's indications were taken up in EU procurement legislation (Caranta, 2016). Albeit now in the past, the unfolding of these legal developments remains crucial to understanding challenges that persist today in reconciling competition and sustainability when public actors undertake procurement within the EU legal framework. Accordingly, the next section recounts key cases, principles and their enduring implications.

From 2002 to the 2014 Procurement Directives

The Court's first important decision on SPP was *Concordia Bus* (Case C-513/99, *Concordia Bus Finland*, ECLI:EU:C:2002:495). In this case, a Finnish municipality had awarded a contract for a public bus fleet based on criteria that included environmental dimensions. An unsuccessful bidder claimed the criteria used were unfair and discriminatory, as only one tenderer was in fact able to meet the emissions parameters referred to.

Rejecting this claim, the Court of Justice upheld the legality of including environmental award criteria. Factors which were not purely economic, it considered, may "influence the value of a tender from the point of view of the contracting authority" (paragraph 56). While the EU procurement rules were adopted to foster free movement of goods and services, moreover, according to the Treaty, environmental protection requirements must be integrated into EU policies (paragraphs 57 f).

At the same time, the Court of Justice built on the safeguards of objectivity and transparency laid down in the earlier case of *Beentjes* (Case 31/87, *Beentjes* ECLI:EU:C:1988:422),⁹ to be applied where secondary considerations were reflected in award criteria.

All award criteria, the Court found in *Concordia Bus*, must be "**linked to the subject-matter of the contract**"; must not confer unrestricted freedom of choice on a contracting authority; must be expressly mentioned in the contract documents or the tender notice; and **should furthermore "comply with all the fundamental principles of Community law, in particular the principle of non-discrimination"** (paragraph 69).

The Court's next landmark decision on SPP was *EVN* (Case C-448/01, *EVN* ECLI:EU:C:2003:651). Here, an Austrian region sought to purchase sustainable energy, but lacked means to ascertain the source of the energy that was to be provided. The Court of Justice reaffirmed that non-price factors could lawfully be considered in evaluating the most economically advantageous tender (paragraph 34). In addition, it held that "contracting authorities are free not only to choose the **criteria** for awarding the contract but also to determine the **weighting** of such criteria..." (paragraph 39, emphasis added).

Based on this decision, the EU enacted Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Like the Court's judgement in *ENV*, the Directive affirmed that under EU procurement law, contracting authorities may meet the "**needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles** [of EU public procurement law]" (Recital 1). In addition, the specific notion of a "link to the subject-matter of the contract" was inserted in Article 53 of the 2004 Directive which deals with award criteria.

⁹ I.e. the criteria chosen for the award must be "aimed at identifying the offer which is economically the most advantageous" (paragraph 19), the contracting authority must "comply with all the relevant provisions of Community law, in particular the prohibitions flowing from the principles laid down in the Treaty in regard to the right of establishment and the freedom to provide services" (paragraph 20) and "the criteria and conditions which govern each contract must be given sufficient publicity" (paragraph 21).

Box 2: Procurement stages relevant for SPP

To summarise, under the above-mentioned case law, public buyers may reflect environmental and social sustainability objectives in their procurements via the following mechanisms:

- **Technical specifications:** terms that describe what the contracting authority seeks to buy (e.g. e-cars; fair trade coffee)
- **Exclusion criteria:** terms that disqualify economic operators from eligibility to compete from public contracts (e.g. companies convicted for the use of child labour or wage discrimination)
- **Selection criteria:** criteria that economic operators must meet to before they can win a given contract (e.g. having an environmental management system or experience of working with specific disadvantaged groups)
- **Award criteria:** terms that score the price and various non-price objectives the buyer wants to meet via the procurement (e.g. paying a price premium for e-cars compared with fossil fuel powered ones)
- **Contract performance conditions:** terms that describe how the contract is to be executed (e.g. limiting delivery in peak traffic hours or training workers performing the contract so that they acquire higher skills).

The next significant development was the EC's espousal, in 2011, of the notion of **strategic procurement**. In a Green Paper on the modernisation of public procurement, the EC used this term to denote the '**strategic use of public procurement in response to new challenges, including in the social, labour and environmental domains** (EC 2011a, 10). The objective of enhancing procurement efficiency, according to the Green Paper, could be met in combination with 'common societal goals such as, the protection of the environment ..., combating climate change, promoting innovation, employment and social inclusion' (p. 2).

Yet, the EC's interpretation of the SPP concept initially remained restrictive. The *Max Havelaar* case arose from infringement proceedings brought by the EC against the Netherlands. The EC objected to a tender for coffee machines that referred to Fair Trade labels in both technical specifications and award criteria and which also included criteria and evidence concerning sustainable purchasing and socially responsible business activity in appraising bidders (Case C-368/10, *Commission v Netherlands*, ECLI:EU:C:2012:284). Besides being discriminatory, the EC argued that a reference to the origin of the coffee as an award criterion was not "linked to the subject-matter of the contract" as required by Directive 2004/18/EC, as this did not relate to an 'intrinsic' characteristic of tea and coffee but rather to the "general policy of the tenderers".

The Court of Justice held that, under EU procurement law, public buyers are "**authorised to choose the award criteria based on considerations of a social nature, which may concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons**" (*Commission v Netherlands*, ECLI:EU:C:2012:284, paragraph 85). The latter also include workers and producers involved in growing and processing the specific goods purchased.

On the other hand, the Court extended to selection criteria, as well as award criteria, the requirement of the link to the subject-matter of the contract. Consequently, **references to suppliers' general corporate policies, going beyond the specific goods purchased, may not be lawfully included in public tenders**. Basically, the Court allowed for the consideration of social aspects in the production processes of the specific good purchased, while it however ruled out the possibility to refer to the general corporate social responsibility to the tenderer.

A significant enunciation of principle, this rule was integrated into the 2014 EU Procurement Directives (Recital 97). As considered further below (Section 3), this may now require reconsideration in light of the EU's evolving legal and policy framework regarding corporate sustainability due diligence.

Box 3: Summary of EU case law requirements

A contracting authority can choose products or services that are sustainable in view of their characteristics or the way they were produced or supplied, provided these characteristics are:

- linked to the subject matter of the contract (i.e. the goods or services to be supplied)
- drawn up in a clear, precise and unequivocal manner in the notice or contract documents.

Sustainability in the 2014 EU Procurement Directives

Following a strong direction from the European Parliament with assistance from the Court of Justice (Caranta 2015), the revised EU procurement Directives adopted in 2014 included further new elements seeking to extend scope for public purchasing aligned to environmental and social sustainability goals. While these measures embraced all three new Directives adopted in 2014, analysis here focuses on Directive 2014/24/EU to which, as highlighted above, the EU Financial Regulation directly refers.¹⁰

The 2014 Procurement Directive affirms government purchasing as a key tool for securing sustainability. "Public procurement", it states, "plays a key role in the Europe 2020 strategy...for smart, sustainable and inclusive growth'...as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds" (Recital 3).

Various elements included in the 2014 Directives can be seen to reflect this vision including, notably, provisions on:

- **Contractors' compliance with minimum environmental and social standards**
- **The use of technical specifications**
- **The use of environmental or social labels (Articles 42 and 43)**
- **The use of exclusions (Article 57)**
- **Selection (Articles 59 and 62)**
- **Environmental Management schemes including EMAS**
- **Award criteria (Article 67)**
- **Life Cycle Costing (LCC)**
- **Abnormally low tenders (Articles 67, 68 and 69)**
- **Contract performance conditions (Article 70).**

Each of these is considered further below. In addition, as a cross-cutting element, and in line with the case law and rules under the 2004 Directive as discussed above, the 2014 Procurement Directive affirms that public buyers are legally permitted to choose products or services on grounds of their sustainability, so long as: i) any characteristics referred to are "linked to the subject matter" of the contract, and ii) all tender requirements must be capable of objective assessment and verification.

However, in the 2014 Directive, the requirement for a link to the subject matter of the contract has been defined flexibly.

Under Article 67(3) of the 2014 EU Procurement Directive, **tenders can refer to any aspect of the works, supplies or services to be provided in any respect and at any stage of their life cycle**, and not only to their 'material substance', in line with the Court's decision in *Max Havelaar*.

¹⁰ See also Directive 2014/23/EU on works and services concessions and Directive 2014/25/EU on utilities procurements.

Furthermore, under Article 2(1)(20), “‘life cycle’ means all consecutive and/or interlinked stages, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of the product or the works or the provision of the service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilisation”.

On the other hand, at Recital 97, the 2014 Directive clarifies 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**” (Recital 97).

Relatedly, Recital 98 indicates that it is “essential that award criteria or contract performance conditions concerning social aspects of the production process relate to the works, supplies or services to be provided under the contract”.

Again, these elements may be seen as presenting tensions with the EU’s repeatedly stated goal to promote the adoption by businesses of corporate due diligence policies and procedures. Whereas the co-legislators’ recent political agreement regarding the foreseen CSDDD may entail changes to this situation, relevant details as yet remain unclear (see further below section 3.4).

Hence, **EU law does not currently permit public procurers to refer to general corporate sustainability due diligence policies**, notwithstanding these are currently recommended and may in future be legally required of companies by other EU legislation, and whereas specific forms of due diligence are already required by EU law of companies operating in specific sectors or linked to certain value chains linked or sustainability challenges (e.g. conflict minerals and deforestation), and also by national law in some EU Member States.

Next, this section explains how each of the elements above is addressed by the 2014 Directives, illustrating their use in practice via examples.

2.3.3. [Specific provisions of the 2014 Procurement Directive relating to sustainability and their application in practice](#)

- **Contractors’ compliance with minimum environmental and social standards**

Under Article 18(2), Member States must “**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**”. This requirement, introduced by the 2014 Directive, also extends to subcontracting, while national authorities are obliged to ensure observance of relevant obligations (Article 71(1)).

- **The use of technical specifications**

The ‘technical specifications’ define the ‘subject matter’ of the contract which, as noted above, **can encompass specific processes or methods of production or provision, or processes in other stages of the life-cycle of works, products or services**. Further, following *EVN* and *Max Havelaar*; technical specifications can relate to characteristics such as environmental and climate performance, and accessible design (Annex VII(1)). In all cases, though, such specifications must be linked to the subject matter and be proportionate to the value and objectives of the contract in question (Article 42(1)).

Box 4: Example: [Redevelopment of a former hospital complex into a technological campus in Strasbourg \(FR\)](#)

Technical specifications set minimum material recovery targets to be reached such as:

1. Cast-iron radiators: at least 80% needed to be reclaimed for reuse
2. Structural roof timber: at least 50% to be reclaimed for reuse.

- **The use of environmental or social labels (Articles 42 and 43)**

Under the 2014 Procurement Directive,

“Contracting authorities that wish to purchase works, supplies or services with specific environmental, social or other characteristics **should be able to refer to particular labels, such as the European Eco-label, international eco-labels or any other label provided that the requirements for the label are linked to the subject-matter of the contract**, such as the description of the product and its presentation, including packaging requirements” (Recital 75).

Further conditions for the use of labels include that requirements to use them “are drawn up and adopted on the basis of objectively verifiable criteria”, use “a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations, can participate”, and that the label is “accessible and available to all interested parties” (Recital 75; Article 43 specifies the requirements listed in the Recital).

It is also provided that so-called “equivalent labels” must be accepted. In addition, economic operators may prove that they do not have “the possibility of obtaining the specific label indicated by the contracting authority or an equivalent label within the relevant time limits for reasons that are not attributable to them”. In such a case, a tenderer may demonstrate with appropriate proof that the works, supplies or services to be provided by them “fulfil the requirements of the specific label or the specific requirements indicated by the contracting authority” (Article 43(1), last phrase).

Box 5: Example: [Purchase of IT by the central contracting authority providing computer workstation and server services for Estonia’s Ministries \(RIK\)](#)

To promote energy efficiency, an EU energy label corresponding to at least A energy efficiency class was required for the monitors offered.

- **Exclusions (Article 57)**

Under Article 56(1) of the 2014 Procurement Directive, contracts can only be awarded to a tenderer that is not excluded in accordance with Article 57. Under Article 57, exclusion is **mandatory** for breaches of the obligations relating to the payment of taxes or social security contributions (Article 57(2)) or in the circumstance where the specific corporation entering the bid has been finally convicted for offences of using child labour or forms of trafficking in human beings defined in Article 2 of Directive 2011/36/EU (Article 57(1)(f)). The Financial Regulation mirrors this approach to exclusions in Article 136(1).

The 2014 Directive permits the exclusion of bidders from public tenders for other breaches of social and environmental obligations on a voluntary basis (Article 57(4)(a)). Individual Member States could, however, make broader-based exclusions mandatory (Case C-66/22, *Infraestruturas de Portugal SA*, ECLI:EU:C:2023:1016; Turudic and Dragojevic 2023). Moreover, scope is preserved for contracting authorities “not to award a contract to the tenderer submitting the most economically advantageous tender [MEAT]” where they have established non-compliance with the applicable obligations mentioned in Article 18(2). This approach, however, reciprocally allows contracting authority to

lawfully accept a cheap tender while disregarding breaches of environmental and social rules unless the tender has to be qualified as abnormally low under Article 69.

The Financial Regulation, instead, takes a prospective approach to compliance with social and environmental obligations, requiring compliance during contract implementation (Article 166(2) and Annex I Point 16.4I). Non-compliance amounts therefore to breach of contract. However, there is no provision in the Financial Regulation mirroring Article 57(4)(a).

Finally, Article 25(2)(d) of the 2023 EU Deforestation Regulation¹¹ requires Member States to take measures to ensure that operators and traders responsible for infringements under the Regulation are excluded for a maximum of 12 months from public procurement processes and access to public funding, including tendering procedures, grants and concessions.

- **Selection (Article 58)**

Under Article 56(1) of the 2014 EU Procurement Directive, contracts can only be awarded to a tenderer that meets specific selection criteria; these may be set by buyers under Article 58(4). Usually, selection criteria will specify the necessary **technical and professional ability of tenderers**, in other words, “the necessary human and technical resources and experience to perform the contract to an appropriate quality standard”. In scholarship, it has been observed that selection criteria are backward-looking as buyers infer them from candidates and tenderers past characteristics and performance (Barnard, 2017, p. 222).

Box 6: Example: [Construction of the headquarters of the Supreme Audit Office in Prague \(CZ\)](#)

Technical specifications included a list of significant construction works and experience working with Design-Build requirements. The construction team had to include a Building Information Modeling (BIM) coordinator. The contracting authority also asked for environmental management measures that the construction company would implement during the performance of the contract.

Notably, whether selection criteria might refer to a business’ capacity to implement human rights or environmental due diligence was not contemplated in the development of the 2014 Directive or addressed by the text of the legislation.

- **Environmental Management schemes including EMAS**

Under the 2014 Directive, contracting authorities may require that tenderers possess environmental management systems or standards certification (Article 62(2)). Primarily, this refers to the EU Eco-Management and Audit Scheme (EMAS), or environmental management systems recognised in line with Article 45 of Regulation (EC) No 1221/2009, or other environmental management standards such as ISO14011 based on “relevant European or international standards”. As with social and environmental labels, discussed above, economic operators lacking certification may demonstrate they possess analogous capacity, subject to various conditions.

Box 7: Example: [Circular Economy in the City of Tampere \(FI\)](#)

The City of Tampere Construction and Maintenance of Urban Environment Unit announced that renovation of Yliopistonkatu, a key thoroughfare, would adopt a newly developed circular economy (CE) procurement procedure. Bidders were as such requested to attest to certification to EMAS or equivalent environmental management system.

¹¹ Regulation (EU) 2023/1115 of the European Parliament and of the Council 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.

- Award criteria (Article 67)

Under Article 67 of Directive 2014/24/EU, contracting authorities can award contracts to “the best price-quality ratio...assessed on the basis of criteria, **including qualitative, environmental and/or social aspects**”. As seen above, these aspects must however be linked to the subject matter of the contract. Consistently with *Max Havelaar*, Article 67(3) of the 2014 Directive further specifies that “Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in: (a) the specific process of production, provision or trading of those works, supplies or services; or (b) a specific process for another stage of their life cycle, even where such factors do not form part of their material substance”. The criteria chosen must be capable of objective assessment and evaluation (Article 67(4)).

Box 8: Example: [Reforestation in Lazio \(IT\)](#)

From 2020 to 2022, the Lazio Region (IT) invested € 12 million to plant and maintain 6 million new trees and shrubs in the whole region, one tree for each inhabitant. This investment had the objective of creating 30 000 more hectares of forest in the Region and offsetting 240 000 tonnes of CO₂ per year. Amongst the award criteria featured the following:

- c. ‘Water saving’ criterion: up to 4 points were awarded for bidders’ proposed water-saving and water resource rationalisation techniques and technologies, such as rainwater collection systems or other high efficiency solutions.
- e. ‘Organic production’ criterion: up to 2 points were awarded in proportion to the percentage of plants and/or trees produced in compliance with Regulation (EC) No 834/2007 on organic production and labelling of organic products.
- f. ‘Renewable energy sources’ criterion: up to 2 points were given to bidders using no less than 50 per cent energy from renewable sources for heating greenhouses.
- h. ‘Valorisation and management of residual material’ criterion: up to 2 points were awarded where a tenderer committed to use of residual material generated by planting activities by delivering it to local composting systems as a structuring material, or for reuse.

- Life cycle costing (LCC)

Article 67(1) of the 2014 Procurement Directive allows public buyers recourse to ‘cost-effectiveness approaches’, such as Life Cycle costing. These can be referred to in the costs imputed to environmental externalities linked to the product, service or works in question which may include, for example, the cost of greenhouse gas or other pollutant emissions. The monetary value of such costs must be determined and verified by methodologies based on ‘objectively verifiable and non-discriminatory criteria’. Moreover, only data that can be provided with reasonable effort by normally diligent economic operator may be required in this context (Article 68(2)(a) and (c)).

Box 9: [Example: Using LCC to calculate CO₂ emissions from indoor lighting](#)

According to the EC LCC Internal Lighting Guide, the externality cost of CO₂-eq emissions must be specified. Since there is no specific EU level guidance for internal lighting, a possible reference is to a 2014 report for DG Transport on the “Update of the Handbook on External Costs of Transport” which proposed a value of 90 EUR/tonne (in 2010 prices) from a range between 48-168 EUR. In some countries, the Government might provide other figures. Therefore, practitioners will need to specify the costs for the climate change externality making sure that the figure they use is in line with the requirements defined in Article 68(2) of Directive 2014/24/EU on public procurement.

- **Abnormally low tenders (Article 69)**

Contracting authorities must reject tenders that are abnormally low because they do not comply with applicable obligations referred to in Article 18(2) (Article 69(3), last phrase). The Court of Justice stressed the duty of a contracting authority thoroughly to check abnormally low tenders in case of suspected breaches of the relevant social obligations (Case C-101/22 P, *Commission v Sopra Steria Benelux* ECLI:EU:C:2023:396).

Box 10: Example: [Abnormally low tenders in Walloon Region \(BE\)](#)

The Guide on verification of prices of Belgium's Walloon Region highlights the need for public buyers to investigate compliance with environmental and labour law in case of abnormally low tenders, i.e. tenders that diverge significantly from the contracting authority's own cost estimates or known market prices or data.

- **Contract performance conditions**

Under Article 70 of the Procurement Directive, contracting authorities may lay down special conditions relating to the performance of a contract including economic, innovation-related, environmental, social or employment-related considerations. Any such conditions must be linked to the subject matter of the contract as defined in Article 67(3) and indicated in the call for competition or procurement documents. Recital 97 of the 2014 Directive indicates that the link to the subject matter "also includes...contract performance conditions relating to the supply or utilisation of fair trade products in the course of the performance of the contract to be awarded". These can include "the requirement to pay a minimum price and price premium to producers" (ibid.).

In addition, Recital 97 highlights that "Contract performance conditions pertaining to environmental considerations might include...the delivery, package and disposal of products, and in respect of works and services contracts, waste minimisation or resource efficiency". Even if Article 70 is silent on the point, to avoid green-washing the contract performance conditions must be designed so as to allow contracting authorities to verify their respect by the contractor.

Box 11: Example: [Procurement for events and meetings, such as receptions, dinners, openings, and lunch buffets by Hague municipality \(NL\)](#)

For the execution of the contract, the tenderer had to employ people from the following categories for an amount equal to at least 5% of the value of the contract:

- Persons registered as unemployed jobseekers, whether benefit recipients or not;
- Persons with an occupational disability benefit.

To summarise, despite the significant advances it made in supporting strategic and more sustainable procurement, the 2014 Procurement Directive leaves little space for government buyers to refer to businesses' due diligence policies or practices based on general corporate approaches (see further below Section 3.2). While the point is not directly addressed in the legislation, the Directive does clearly provide that the "link to the subject matter" requirement "excludes criteria and conditions relating to general corporate policy" so that contracting authorities "should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place" (Recital 97). Whereas it might be considered that tenderers' due diligence practices can be addressed via requirements concerning social or environmental labels, these too are conditioned by the link to the subject-matter requirement.

While tenderers may be excluded for involvement in child or forced labour, and mandatory exclusions are activated where offers breach locally applicable minimum environmental or labour standards, or

where they reveal themselves via a price proposal that is abnormally low, these criteria in addition lack any reliable link to suppliers' adoption or implementation of due diligence policies or practices, and anyway have limited traction in practice.

Post-2014 case law

Over the last decade, the Court of Justice has gradually extended scope for EU Member States to pursue different aspects of SPP under the 2014 Directive (Burgi 2022, 60 ff). In the **TIM case** (Case C-395/18, *TIM*, ECLI:EU:C:2020:58), the contracting authority found that a subcontractor in the tender did not comply with standards relating to the right to work for people with disabilities and therefore excluded the tenderer from the procedure. The Court held that the 2014 Directive had established suppliers' compliance with obligations relating to environmental, social and labour law as a "principle" on par with other principles including those of "equal treatment, non-discrimination, transparency, proportionality". Given this 'cardinal value', the Court held that Article 57(4)(a) referred to sub-contractors as well as main contractors (paragraph 35) and Member States were obliged to ensure their compliance under Article 18(2) (paragraph 38).

In **Sophia Group**, the Court considered the use by the EP of award criteria referring to workers' rights (Case T-578/19 *Sophia Group* ECLI:EU:T:2021:77). Several social aspects had been included in award criteria for the procurement of management services for its buildings. Specifically, points were attributed for equal treatment (*Diversité/égalité des chances*); combating harassment (*Lutte contre le harcèlement*); inclusion of persons with disabilities (*Inclusion de personnes en situation de handicap*); quality of working environment (*Bien-être au travail*); training and certification schemes, including ISO 9001 or equivalent. The second ranked tenderer challenged the award decision based on claims including that selection and award criteria had been confused and that the award criteria were not linked to the subject matter of the contract.

The General Court rejected all claims. Concerning equal treatment, it held that under the Financial Regulation, 2014 Directive and relevant case law, award criteria can refer to the "organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract" (paragraphs 50 ff).

Concerning the link to the subject matter, recalling *Concordia Bus, EVN* and *Max Havelaar*, the Court stated that award criteria need not be economic in nature, nor need they affect the "material substance" of goods or services acquired (paragraphs 90 ff). The criteria chosen indeed concerned the working conditions of employees providing services to the EP, and as such had to be considered as linked to the subject matter of the contract (paragraphs 109 ff). Finally, even if the EP had not articulated the label requirements to be met by the tenderers, the specific titles of the award sub-criteria were deemed sufficient to make clear what those requirements were (paragraphs 130 ff).

While the General Court's decision in *Sophia Group* concerned award criteria, its rationale applies *mutatis mutandis* to contract performance conditions: criteria that refer to working conditions and social rights of workers engaged in the production or delivery of purchased goods and services are to be considered as linked to the subject matter of the contract.

Finally, in **Sopra Steria Benelux** the Court of Justice stressed the **duty of the contracting authority thoroughly to check abnormally low tenders in case of suspected breaches of social obligations** (Case C-101/22 P, *Commission v Sopra Steria Benelux* ECLI:EU:C:2023:396).

Moreover, it held that before a statement of reasons as to why a successful tender is *not* abnormally low can be considered adequate, it must attest i) that a bid, based on its financial characteristics complies with the legislation of the country where the services are to be carried out on remuneration of staff, social security contributions, and compliance with occupational safety and health standards; and ii) that it has verified that the proposed price included all the costs arising from the technical aspects of the tender (paragraph 74).

Sustainable procurement under the EU Financial Regulation

To recall, according to Recital 96 of the Financial Regulation, EU institutions' procurement is modelled on the 2014 Procurement Directive. Accordingly, various aspects of the 2014 Directive relating to SPP discussed above generally apply to purchasing by EU institutions. In addition, as noted, EU institutions must abide by EU treaty provisions addressing human rights, labour and social rights, and the environment. Further, **EU Regulations, including those that regulate procurement are in principle applicable to EU institutions and agencies.** Nevertheless, there remain certain divergences between the two regimes in the area of SPP. To help visualise these, a comparative table is shown in Annex I.

To illustrate, the Financial Regulation specifically reinforces the requirement that buyers should address suppliers' compliance with minimum social and environmental conditions.

"In order to ensure that, when executing contracts, economic operators comply with the applicable environmental, social and labour law obligations established by Union law, national law, collective agreements or the international social and environmental conventions listed in Annex X to Directive 2014/24/EU, **such obligations should be part of the minimum requirements defined by the contracting authority and should be integrated in the contracts signed by the contracting authority**" (Recital 103)

Furthermore, the EU Financial Regulation provides that,

"The **draft contract shall: (e) specify** that the contractor shall 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 social and environmental conventions listed in Annex X to Directive 2014/24/EU" (Point 16.4, Annex I).

In practice, this requires that EU institutions must include a specific contract clause obliging contractors to comply with 'the minimum requirements'.

On the one hand, provisions permitting EU Member States, under the Directive, to establish mandatory exclusion of tenderers for past breaches of environmental and social obligations under Article 57(4)(a) of Directive 2014/24/EU lack parallel in the Financial Regulation. On the other hand, Article 136(1)(e) thereof provides for the exclusion of economic operators having "shown significant deficiencies in complying with main obligations in the implementation of a legal commitment", which might find application also in this area. Neither does the Financial Regulation explicitly regulate contract performance conditions, albeit Article 70 of the 2014 Directive is spelling out general EU public procurement principles and may thus be adapted to EU institutions.

In any event, to the extent SPP is not mandatory for EU institutions, there is a strong case for EU institutions to procure sustainably, in the interests of policy coherence and leadership by example, given that EU law imposes duties as detailed below for Member States, and for EU businesses, in the sustainable procurement domain (see also below 5.2.1., where the recent recast of the Financial Regulation is discussed). This was reflected already in 2014 by the EU Court of Auditors, which recommended that, **"Green procurement should be used by the EU institutions and bodies, wherever possible.** The financial rules and/or the procurement rules applicable to the EU institutions and bodies should provide the tools for contributing to the protection of the environment and sustainable development, while ensuring that they can obtain best value for money for their contracts" (ECA 2014, 39).

Supporting SPP: EU policy and guidance

To support contracting authorities in giving effect to EU procurement law and its SPP dimensions as described above, the EC has published a number of formal guidance documents (EC 2016 and 2021a). In addition, the EC has devised 'GPP criteria' that can be incorporated into tender procedures for goods, services or works. There are two types of GPP criteria: **'core' criteria** aimed at minimising administrative

costs for suppliers associated with the procurement process; and **'comprehensive' criteria** addressing higher levels of environmental performance (EC nd). Together, the EC's GPP guidance and GPP criteria comprise the 'GPP toolkit'. Similarly, the EC has published two successive 'Buying Social' documents addressing social procurement including SPP criteria (see today EC 2021b; also EC 2020).

Current developments in EU procurement law and policy: Towards mandatory SPP

As conveyed above, EU regulation has during the 21st century increasingly sought to clarify the scope for the pursuit of sustainable procurement by public buyers in the Member States and by EU institutions. Despite this, the uptake and implementation of SPP in the Member States remains incomplete. According to the EC's 2021 Report *Implementation and best practices of national procurement policies in the Internal Market*, contracting authorities continue to experience challenges in practising GPP and SRPP, including because of the 'link to the subject matter' requirement (EC 2021a; Semple 2016). At the same time, data on SPP across Member States remains inadequate (EC 2021a, Caimi and Sansonetti 2023). The recent special report of the European Court of Auditors on Public procurement in the EU both confirmed the limited uptake of SPP in the Member States and stressed the lack of reliable data (ECA 2023), findings echoed in other recent cross-national studies (Caimi and Sansonetti 2023).

The COVID-19 pandemic and energy shortages linked to the invasion of Ukraine put acute pressures on EU public supply chains. In tandem, demands for healthcare supplies and green transition minerals have highlighted abuses breaching EU human rights and environmental commitments (Methven O'Brien and Weatherburn 2023, BHRRC nd). Combined with widespread evidence of SPP's weak penetration across the EU public sector, these developments have refocused EU policy-makers' attention on the issue of mandatory SPP requirements.

The 2019 EU Green Deal afforded SPP a prominent role. In 2020, in its *New Industrial Strategy for Europe* of 2020, the EP called for action, including via SPP, to strengthen, shorten and diversify EU supply chains, while making them more sustainable, to reduce overreliance on specific markets and increase resilience.¹² In particular, the Resolution requested the EC to "analyse the conditions for making mandatory in public procurement sustainability based on environmental, social and ethical criteria, including carbon footprint, recycling content and working conditions throughout the whole life-cycle" (paragraph 96).

Also published in 2020, the EC's Circular Economy Action Plan sought to move beyond an exemplary role for SPP, insisting it should rather be mandatory. With reference to untapped potential for SPP, and the "limitations of voluntary approaches" (para 2.1), in it the EC commits to propose, "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" (EC 2020, para 2.2.; see Tátrai and Diófási-Kovács (2021)).

Moreover, many initiatives under the Circular Economy Action Plan, the European Green Deal, the European Pillar of Social Rights, the 'Fit to 55' EU plan for a Green transition rely on or entail impacts for SPP, and include mandatory SPP elements, as illustrated next. Such measures can be seen as embodying leadership by example in support of transition to a circular economy and in the fight against climate change, by sending clear market signals regarding the demand for sustainable services and products.

¹² [A New Industrial Strategy for Europe - Wednesday, 25 November 2020.](#)

a) SPP targets

Some new instruments establish **mandatory SPP targets** in the Member States, for example, the EU Clean Vehicles Directive,¹³ albeit this does not seem directly applicable to own-account procurement by EU institutions.

b) Mandatory SPP exclusion criteria

Article 25 of the EU Deforestation Regulation¹⁴ provides that EU Member States “...shall lay down rules on penalties applicable to infringements of this Regulation by operators and traders and shall take all measures necessary to ensure that they are implemented” (Article 25(1)). Under Article 25(2), such penalties shall be “effective, proportionate and dissuasive” and shall inter alia include: “(d) temporary exclusion for a maximum period of 12 months from public procurement processes and from access to public funding, including tendering procedures, grants and concessions”.

c) Mandatory SPP technical specifications

Some new legislation requires contracting authorities to buy high environmentally performant products (e.g. recast Article 15(2) Directive (EU) 2018/2001 and Article 85 of the Batteries Regulation).¹⁵ In addition, various proposed instruments would empower the EC to adopt technical specifications for use in public procurement, such as Article 84 of the Proposal for a Regulation 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).

Another illustration is provided by Article 15a (3) of Directive (EU) 2018/2001 as added by the Renewable Energy Directive (RED III).¹⁶ Under this provision, “Member States shall ensure that public buildings at national, regional and local level fulfil an exemplary role as regards the share of renewable energy used...”

Similarly, Article 7(1) of the recently approved Energy Efficiency Directive¹⁷ requires Member States to ensure that, unless it is not technically feasible, contracting entities “...**purchase only products, services buildings and works with high energy-efficiency performance in accordance with the requirements referred to in Annex IV to this Directive**”. Annex IV in turn refers to standards established via Commission implementing regulations or, in their absence, to EU GPP ‘core’ criteria (lit. (c)) (cf. Caranta and Janssen 2023, 268; Andhov et al, 2020).

d) Mandatory SPP award criteria

Regulation (EU) 2023/1542 concerning batteries and waste batteries provides **mandatory award criteria** drafted by the EC. Under Article 85(1), contracting authorities and entities “shall, when procuring batteries or products containing batteries..., take account of the environmental impacts of those batteries over their life cycle with a view to ensuring that such impacts are kept to a minimum”. Under Article 85(3), the EC is to adopt delegated acts “establishing award criteria for procurement procedures for batteries, or products containing batteries, based on the sustainability requirements”. Within 12 months of the first delegated

¹³ Directive (EU) 2019/1161 of the European Parliament and of the Council of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles.

¹⁴ Regulation (EU) 2023/1115 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010.

¹⁵ Regulation (EU) 2023/1542 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC.

¹⁶ Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652.

¹⁷ 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).

act's entry into force, contracting authorities and entities must comply with the obligations under Article 85(1) by referring to the mandatory award criteria set by the Commission in their procurement documents.

Given EU procurement law's original concern with market integration, the inclusion of mandatory SPP approaches represents a significant reorientation in EU procurement regulation. With the extension of focus from the award procedure ('how to buy') to the character of the products and services purchased ('what to buy') and of suppliers ('whom not to buy from') (Janssen and Caranta 2023), sustainability considerations are becoming increasingly integral in procurement rather than just a secondary consideration (Pernas Garcia 2023).

Mandatory measures should, it has been observed, "promote...availability of information on the market, further standardisation, and more legally certain and efficient procurement processes for the authorities. Furthermore, a mandatory GPP approach is likely to increase market demand and innovation and lower the costs of environmentally-friendly products and services" (Mélou 2020). Such a shift should, then, respond to the need observed by legislators, policy bodies, trade unions and civil society as well as scholars to extend the uptake of sustainable purchasing in the EU to meet sustainability and human rights objectives as well as to avoid fragmentation in the internal market (Martin-Ortega and Methven O'Brien 2017; Methven O'Brien and Martin-Ortega 2019; Rosell 2021; Janssen and Caranta 2023).

Developments towards mandatory SPP in EU Member States

Alongside the above EU-level developments, some EU Member States have also enacted rules to establish binding SPP requirements. Two basic approaches may be identified: (a) general requirements to consider sustainability in public procurement; and (b) specific SPP criteria.

a) Mandatory national requirements to consider SPP

One jurisdiction where this approach has been pursued is the Netherlands. Under Article 1.4 (2) of the Dutch Procurement Act 2012, a contracting entity is required to ensure that as much societal value as possible is created for public resources when entering a public contract (Heijnsbroek 2023). Similarly, in France, under L. 2152-7, first paragraph, of the Code de la commande publique (CCP) (French Code on public procurement) concerning award criteria, there is a general duty to insert at least one green criterion (« au moins un de ces critères prend en compte les caractéristiques environnementales de l'offre ») (Lichère 2022a).

b) Mandatory national SPP criteria

In Italy, based on the EU GPP criteria, but adapted locally following market analysis and feedback from stakeholders, detailed technical specification and performance clauses have been designed for 19 product or service categories (Criteri Ambientali Minimi) since 2017 (De Leonardis 2019). Failure to introduce these mandatory criteria in contract documents can lead the concluded contract to be declared ineffective by the administrative courts (Iurascu 2023). Moreover, specific award criteria have been designed for the relevant categories to ease the work of contracting authorities willing to use them (Botta 2023). A similar if less structured approach has recently been adopted in Ireland (Revez et al 2023).

Such innovations have been recognised by the EC as good practices that can trigger an increase in the uptake of GPP at national level (EC 2021). Nonetheless, successful implementation of mandatory SPP requirements has prerequisites beyond formal legal rules. Procurement officials and economic operators, as UNEP observes, require shared understanding and hence "training, capacity-building and incentives" (UNEP 2022, Recommendation 4.2, p.73). While some resources have been developed, such as the EC GPP Toolkit (EC 2023; see also Danish Institute for Human Rights, 2020), currently in EU Member States knowledge is insufficient and relevant procurement skills are lacking (EC 2021).

In summary, EU procurement law and policy has over recent decades demonstrated a gradual shift from an almost exclusive focus on regulating award procedures with the aim of securing market integration, towards also regulating the environmental and social sustainability of purchased goods and services. In principle, EU institutions are generally addressed or expected to abide by applicable norms on sustainable procurement. On the other hand, irrespective of whether relevant rules are mandatory or voluntary, there is widespread recognition of a general shortfall in capacities and resources needed to fully realise SPP, and its potential to drive respect for human rights and just transition, in practice.

3. DUE DILIGENCE AND PUBLIC PROCUREMENT

3.1. Human rights due diligence

Since 2011, international actors including the UN, OECD, regional bodies including the EU and Council of Europe, as well as individual States in Europe and globally have adopted legal and policy measures directing that **all businesses undertake processes of 'due diligence' in order to give practical effect to their responsibilities to respect human rights**, the environment and good governance (OECD 2011, 2023; EU 2011; COE 2018; République Française, 2017; Deutscher Bundestag, 2021; Danish Institute for Human Rights, nd).

The principal point of departure for these developments is found in the UN Framework and Guiding Principles on Human Rights (UN 2008, 2011). According to the UNGPs, UN human rights treaties entail, besides the duties they explicitly establish on States, a corporate responsibility to respect human rights.

Consequently, businesses should seek to prevent or mitigate impacts that they have "caused or contributed to", as well as those "directly linked" to their operations, products or services through their business relationships, whether contractual or non-contractual (UNHRC 2011, GP13). According to the UNGPs, practising 'due diligence' provides a mechanism for businesses to avoid infringing human rights and to address adverse human rights impacts they are involved in. In terms of scope, the corporate responsibility to respect human rights, and likewise due diligence, refers to all internationally recognised human rights, not only those applicable in a single jurisdiction (UNHRC 2011, GP11).

The first step of corporate due diligence is **adopting a policy to respect human rights** (GP15). Next, due diligence comprises a four-step continuous improvement cycle (UNHRC 2011, GPs17-20): **1) Assessing actual and potential impacts** of business activities on human rights ("human rights risk and impact assessment"); **2) Integrating appropriate measures** to address impacts into company policies and practices; **3) Tracking the effectiveness** of measures taken in preventing or mitigating adverse human rights impacts; and **4) Communicating publicly** about the due diligence process and its results. Given victims' rights to access effective remedies for human rights abuses, companies should also take steps to their remediation (UNHRC 2011, GP22; Methven O'Brien and Botta, 2022). Reflecting the diversity of businesses, in terms of size, activities and location, due diligence as described in the UNGPs is a scalable and context-sensitive process that can and should be tailored to reflect what is feasible for businesses in their specific situation. Likewise, the management of business responses to human rights abuses they are linked to should, in a rational way, prioritise amongst these to address the most severe, extensive and irremediable harms first (UN Working Group on the issue of human rights and transnational corporations and other business enterprises, 2018).

3.2. Due diligence and responsible business conduct

A second terminology that has emerged in parallel with that of due diligence is 'responsible business conduct'. Prominently, the notion of responsible business conduct due diligence has been articulated in new standards advanced by the OECD, including its Guidelines for MNEs (OECD 2011, 2023), Due Diligence Guidance for Responsible Business Conduct (OECD 2018) and various sector-specific due diligence guidance documents (OECD, nd).

In terms of scope, **responsible business conduct due diligence includes, but goes beyond internationally recognised human rights, to embrace a wider range of environmental and governance objectives** (EC 2011b; OECD 2018). Yet, like the corporate responsibility to respect human rights articulated by the UNGPs, 'responsible business conduct' is, according to these policy instruments, executed by businesses via their implementation of due diligence processes. In a move beyond ethical 'voluntarism', then, due diligence is increasingly widely seen as the required mechanism through which companies' 'corporate social responsibility' is realised (CSR) (EC 2011).

Throughout OECD RBC guidance, furthermore, businesses' supply chains are central to the analysis of risk and associated prevention, control and remediation measures. For example, under the OECD RBC Guidance (2018), identifying and assessing impacts entails that businesses, *inter alia*:

- "Carry out a broad scoping exercise to identify all areas of the business, across its operations and relationships, including in its supply chains, where RBC risks are most likely to be present and most significant" (OECD 2018, Section 2.1);
- "Carry out iterative and increasingly in-depth assessments of prioritised operations, suppliers and other business relationships in order to identify and assess specific actual and potential adverse RBC impacts".

Further, under the heading "Procurement, supply chain, business relationships", the OECD RBC Guidance highlights as applicable the "full range of OECD Guidelines for MNEs issues in the supply chain..." and "screening, contracting and monitoring supply chain/business relationships for these issues" (OECD 2018, p58).

Regarding the question, "How can RBC expectations be built into business relationships?", the OECD RBC Guidance further counsels that "...expectations of new business relationships can be communicated and agreed to through formal agreements or documentation," such as "through supplier codes of conduct, joint venture contracts, side letters to investee entities etc". Such agreements or documents, it notes, can be drafted so as to establish:

- 'Expectations that business relationships meet the OECD Guidelines for MNEs and/or the Guidance or aligned standards.
- Expectations about transparency, monitoring and reporting by the business relationships.
- Specification about whether/how the business relationships are expected to cascade requirements to their own business relationships through the supply chain or value chain.
- Grounds for terminating the contract due to failure to meet expectations regarding the OECD Guidelines for MNEs' (OECD 2018, p60).

Such approaches reflect consistent concerns for the OECD which has accordingly devised additional guidance supporting RBC due diligence for specific value and supply chains including agriculture, garment and footwear as well as conflict minerals (OECD 2016, OECD nd).

3.3. Corporate due diligence standards: EU law and policy

Turning to the EU setting, here also corporate due diligence has rapidly assumed a central role in new legal rules addressing sustainability challenges linked to business activities. Context-specific due diligence duties for corporations are central to the regulatory schemes espoused, for instance, by the EU Conflict Minerals Regulation,¹⁸ EU Deforestation Regulation,¹⁹ and EU Batteries Regulation.²⁰

Such specific statutory requirements build on more generally applicable duties under EU non-financial reporting legislation. Already in 2014, the EU Non-financial Reporting Directive²¹ sought the disclosure by relevant companies of

¹⁸ Regulation (EU) 2017/821 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

¹⁹ Regulation (EU) 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.

²⁰ Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC.

²¹ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance.

- information “relating to at least environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters”,
- a “description of the policies, outcomes and risks related to those matters” and
- “information on the due diligence processes implemented by the undertaking, also regarding, where relevant and proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts” (Recital 6).

In 2023, these provisions were strengthened and extended by the 2023 EU Corporate Sustainability Reporting Directive.²² Under Article 19(a)(2) of the 2023 Directive, corporations are required to publish, following external assurance, and with reference to the “whole value chain of the undertaking including its own operations, its products and services, its business relationships and its supply chains” (Recital 31), a description of:

- ...(i) **the due diligence process** implemented by the undertaking with regard to sustainability matters, and, where applicable, in line with Union requirements on undertakings to conduct a due diligence process;
- (ii) the principal actual or potential adverse impacts connected with the undertaking’s own operations and with its value chain, including its products and services, its business relationships and its supply chain, actions taken to identify and monitor those impacts, and other adverse impacts which the undertaking is required to identify pursuant to other Union requirements on undertakings to conduct a due diligence process;
- (iii) any actions taken by the undertaking to prevent, mitigate, remediate or bring an end to actual or potential adverse impacts, and the result of such actions;
- (g) a description of the principal risks to the undertaking related to sustainability matters, including a description of the undertaking’s principal dependencies on those matters, and how the undertaking manages those risks;
- (h) indicators relevant to the disclosures referred to in points (a) to (g).

Under the 2019 EU **Sustainable Finance Disclosure Regulation (SFDR)**,²³ financial market participants are similarly required to publish information online concerning their “adherence to responsible business conduct codes and internationally recognised standards for due diligence and reporting and, where relevant, the degree of their alignment with the objectives of the Paris Agreement”.

In parallel, national due diligence legislation has been adopted in France, Germany, the Netherlands and Norway (République Française, 2017, Deutscher Bundestag, 2021, Kingdom of the Netherlands 2019, Norwegian Storting 2021) or official guidelines launched in similar terms (Japan Ministry of Economy Trade and Industry 2022). Establishing social and/or environmental sustainability-related statutory due diligence duties for large companies, these laws diverge in significant details. Nevertheless, all such instruments include in their scope harm to human rights or the environment linked to targeted corporate entities via their procurement relationships.

These developments set the stage for the publication, in 2022, by the EC of a proposal for an EU **Corporate Sustainability Due Diligence Directive (CSDDD)**.²⁴ Addressed to larger European companies, and non-EU companies operating in Europe, the Directive would establish for such corporations duties of “identifying, bringing to an end, preventing, mitigating and accounting for

²² Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

²³ Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector (SFDR).

²⁴ 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.

negative human rights and environmental impacts in the company's own operations, their subsidiaries and their value chains". In terms of monitoring and enforcement, the EC draft proposed to combine action by administrative authorities at national level "to supervise and impose effective, proportionate and dissuasive sanctions, including fines and compliance orders"; a European Network of Supervisory Authorities; and a requirement on Member States to establish civil liability of companies where victims were harmed by damage resulting from corporate due diligence failures. The EC's original proposal also foresaw directors' duties including 'setting up and overseeing the implementation of the due diligence processes and integrating due diligence into the corporate strategy' (EC, nd).

Whereas the European Council agreed its General Approach in 2022,²⁵ and the EP adopted a text as the basis for negotiations in 2023,²⁶ a political agreement reached on the two texts by end December 2023 is articulated only in broad contours and still requires formal confirmation by the co-legislators.²⁷ Consequently, this Study discusses the agreed draft, which is still under technical scrutiny before being subject to confirmation.

It should nonetheless be noted that the political agreement of December 2023 does include highly significant elements for this study. Under the heading, 'Public procurement', it is stated that 'The deal establishes that compliance with the CSDDD could be qualified as a criterion for the award of public contracts and concessions'. In line with the previous analysis advanced in this study, this would appear to necessitate the future reform of current EU procurement law (id). In addition, it exclusions for non-compliance may be effected in relation to suppliers who breach statutory due diligence duties arising under national laws transposing the Directive.

3.4. Due diligence in public procurement law and policy

Global and EU regulatory developments over the last decade, as shown in the last section, evince a trend towards extension of due diligence requirements to businesses. While some aim to prevent and address harms to human rights and environment in specific value chains or contexts, new instruments are generally tied also to supporting green transition and realisation of sustainable development.

A common horizontal goal across EU legal and policy developments resting on due diligence is "to foster the contribution of businesses operating in the single market towards the achievement of the Union's transition to a climate-neutral and green economy in line with the European Green Deal and the UN Sustainable Development Goals" (European Council 2022).

Given the contribution of government buying to the EU and global economy, and the role of States as primary duty bearer under human rights treaties it would seem rational if the responsibility to perform due diligence were therefore extended to public procurement (Methven O'Brien and Martin Ortega 2019).

With reference to the state duty to protect human rights, the UNGPs (UN 2011) encourage states to 'promote respect for human rights by business enterprises with which they conduct commercial transactions' (UNGP 6). They also call on states 'to exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services' (UNGP 5).

²⁵ Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach, Interinstitutional File: 2022/0051(COD).

²⁶ See in the EP Legislative Observatory, a summary page for the legislative proposal on [Corporate Sustainability Due Diligence](#).

²⁷ See press release from the 14 December 2023, 'Corporate sustainability due diligence: Council and Parliament strike deal to protect environment and human rights', available at <https://www.consilium.europa.eu/en/press/press-releases/2023/12/14/corporate-sustainability-due-diligence-council-and-parliament-strike-deal-to-protect-environment-and-human-rights/>.

However, perhaps because an explicit injunction on State buyers to undertake due diligence was not expressly included in the UNGPs, public purchasing has not to date been included in the scope of due diligence statutes, with the exception that Germany's supply chain law provides for due diligence-based exclusions from public procurement (Section 22). Likewise, in spite of calls from scholars and stakeholders (Methven O'Brien and Martin Ortega, 2019, 2022) the EC's original draft EU CSDDD did not extend in personal scope to public buyers (para.63).

Equally, although post-dating the adoption of the UNGPs, as well as EC and OECD policies espousing due diligence (EC 2011, OECD 2011), the EU's 2014 procurement reform did not integrate the due diligence concept, a perhaps remarkable omission given other measures to advance strategic procurement included in the latter. Neither did the OECD's 2015 Recommendation on Public Procurement, though incorporating sustainability and strategic procurement objectives, refer explicitly to due diligence (OECD 2015). As for the 2014 EU Public Procurement Directive, as related above, it deliberately excluded the possibility for contracting authorities to refer to "criteria and conditions relating to general corporate policy" which, it reiterated "cannot be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or services" (Directive 2014/24, Rec. 97). Despite its suggestion by the European Parliament,²⁸ due diligence was not addressed by the European Commission's draft Corporate Sustainability Due Diligence Directive; nor by the European Council's position on the same.²⁹

There has thus been an appreciable disconnect or 'policy incoherence' between EU sustainable business and corporate due diligence regulation on one hand, and public procurement standards on the other. Given governments' stronger obligations to protect human rights and the environment, by comparison with companies, this divergence presents a paradox (Methven O'Brien and Martin Ortega 2019).

Given that EU treaty law commits to protection of human rights and the environment, and that the EU legislator foresees due diligence as a proper and proportionate tool to secure balancing pure economic considerations (costs for the buyer) and environmental, social and human rights considerations, there would appear to be a clear legal as well as a policy basis for extending due diligence to EU public procurement rules.

Responding to scholarship and social actors' advocacy, gradually other legislators and organisations are recognising the need for policy correction in this context. Some recent legislation on modern slavery addresses public actors (UK Parliament 2015, Parliament of Australia 2018). In its recent material, the OECD has sought to bridge its sustainable procurement, RBC and due diligence agendas (OECD 2020). Due diligence has also featured in guidance addressing specific issues such as human trafficking in international organisations' procurement (OSCE 2022; UNSCEB 2022). The need for the EU to continue to evaluate the interface between its procurement laws and foreseen due diligence legislation was again highlighted by the Parliament in its revised position on the draft CSDDD Directive in June 2023.³⁰

Ultimately, such developments appear to have influenced the terms of the CSDDD: while as noted it awaits confirmation by the EU co-legislators, the politically agreed CSDDD text of December 2023 now includes a provision on public procurement (Article 24).

²⁸ European Parliament, Parliament Resolution Recommendations for Drawing up A Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability; European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Article 18.

²⁹ Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – General Approach, Recital 63.

³⁰ European Parliament, Corporate Sustainability Due Diligence Amendments adopted by the European Parliament on 1 June 2023 on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Recital 54b.

More specifically, under the agreed text, the Member States shall ensure that contracting authorities and entities may require compliance with the national rules implementing the Directive as **contract performance conditions** for those economic operators bound by it. Similarly, compliance with those rules by economic operators not bound by them may be valorised as an **award criterion**.

Scholars, in considering potential issues arising from such proposals, adopt differing views of their feasibility (see e.g. Treviño-Lozano Uysal 2023; Sanchez-Graells 2019). Accordingly, without sight of the specific legislative terms proposed in respect of these matters, it is not possible to analyse their exact application, scope, limits or impacts for EU institutions or indeed EU Member States authorities, or suppliers, given the current state of EU procurement law.

Besides, the agreed CSDDD does not link breaches by economic operators to exclusion from public procurement. This approach has been pursued in some national due diligence laws. Germany's supply chain law provides for the exclusion, for up to three years, from procurement procedures of enterprises that have been fined, by final and binding decisions, for having breached its statutory due diligence requirements, 'until they have proved that they have cleaned themselves (Deutscher Bundestag, 2021, Section 22).

This approach echoes the provision under existing EU procurement law for mandatory and discretionary exclusions of economic operators from eligibility to compete for contracts on various grounds as discussed above. The same is true of 'self-cleaning' so that operators that address infractions can once again enter the public procurement market (see further Methven O'Brien and Weatherburn 2022, Section 4.4). Exclusion and self-cleaning are also well established internationally, for instance, in the policy and practice of international financial institutions (ibid, Section 4.5). They may have potential to contribute to enforcement of the foreseen EU Forced Labour Regulation, as well as other EU sustainability legal and policy instruments, and as a mechanism to help secure remediation for victims of human rights and environmental harms linked to corporate due diligence failures, particularly if associated to an EU-wide cross debarment regime (ibid).

In short, while the December 2023 political agreement on the CSDDD anticipates permissive measures (the establishment of discretion for public buyers to refer to tenderers' due diligence practice in award and contract performance clauses), combining such measures with an exclusion regime would be more impactful. At the same time, this would not entail any significant hurdles for contracting authorities and entities. Article 18 of the agreed CSDDD text allocates to specific supervisory authorities the role to verify compliance with the relevant obligation and to sanction breaches, so this role is not to be borne by the generality of public authorities in EU Member States.

Moreover, other parts of the regulatory infrastructure required to underpin an exclusion and self-cleaning regime concerning corporate due diligence are already included in the draft CSDDD. Under Article 20(4), publicity attaches to any decisions made against economic operators under the CSDDD that contain penalties for defaulting on their duties under the Directive; those decisions are also sent to the European Network of Supervisory Authorities.

In light of the above, consideration should be given by the co-legislators to including provisions for exclusions from public procurement, and self-cleaning, based on defaults by economic operators on their foreseen statutory duties under the EU CSDDD. While this would primarily relate to eligibility for contracts concluded by national authorities in the EU Member States, as related by this Study, enactment of such provisions would likewise condition procurements by EU institutions.

Regardless, aside from the question of what requirements EU buyers may impose by different means on their suppliers, what cannot be disputed is that EU institutions, even if not explicitly statutorily obliged to do so, still enjoy discretion within the existing legal framework to themselves undertake due diligence. This is anyway fully consistent with their general duties to uphold human rights under the EU treaties and their duties of good and efficient administration under the EU Financial Regulation,

given the risk-management function fulfilled by due diligence processes, while also aligned with the UN and OECD materials highlighted earlier in this chapter. Many public authorities within EU Member States, individually or through coordinated actions, have over recent years initiated such endeavours, without attracting EU-based or other legal challenge, whether by the Commission itself, market or other actors. Extensive guidance and evidence of good practices is available to orient EU public bodies in such an exercise, some published by the Commission itself (EC 2021b, Danish Institute for Human Rights 2020, OECD 2020).

Summary: Due diligence and public procurement

International and EU standards now direct that all businesses undertake processes of 'due diligence' to advance responsible business conduct concerning human rights and the environment. EU procurement law and policy has not yet adapted to accommodate this trend: as matters stand, the EU procurement Directives pose various obstacles to articulating public buying decisions with suppliers' due diligence, and hence to leveraging public purchase of goods and services to advance human rights and environmental objectives. Still, the foreseen CSDDD has potential to redress this source of policy incoherence. In any event, there are no formal legal impediments to EU institutions themselves engaging in supply chain due diligence and compelling legal and policy grounds for them to do so.

4. CASE STUDIES

The complex and dynamic regulatory environment analysed above provides the context for this Study's investigation of if, how, and to what effect, due diligence currently forms part of EU institutions' own-account procurement practice. However, the formal laws and policies analysed in the previous section comprise only part of the basis on which EU institutions' procurement is conducted. In practice, these are complemented by institutional guidance and procurement procedures for the respective EU institutions, bodies and agencies. The following sections examine the practice of the European Parliament, European Commission and selected EU decentralised agencies (EUSPA, FRA and FRONTEX) based on data collected for this Study from desk research and interviews with relevant EU officials (Annex III). Finally, this section describes the cross-institutional role of the EU GPP Helpdesk.

4.1. European Parliament

4.1.1. Institutional and procurement activity overview

Besides being EU co-legislator, the EP exercises scrutiny over the EC and other EU bodies, while it also has a public-facing engagement and communications mandate. Internal EP rules establish the framework for delegation of powers to implement the EP's budget. The EP internal administration is divided into fifteen Directorate-Generals (DGs). Its procurement function is decentralised across these: in place of a single focal point responsible for purchasing goods, services and works, buying is generally undertaken by individual DGs according to their needs. On the other hand, overall goals are set at corporate level, including in the procurement realm. For example, the EP Bureau, comprising the EP's President and 14 Vice-Presidents adopted a target requiring the percentage of contracts in 13 priority product categories and of value exceeding EUR 15.000 classified as "Green" or "Green by Nature" to reach 90% by 2024.

In addition, certain EP entities have a role in coordinating procurement. In particular, the Central Financial Unit (CFU) of EP's DG Finance provides procurement support to other EP DGs. For instance, the CFU prepares and updates standard tender procurement documents used across the EP; produces general guidance, notably the EP Vade Mecum and Procurement Planning Document (PPD); as well as subject-specific procurement guidance documents. These for example deal with accessibility of tenders; composition of bid evaluation teams; the drafting of tender specifications; conflicts of interest; ex ante / ex post award controls; and the involvement of external experts in tender evaluations.

Besides, the CFU convenes an inter-DG EP Working Group on Public Procurement. Specific sub-Working Groups have been established in recent years, including two respectively charged with drafting the 2020 EP Implementation Guide on Green Public Procurement and the 2022 EP Guide for Socially Responsible Public Procurement at the European Parliament. A single SPP sub-Working Group has now been formed. The EP Procurement Agora/Forum is a platform for exchanging good practices amongst EP procurement officials and to collaboratively develop guidance and other materials. Finally, a GPP officer is appointed in each DG, to receive training, disseminate new standards and participate in EP-wide dialogue and information-sharing.

As the EP is accredited under EMAS, an EP EMAS and Sustainability Unit (EMAS Unit) was established under the office of the EP Secretary-General in 2014. Reporting to the inter-DG Steering Group on Environmental Management and Steering Committee for Environmental Management, it is responsible for coordinating the EP Environmental Management System. Moreover, the EMAS Unit serves as the Secretariat for the EP Sub-Working Group on SPP.

Its role as a central service of the EP under the EP Secretary General underlines the EMAS Unit's horizontal responsibilities across all EP administrative units and activities. While its remit goes beyond public procurement, it plays an important role in guiding the adoption of GPP solutions by EP services and in helping EP Operational Units with the insertion of SPP considerations, where this occurs. All EP DGs are expected to submit annual procurement plans to the EMAS Unit, to facilitate assessment of contracts' potential for greening. On the basis of such plans, and analysis of data from the WebContracts register of contracts awarded by EU institutions, the EMAS Unit selects procedures for recommendations. The EMAS Unit also coordinates preparation of the Annual Sustainability Report of the European Parliament.

4.1.2. Legal and policy framework

As analysed above the **EU Financial Regulation** and thereby the **2014 EU Procurement Directive** apply to EP procurement. However, those instruments, as already seen, mainly enable SPP rather than require contracting authorities to pursue specific sustainable solutions or approaches beyond restricted mandatory elements such as exclusion of abnormally low tenders.

Relevant in this context is the EP's **Environmental Policy**. This reaffirms the EP's "commitment to maintaining its EMAS registration and its environmental approach of continuous improvement, with a view towards achieving environmental sustainability in all its administrative activities" (EP 2019). It also states that the EP "endeavours to **further strengthen its sustainable procurement approach as a key tool in environmental management** by applying targets for the classification of contracts, combining the implementation of established good practices in [SPP] with potential innovative [SPP] solutions while keeping in mind the specificity of each market" (emphasis added).

Other elements of the policy have procurement relevance, including: the adoption of new EP medium- and long-term **environmental KPI objectives** in areas including GPP; preventive measures to ensure that environmental considerations and sustainability criteria are integrated in EP administrative activities; and a commitment to apply strict environmental and energy efficiency criteria in all building policies and projects. The 2019 EP policy hence strengthens the mandate for SPP and more specifically GPP for the EP. This mandate is afforded practical support via additional institutional tools and measures as discussed next.

EP Implementation Guide on Green Public Procurement and supporting material

An **EP Implementation Guide on Green Public Procurement** was adopted in 2020 by the EP Public Procurement Agora/Forum. This aims to help EP procurement officers launch green procedures to meet the EP's 90% corporate target for "Green" or "Green by Nature" contracts by 2024 noted above. "Green by nature" contracts have the primary function to improve the environmental performance of the European Parliament, for instance, for installation of solar panels. Other contracts that can become 'green' include those for:

- Buildings (construction; heavy renovations; light renovations and refurbishment)
- Cleaning
- Food and Catering
- Furniture
- Gardens, green areas and hydroculture plants
- IT and Imaging Equipment
- Lighting

- Office Supplies (excluding IT consumables and paper)
- Paper
- Sanitary and Water Equipment
- Textiles
- Vehicles and Transport
- Waste Management

GPP is however encouraged also for contracts below the EUR 15000 threshold and outside the above categories.

For a contract to be classified as 'Green', "greening elements introduced in the tender documents [sh]ould result in a meaningful and measurable reduction of the environmental impacts from that contract compared to the situation without those greening elements," (p. 4). A non-exhaustive list of elements that can contribute to making a contract 'green' is presented, following the steps of the award procedure (**selection, technical specifications, award and contract performance clauses**). These include:

- Environmental selection criteria (e.g. EMAS registration or similar certification, such as ISO 14001) or submission of a contractor's environmental policy containing concrete and meaningful commitments for improving environmental performance e.g. use low-emission or emission-free delivery systems;
- Significant environmental requirements in the technical specifications, matching at least the "Core Criteria" of the EU GPP Toolkit and being at least partially compliant with the "Comprehensive Criteria" of the GPP Toolkit (or similar tool);
- Strong emphasis on environmental aspects in award criteria (a weighting of 10 % or more of the total number of points, concerning a weighting for price and quality combined; or weighting of 25% or more of points for quality criteria alone);
- Specific contract clauses with significant environmental requirements which are not covered by the respective technical specifications.

To facilitate greening of EP procurement contracts, a **GPP Quick Reference Sheet** (QRS) has been developed for each category above with a non-exhaustive list of areas and methods for greening specific to the spend category (Annex I of the EP Implementation Guide).

The GPP Implementation Guide addresses matters beyond the award procedure. Like the EC's 2016 guidance (EC 2016), it starts with planning, indicating also the use of need assessment and market consultations, acceptance of equivalent alternatives and definition of the subject matter.

The EP Public Procurement Agora/Forum has also developed **Procurement Planning Document (PPD) templates** adapted to the value of the contract.³¹ The PPD is a standard form accompanied by comments (in shaded text) which authorising departments can adapt to their specific requirements. A specific section of the PPD addresses "Environmental assessment" and "Environmental impact" (p. 5). Authorising officials must include a description of the possible environmental impact and tick boxes corresponding to whether the contract involves one or more of the 13 priority categories listed above. Environmental impacts must be accompanied by a "rough estimate of the significance of those impacts". The PPD highlights that, in addition to the core purchase, "whole life cycle aspects, packaging, transport, and other indirect impacts of the purchase also need to be taken into account when determining possible environmental impacts and green procurement criteria" (p. 5). Authorising

³¹ This Study was given access to the template for higher value contracts above the thresholds in the EU Procurement Directives.

officials are required to describe the nature of the environmental impact, and to classify the contract as either 'Green' or 'Not green', giving reasons. Finally, it must be indicated at what stage of the procurement environmental considerations were taken into account.

Concerning environmental **technical specifications**, the GPP Implementation Guide recalls these must be capable of objective assessment and proportionate. In line with the EU Financial Regulation (Annex, Point 17), they "may not have the effect of creating unjustified obstacles to competitive tendering" (p. 9). This formulation arguably goes too far, as a proportionate requirement will be justified. Indeed, this section of the Guide generally appears over-cautious, and could risk discouraging officials from pursuing GPP. On the other hand, it contains suggestions on packaging, delivery and take-back obligations (referring to goods when they are no longer used by the administration). It also reminds those authorising EP purchases to inform tenderers, via a specific contract clause, about duties arising from the EP's EMAS-certification (pp. 11 f).

The next subsection of the EP Implementation Guide addresses **exclusion and selection criteria**. Here the provisions of the EU Financial Regulation permitting **exclusion** of economic operators for grave professional misconduct and for breaches of environmental, social and labour law are recalled. These rules must be complied with during contract execution (p. 12; Article 166(2) EU Financial Regulation and Annex I Point 16.4 (e)). Concerning **selection criteria** referring to tenderers' technical and professional capacity, the Guide recalls that tenderers may be required to possess an environmental management system such as EMAS or equivalent. The more detailed selection criteria laid down in the EU GPP Toolkit are also referred to (p. 13).

The Implementation Guide's analysis on green **award criteria** also proceeds cautiously. "[T]he inclusion of environmental aspects in invitations to tender," it states,

"must not have a negative effect on the quality or efficiency of the subject of the contract. The environmental impact of an eco-friendly product throughout its life cycle must be less than that of other, conventional, products for similar uses. However, the eco-friendly product must always be as serviceable as the conventional product (and equally or more efficient)" (p. 14).

The possible use of award criteria from the EU GPP Toolkit is highlighted, along with scope to require eco-labels as a way to evidence compliance with them. The PPD requires that the weight given to award criteria, including environmental criteria, be indicated (pp. 20 f.), again possibly going beyond the percentages mentioned above (Guide, p. 15). The Guide recalls that life-cycle costing is still rarely used and sets out the elements of a life-cycle approach or analysis (LCA) that can be evaluated in the purchase of supplies (e.g. manufacture, distribution, use and end of life) or works and services (e.g. carbon footprint).

Such elements can also be relevant to **contract performance conditions**. On this topic, the GPP Implementation Guide replicates some examples provided concerning technical specifications, such as take-back of packaging and products, highlighting the difficulty in general of distinguishing this notion from other steps in the award procedure. **Contract monitoring** is also briefly mentioned, the Guide recalling that contractors can be asked to supply evidence of compliance and the possibility to conduct spot checks, including through third parties. The **WebContracts** application is used for GPP performance monitoring, in that it generates information on the classification of contracts. The 'greenness' of a contract is required to be indicated in a specific field and justified in the PPD or elsewhere in the procurement file in cases when the planning document is not used. For reporting purposes, contracts are then divided in price ranges (p. 6).

Advice: Green Public Procurement (GPP) Help Desk

There are a number of sources of advice for procurement officers across the EP applying the above standards and guidance. General procurement advice offered by the EP Central Financial Unit focuses on financial aspects. Albeit resource and time constraints prevent the EMAS Unit itself from generally assuming this role, it does receive and respond to GPP-related inquiries via email, and it may refer inquiries to the inter-institutional GPP Helpdesk (see further Section 4.4). This has been operational since 2017 (Resolution (EU) 2018/1310), with the function to help procurement staff, authorising officers, and any other relevant EP staff to introduce environmental considerations in EP tenders in accordance with the GPP approach outlined above and specifically via input to the development of tender specifications. Originally focused only on green procurement, by now the Helpdesk also provides advice on SPP, as considered next.

SRPP and Due Diligence

At the corporate level, the EP has acknowledged the increasing momentum of due diligence standards and their link to sustainable procurement. In its 2021 Budget Discharge Resolution, the EP welcomed the prospect of sustainability reporting including on “social aspects of procurement”; called for the EP “to monitor developments in ... social and sustainable public procurement, such as the OECD work on Public Procurement and Responsible Business Conduct and upcoming Union legislation on corporate due diligence”. Significantly, it further affirmed “that by incorporating responsible business standards into its procurement and purchasing policies”, the EP “can lead by example, safeguard the public interest and ensure the accountability of public spending”. In like vein, the EP’s Budgetary Estimates 2022 Resolution (29 April 2021), stated that the EP “expects the Bureau to adopt a sustainability reporting system such as the Global Reporting Initiative and its extension to Embedding Gender in Sustainability Reporting by 2022”.

Relatedly, in 2021 the EP Public Procurement Agora/Forum established a **Working Group on SRPP**, which developed a new **Guide for Socially Responsible Public Procurement at the European Parliament (SRPP Guide)** published in 2022. Reflecting the multi-faceted character of SRPP, this Guide addresses:

- Compliance with Human Rights and Labour Standards
- Promoting Sound Social Conditions
- Promoting Equal Opportunities and Gender Equality
- Promoting SMEs, start-ups and micro enterprises.

In opening, the SRPP Guide notes that such diverse SRPP topics can be relevant to contracts according to their character and highlights, for instance, the nature and length of supply chains and worker vulnerability in this context. In addition, the need to understand the market and assess risks and opportunities, including considering the availability of due diligence certifications is underlined (pp. 7 ff.). Such analysis, the Guide suggests, allows procurement officials to identify the pros and cons of inserting SRPP considerations at various stages of the acquisition process (pp. 12 f.).

Starting with **horizontal minimum requirements**, the SRPP Guide notes that applicable **environmental, social and labour law obligations** must be complied with by contractors; that this must be specified in contract documents (p. 15, with reference to Point 16.4.e. of Annex I to the FR); and checked during contract execution. **Human Rights and Labour Standards** are stated to embody such core minimum requirements.

Regarding minimum requirements, the SRPP Guide urges the need to develop tools “for providing proof of compliance”, which can be a complex challenge particularly with products originating outside the EU. Requiring supplier certification via **selection criteria** can be a good tool in principle, although it may not always be proportionate or available in practice (p. 18); relying on **award criteria** to distinguish between compliance tools might be advisable (p. 19). Compliance with minimum requirements is also relevant in **contract performance**, where tools include self-declarations, verification by independent third parties and *in situ* compliance checks by the contracting authority. The latter, it is noted, can vary in accuracy and resource-intensity. Non-compliance, if detected, should be addressed through appropriate contract tools, including penalties (p. 20). The promotion of **Sound Social Conditions** can extend beyond contract compliance, through mandatory provisions or exclusions, including based on abnormally low tenders (p. 22) or, for instance, **quality criteria** in the award, such as the promotion of decent salaries and payment of overtime.

The promotion of **Equal Opportunities and Gender Equality** likewise extends beyond checking compliance with mandatory rules. Tender procedures should be made more inclusive, for instance, via clauses asking for the employment of people from disadvantaged sections of the population (work integration) or affirmative action to reduce inequality in the workplace. Measures to advance gender equality can be introduced at award stage or in contract performance (for instance, integration and training clauses, p. 25). Once more, there is a need for ‘robust verification’ during contract implementation, which could underpin a bonus or malus system.³² Finally, the SRPP Guide provides examples of best practices to help **SMEs, start-ups and micro enterprises** access procurement markets.

The SRPP Guide at points appears timid. For instance, it defines its own purpose as being to inform procurement services about “the different legal and practical possibilities for including SRPP objectives in their procurement with the use of social clauses, *without disturbing the functioning of the market and in line with the Financial Regulation*” (e.g. at p. 3, emphasis added). In interviews, the SRPP Guide was described as “neutral guidance, rather than SRPP advocacy”. Such an approach can seem hard to square with the ambitious expectations articulated by the EU regarding public procurement’s role in delivering the green energy transition and SDGs, noted earlier.

At any rate, the Guide provides a first foundation for EP social procurement, and concedes the need to continuously update its approach in line with the evolving EU regulatory framework, for instance with reference to the forthcoming EU CSDDD (pp. 15, 16). Indeed, the role of **due diligence** is specifically, if briefly, acknowledged:

“Generally, in supply contracts, special attention needs to be paid on due diligence aspects; while for service and work contracts, issues related to equal opportunities and working and social conditions can be at stake. Nevertheless, work contracts that involve purchasing and use of construction materials may also imply considerations regarding the origin and due diligence in the supply chain concerning the construction materials used” (p. 8).

Current practices concerning GPP, SPP and Due Diligence

Following from the above analysis and as highlighted in interviews, it can be seen that EP procurement practice is more mature in the area of GPP than SPP, even if EP procurement practice has started more regularly to consider wider SPP aspects since adoption of the 2022 SRPP Guide. The EP DGs with more intense procurement activities, according to interview data, are the **Directorate-General for**

³² “In the malus system, a number of hours of inclusion or training is required. A penalty is applied for each hour that was not performed. In the bonus system, the contract provides for a maximum number of integration hours and reserves a budget for them” (p.26).

Infrastructure and Logistics (DG INLO), Directorate-General for Innovation and Technical Support (DG ITEC), and the Directorate-General for Communication (DG COMM).

As noted above, environmental aspects and impacts must be considered in drafting the PPD based on the template drafted by the CFU. An **Explanatory Note on Environmental Impacts and Contract Classification** provides guidance to authorising officers on identifying environmental aspects and impacts for 13 EP product and service categories listed in the PPD with greatest relevance for GPP.

For instance, the **Explanatory Note** concerning **3. Food and Catering** specifies as relevant risks:

- Eutrophication, acidification and toxic impacts on human health and the environment (plants and animals) due to the bioaccumulation and biomagnification of pesticides and fertilisers present in water, air, soil and food
- Soil erosion, forest destruction and loss of biodiversity caused by agriculture, intense animal production and intense fishing and aquaculture practices
- Animal cruelty due to a lack of respect for animal welfare
- High energy consumption in food production and processing
- High water consumption and pollution in manufactured food production
- Packaging waste
- Negative impact on the occupational health of farmers due to the handling and use of certain pesticides and fertilisers
- High consumption of cleaning agents which might have a negative impact on the occupational health of kitchen personnel and on environment through waste water
- High water and energy consumption from kitchen appliances
- Transport impacts in the carrying out of catering services

The EMAS Unit and the GPP Helpdesk may be consulted in this phase. On the basis of the analysis conducted, contracts are classified as “green” or “not green”.

Examples of EP contracts classified as “Very Green” or “Green” in 2020 include the purchase of green electricity at the three places of work, cleaning contract for the EP buildings in Luxembourg, several building maintenance contracts at the three places of work, covering both structural work and finishing and fittings, purchase of protective work outfits and shoes, uniforms, and suits, etc.

Source: 2021 European Parliament Environmental Statement for 2020

Some **standard SPP clauses** have been drafted by the CFU, for instance, concerning compliance with applicable environmental and social obligations. According to the CFU’s **model contract specifications** for above threshold contracts, Annex II, the EP’s environmental policy supplements and is an integral part of the technical specifications and must be sent with other documents relating to the invitation to tender in all instances where the value of the contract is greater than the thresholds in the 2014 Directives.

Further, Point 11 of the general contract clauses specifies that

“Tenderers shall undertake to comply with the environmental legislation in force in the field of the contract, should it be awarded to them. It should be noted in this connection that the [EP]

applies the EMAS environmental management system in accordance with Regulation (EC) No 1221/2009 ... Information about EMAS is provided by the authorising department in Annex [III] to these specifications. The successful tenderer will be required to ensure that the information provided by the [EP] on the EMAS programme in general, and more specifically on the implementation of environmental measures in practice, is known by all his staff working for the [EP]. At the [EP]'s request the successful tenderer may be required to certify that anyone assigned to work under the contract has received the appropriate professional training required (technical, safety and environmental training) concerning compliance with safety rules and correct handling of the equipment and products to be used, including action to be taken in the event of incorrect handling or any other incidents. [Upon request the successful tenderer will also supply the requisite information for [EP] staff on the environmental measures to be taken with regard to the products used in connection with performance of the contract.]” (footnotes omitted).

A model clause for the management of carbon emissions is also foreseen.

More succinctly, *Article I.6 – Performance of contract of the model clauses for supply contracts* provides that,

“The Contractor must comply with the minimum requirements provided for in the tender specifications. This includes compliance with applicable obligations under environmental, social and labour law established by Union law, national law and collective agreements or by the international environmental, social and labour law provisions listed in Annex X to Directive 2014/24/EU ...”.

Article II.1 - General terms and conditions relating to the performance of the contract further indicates that,

“The Contractor shall have sole responsibility for complying with any legal obligations incumbent on him, notably those resulting from employment, tax, social and environmental protection legislation”.

Under Article II.22,

“The European Parliament **reserves the right to carry out itself any inspections and checks on the Contractor which are necessary to ensure compliance with the environmental and social and labour law requirements** laid down in Article I.6. Such inspections and checks may be carried out in part or in full by an external body duly authorised by the [EP]”.

Along similar lines, under point 4 of *Article II.8 - Subcontracting and assignment*, the EP reserves the right to require the Contractor to supply information on compliance by any subcontractor with the exclusion criteria and his legal, regulatory, financial, economic, technical and professional capacities, including “compliance with applicable obligations under environmental, social and labour law established by Union law, national law and collective agreements or by the international environmental, social and labour law provisions listed in Annex X to Directive 2014/24/EU”.

Moreover, under Article II.8.1.c, the **EP can terminate a contract where a contractor does not comply with applicable obligations under environmental, social and labour law** (see also Article II.22.2).

The general contract clauses used in EP procurements hence emphasise contractors’ duties linked to existing environmental and social obligations. On paper, this provides a basis for checking contractors’ compliance and sanctioning delinquencies. Actual verification of contractors’ compliance in practice is however a distinct matter. Interview data obtained for this study indeed indicate, in the case of the EP procurement: i) a general assumption of compliance monitoring by national authorities, which is only

relevant for contracts where manufacturing or service delivery is within the EU; and ii) the absence of any practice of performing checks on longer supply chains, including for reasons of costs.

Moreover, EP general contract clauses do not generally exceed existing legal requirements and cannot therefore be identified as proactive in pursuing sustainable production or consumption policies. As an exception, Article II.2.1. of the model clauses for supply contracts requires the inclusion of a clause on taking back and recycling packaging.

Neither do contract clauses or specifications observed refer to due diligence as understood by the TOR for this study. Article II.17 *Force majeure* of the standard contract clauses refers to 'due diligence' but only as a behaviour required by the parties if faced by an unforeseeable and exceptional situation or event.

Besides, many interviewees identified 'due diligence' with a procurement conduct in line with the budgetary principles laid down in Article 6 of the Financial Regulation, and specifically with that of sound financial management. Taking stock of lessons learned from past procurements was also viewed as pertinent by interviewees in this regard.

Social clauses are considered in the **model technical specifications** for EP above thresholds contracts:

12. POLICY ON THE PROMOTION OF EQUAL OPPORTUNITIES

Tenderers shall undertake to observe a policy on the promotion of equality and diversity in the performance of the contract, should it be awarded to them, by applying the principles of non-discrimination and equality set out in the Community Treaties in full and in their entirety. More particularly, the tenderer awarded the contract shall undertake to establish, maintain and promote an open and inclusive working environment which respects human dignity and the principles of equal opportunities, based on three main elements:

- equality between men and women;
- employment and integration of disabled persons;
- the removal of all obstacles to recruitment and all potential discrimination based on sex, race or ethnic origin, religion or convictions, disability, age or sexual orientation.

Specific requirements are set by each Operational Unit with reference to specific procurements or categories thereof. Contract performance is based on a mandatory questionnaire, resembling a checklist, that must be compiled as an element of the Contract Management System / WebContracts at the award stage of all contract procedures. Questions on SPP aspects are part of the questionnaire, which includes since 2021 aspects such as those relating to gender, subcontracting, SMEs and supply chain due diligence. Data are currently being collected based on questionnaires and are expected to lead to a report by DG FINS and the EMAS Unit.

Key findings: Due diligence in the European Parliament's procurement

- Procurement rules for the EP are convergent with the EU Financial Regulation, the 2014 EU Procurement and Concessions Directives; in other words, the Parliament is generally bound by the same procurement rules as the Commission, EU Agencies and Member State authorities when conducting procurements governed by EU law.
- Procurement activity by the Parliament is largely decentralised across its Directorate-Generals. However, it is nevertheless constrained, guided and supported by such transversal

EU legal rules, as well as EP internal policies, tools, templates and systems, that appear to be closely observed in practice.

- Sustainability considerations are to an extent integrated within this framework, with additional SPP support provided by entities including the EP EMAS Unit, inter-DG Steering Group on Environmental Management and Steering Committee for Environmental Management, EP Sub-Working Group on SPP, and EP Procurement Agora/Forum which provide for a degree of cross-EP coordination, for instance towards definition and fulfilment of GPP targets, and an EP Annual Sustainability Report. Ambitious targets have been adopted in some areas (for example, that “Green” or “Green by Nature” contracts should account for 90% of the total by 2024).
- The EP Central Financial Unit (CFU) within DG Finance also plays a key role in supporting other EP DGs, for instance, via standard tender procurement documents, general guidance, notably the EP Vade Mecum and Procurement Planning Document (PPD) and subject-specific procurement guidance documents.
- On this basis, some EP procurements apply measures to address suppliers’ compliance with minimum environmental and social requirements; abnormally low tenders; technical specifications, selection criteria and award criteria, linked to GPP or, albeit infrequently, SPP objectives.
- Some EP policy and guidance materials reflect the specific meaning of due diligence as per recent EU and international policies on responsible business conduct, and EU legislation. However, in practice, ‘due diligence’ is still predominantly understood, in the context of EP procurement, as synonymous with ensuring sound and efficient buying practices.
- Dedicated supply chain or procurement due diligence policies and practices are not yet observable in EP purchasing activity, either at corporate level or within individual DGs.
- Although some steps have been taken, such as publication of an EP Guide for Socially Responsible Public Procurement at the European Parliament (SRPP Guide) in 2022, EP policies and practices relating GPP are more mature and extensive than those concerning SPP; social risks, including risks to human rights, do not appear to have been subjected to specific identification, assessment or management exercises with reference to EP spend breakdown or supply chains, while SPP KPIs and reporting are lacking.
- In terms of securing suppliers’ compliance with minimum environmental and social obligations during contract performance, the EP generally assumes that national authorities fulfil this role where production or service delivery occurs within EU Member States. Proactive monitoring during contract performance is hence not undertaken, while supplier exclusions or contract terminations based on either green or social criteria were not in evidence either.
- Overall, while EP sustainable procurement goals appear institutionally well supported, they do not yet comprise a functional substitute for supply chain due diligence as envisaged by international and EU standards, in particular, lacking full coverage of social as well as green issues, and comprehensive approaches for the management of material sustainability risks.

4.2. European Commission

4.2.1. Institutional and procurement activity overview

The EU’s principal executive body and legislative initiator (EC 2023), the EC has a larger budget than the EP, more employees and offices in more locations across the EU. The EC’s procurement is mostly decentralised across its respective DGs, and often further decentralised within individual DGs. Where

the latter is the case, a **Procurement and Contract Management Unit (PCMU)** leads the procurement process up to contract award with technical inputs from specialised units. Operational Units within individual DGs are charged with overseeing contract implementation; they may also award specific 'call-off' contracts under framework agreements, where these exist.

The EC's **Directorate-General Budget (DG BUDG)** provides guidance on procurement and model contract clauses for use by other EC DGs. Individual EC DGs manage framework contracts for specific goods or services; not only EC services but also other EU institutions, bodies and agencies participate in some such framework contracts; for example, an IT framework contract is managed by the EC's **Directorate-General Digital Services (DG DIGIT)**. An **EMAS Unit** located in the EC's **Directorate-General Human Resources and Security (DG HR)** provides GPP assistance and coordinates activities to limit the EC's carbon footprint on a cross-DG basis.

4.2.2. Legal and policy framework

The EU legal framework for own-account procurement by the EC is similar to the EP's: in other words, the **EU Financial Regulation** and **EU Procurement Directive** are the principal elements. Other EU instruments may be relevant in the procurement of particular goods or services (for instance, Directive (EU) 2019/882 on accessibility requirements for IT products and services sold on the internal market³³).

National law is also relevant for contract execution, however. By contrast with the EP, the EC has offices in multiple EU Member States beyond Belgium, Luxembourg and France. Accordingly, EC procurements may be required to reflect a range of national laws regarding taxation, workers' rights and equal treatment, for example. This is also true of bodies established by the EC under Article 70 TFEU: for instance, Italian law applies to procurement contracts concluded by the EU Joint Research Centre ISPRA.

EC services should, in their own-account procurement, also give effect to EU policy indications, such as those in the European Green Deal (EC 2019a) and New European Bauhaus. Interviewees indicated that they also refer where relevant to general EU GPP criteria, such as the 2021 EU green public procurement criteria for computers, monitors, tablets and smartphones (EC 2021).

The **Central Financial Service** within the EC's DG BUDG issued a **Vade Mecum on Public Procurement in the Commission** for internal use, with the aim "to provide contracting authorities in the European institutions and agencies with practical assistance in preparing and implementing these [own-account procurement] procedures".

The EC is registered with **EMAS**. This entails actions, such as efficiency measures relating to energy and water, which according to interviewees, influence procurement policies and organisational choices, such as closing offices at weekends and holidays, limiting heating and sharing workspace.

4.2.3. Current practices concerning SPP and due diligence

The Vade Mecum reflects a traditional approach focusing on the economic dimensions of procurement. Under the heading, *The goal of procurement rules*, it states,

"EU public procurement plays an important part on the single market and is governed by rules intended to remove barriers and open up markets in a non-discriminatory and competitive way. The objective of public procurement is to increase the choice of potential contractors to

³³ Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services PE/81/2018/REV/1, 70–115.

public bodies, thereby achieving a most economically advantageous tender, while at the same time developing market opportunities for companies” (p. 16).

Therefore, the Vade Mecum continues,

“[A]ll EU procurement must comply with the principles of transparency, proportionality, equal treatment and non-discrimination and sound financial management. According to the principle of sound financial management the effort and resources should be proportionate to the subject and value of the contract”.

Later, the Vade Mecum does however address sustainability aspects (Section 4.3.1.3, pp. 87 ff.). Opening with a reference to the European Green Deal and highlighting the need to ‘lead by example’, it here concedes that, “Wherever possible and cost-effective, environmental and social aspects should be taken into account in the whole procurement process” (p. 88). Consequently, the Vade Mecum recommends that procurements refer to the **EU GPP criteria**, and lists a number of possible environmental and social aspects, including:

- “**environmental performance characteristics** (e.g. durability, reparability, reusability, energy and resource efficiency, waste reduction, avoidance of hazardous substances, implementation of an environmental management scheme, recycling, short-circuits...);
- **climate performance characteristics** (carbon-reduction target...);
- aspects related to **social and professional inclusion**, such as requirements to employ disadvantaged people or people with disabilities in the performance of the contract;
- **equality and gender-related considerations**, such as considerations related to work-life balance conditions, gender equality in the staff performing the contract and a user-based, inclusive approach in the performance of the contract;
- requirements ensuring the **compliance with labour rules and collective agreements** applicable to the staff performing the contract;
- requirements to foster transparency on the environmental and social impact throughout the supply chain; requirements to prevent, mitigate and address environmental and human rights issues in the supply chain (notably through the application of **due diligence principles**);
- **design for all types of users**” (p. 88).

While the Vade Mecum refers to ‘due diligence’ as a process to prevent, mitigate and address environmental and human rights issues in the supply chain, many interviewees identified ‘due diligence’ with a procurement conduct in line with the budgetary principles in Article 6 of the Financial Regulation, mirroring this Study’s findings on this point also in the case of the European Parliament.

In some EC entities, such as the **Office for Infrastructure and Logistics (OIB)**, recourse is made as part of the procurement process to market analysis and market consultation to assess which SPP criteria economic operators are capable of complying with (see also Vade Mecum p. 88). The Vade Mecum further provides indications on how to take SPP into consideration during different phases of the procurement process.

Compliance with environmental, social and labour obligations is integrated into procurement processes as indicated in the Vade Mecum (pp. 87 et seq.). In parallel, a **model clause on sustainability addressing ‘minimum social requirements’** drafted by DG BUDG provides, under the heading “**Tender specifications**’,

'By submitting a tender a tenderer commits to perform the contract in full compliance with the terms and conditions of the procurement documents for this call for tenders. Particular attention is drawn...to the fact that tenders must comply with applicable data protection, environmental, social and labour law obligations established by Union law, national legislation, collective agreements or the international environmental, social and labour conventions listed in Annex X to Directive 2014/24/EU. The minimum requirements shall be observed throughout the entire duration of the contract. Compliance with these requirements is mandatory and cannot be subject to any assumptions, limitations, conditions, or reservations on the part of a tenderer.'

A similar sustainability clause may be found in Point II.4.3. of the **model framework contract** used by the EC services.

EMAS registration has also triggered the insertion of an **EMAS compliance clause** into the standard EC contract. This clause provides,

"The contractor shall assist the Commission to perform its commitments as set in the EMAS EC Environmental Policy and shall follow EMAS best practices. The Commission's EMAS Environmental Policy is contained in Annex II. Environmental considerations are taken into account throughout the complete life cycle of a product or a service".

The CFU within DG BUDG has issued an **Explanatory Note on Abnormally Low Tenders** (2022 version). This Note recalls the duty of a contracting authority

"[to] verify that the tender is compliant with applicable obligations in the fields of environmental, social and labour law, and namely with the national legislation of the country in which the services were to be provided in respect of the remuneration of staff, contributions to the social security scheme and compliance with occupational safety and health standards" (p. 5).

This entails that the **purchaser must ask the tenderer for substantiated justifications where a low price is offered**. In terms of evidence that may be requested, the Explanatory Note refers to "appropriate documentation on the production process, facilities, social conditions, certificates, environmental standards etc." (p. 6). Finally, a contracting authority is **required to reject the tender, according to the Explanatory Note, "where it has established that the tender is abnormally low because it does not comply with applicable obligations in the fields of environmental, social and labour law"** (p. 6).

According to interviews with EC officials, specific steps are taken in instances of abnormally low tenders to verify compliance with environmental, social and labour obligations (cf. EU Financial Regulation, Annex I, 23.1) and where low pay might prejudice the quality of the service rendered.

Beyond these scenarios, the EC's general approach is to rely on **supplier self-declarations**, in place of conducting checks itself. This practice aligns with the Vade Mecum which states that, "...compliance with law obligations is not subject to systematic *ex ante* verification. It is only in case of doubts that it should be verified (e.g. in the case of abnormally low tender)" (p. 88). On the other hand, it was indicated that, at least in Brussels, EC services may check whether workers are duly registered in the social security system via national authorities.

The terms of the call for competition are mirrored in a clause in the model framework contract. This specifies that,

The contractor must comply with the minimum requirements provided for in the tender specifications. This includes compliance with applicable obligations under environmental, social and labour law established by Union law, national law and collective agreements or by the international environmental, social and labour law provisions listed in Annex X to Directive 2014/24/EU, compliance with data protection obligations resulting from Regulation (EU) 2016/679 and Regulation (EU) 2018/1725’.

Further, according to the EC services’ **model framework contract**, a contract may be terminated on grounds of non-compliance “with applicable obligations under environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to Directive 2014/24/EU” (EC Model Framework Contract, II.18.g).

Based on interview data, the competent services may evaluate *ex ante* if environmental criteria going beyond mandatory compliance with environmental, social and labour obligations are appropriate to the contract at issue; more rarely this practice may extend to social criteria. In this regard, reference is made to the **GPP criteria** drafted by EC **Directorate-General Environment** (DG ENV) (above §2.3.3.e). Concerning buildings, EC procurements may require **BREEAM certification** (BRE, nd) with the **EC OIB’s Real Estate Department** working on these aspects together with the **EC EMAS Unit**.

Where an EC contract is not covered by established EU GPP criteria, insertion of environmental criteria is perceived as more difficult given that the contracting authority must establish a link between its chosen criterion or criteria with the subject matter of the contract (EC 2021); more so, with social criteria. Still, contracts for green spaces maintenance, cleaning and movement services in Brussels, for instance, feature *ad hoc* social inclusion clauses as well as worker training clauses that are managed in coordination with the local job service. It was also reported during interviews that EC own-account contracts for furniture and textiles specify requirements for compliance with labour standards going beyond ILO Core Labour Standards.

Since all EC contracts include clauses entitling the EC to undertake audits of supplier performance, in principle, verification of adherence to environmental and social standards during contract performance is possible. It is foreseen that, in some cases, this might entail the involvement of third parties such as NGOs (see, for example, EC model framework contract, Point II.24.1).

Key findings: Due diligence in the Commission’s procurement

- Procurement rules for the Commission are convergent with the EU Financial Regulation and the 2014 EU Procurement and Concessions Directives; in other words, the Commission is generally bound by the same procurement rules as the EP, EU Agencies and indirectly the Member State authorities when conducting procurements governed by EU law.
- While procurement activity by the Commission is largely decentralised across its Directorate-Generals, it is nevertheless constrained, guided and supported by such transversal EU legal rules, as well as internal policies, tools, templates and systems that appear to be closely observed.
- Within this framework, EC procurements apply approaches relevant to sustainability, for instance, via generally applicable measures to address suppliers’ compliance with minimum environmental and social requirements; scrutiny, where relevant, of abnormally low tenders; and, in some cases, technical specifications, selection criteria and award criteria, linked to GPP objectives.

- Even if some Commission materials reflect the specific meaning of due diligence as per recent EU and international policies on responsible business conduct, and EU legislation, in general the term 'due diligence' is instead understood, in the context of Commission procurements, as synonymous with ensuring sound and efficient buying practices, including taking stock of lesson learned.
- The practice of sustainability due diligence is not as such currently observable in Commission procurement activity.
- The Commission does not, at corporate level or within individual DGs, itself perform supply chain due diligence, as articulated by international policy instruments, nor does it require this of suppliers. In other words, processes of sustainability risk identification, assessment, and management across procurement spend; supply chain monitoring and reporting, as counselled by UN, EU and OECD due diligence standards are currently lacking. Likewise, mechanisms to facilitate complaints and remediation concerning harms linked to EU institutions' procurement are not in place.
- Data on the scale and character of Commission procurement, as well as its environmental and social footprint are lacking.
- EMAS certification has been a significant driver for GPP within the Commission. This is because impacts need to be reported in the context of the annual verification foreseen under Articles 18 and 19 of Regulation (EC) No 1221/2009. GPP activity is correspondingly more extensive and mature in the Commission's procurement practice than SRPP. EU GPP criteria furthermore provide an important reference point for Commission GPP measures and, to the more limited extent, for SRPP ones.
- In terms of securing suppliers' compliance with minimum environmental and social obligations during contract performance, the Commission generally assumes that national authorities fulfil this role where production or service delivery occurs within EU Member States. Likewise, declarations of honour are mostly relied on as guarantees of suppliers' past compliance with environmental and social obligations at award stage, albeit some information is routinely checked through Belgian databases for Brussels-based procurements.
- There is a general perception that adding further, sustainability-focused requirements to Commission tenders could both limit competition for EU contracts and extend internal capacity requirements, as well as contract costs. Market analysis and market consultation would therefore be seen as prerequisite in assessing which SPP criteria relevant economic operators can comply with.
- While such concerns, along with pressure on budgets, might constrain Commission efforts to develop or implement due diligence policies and practices voluntarily, strong institutional and professional capacity would support effective implementation of sustainability due diligence, if mandated.
- Framework contracts managed by the Commission could offer a relevant focal point for piloting due diligence approaches across EU institutions.

4.3. EU Agencies

The EU has established both **executive agencies** and **decentralised agencies**. The former help the EC manage specific EU programmes: under Article 69(1) of the EU Financial Regulation, such "Executive agencies shall be created by means of a **Commission decision** and shall have legal personality under Union law. They shall receive an annual contribution". Decentralised agencies, by contrast, are established by **EU Regulations** adopted via the EU's ordinary legislative procedure. Located across EU

Member States, they enjoy greater autonomy than EU executive agencies and carry out technical, scientific or managerial tasks.

Through dialogue with the EP, three such decentralised agencies were selected for focus in this Study. Before turning to the specific rules and practices of each, this section introduces elements applicable to procurement by all EU agencies. To start with, Point 45 of the **2012 Joint Statement on Decentralised Agencies** indicates the need for EU agencies to implement rules as close as possible to the **EU Financial Regulation** (European Parliament, Council and Commission 2012).

In turn, **Article 70(1) of the EU Financial Regulation** (Bodies set up under the TFEU and the Euratom Treaty) provides that “[The EC] is empowered to adopt **delegated acts** in accordance with Article 269 of this Regulation to supplement this Regulation with a framework financial regulation for bodies which are set up under the TFEU and the Euratom Treaty and which have legal personality and receive contributions charged to the budget”, such as is the case with decentralised agencies. Under Article 70(2) of the EU Financial Regulation, “The framework financial regulation shall be based on the principles and rules set out in this Regulation, taking into account the specificities of the bodies referred to in paragraph 1”.

On the basis of Article 70(1), the EC adopted **Delegated Regulation (EU) 2019/715**.³⁴ Title VI Public procurement and concessions, Article 89 - Common provisions indicates that Title VII of the Financial Regulation and its Annex 1 apply to EU agencies. Moreover, EU agencies may be associated, at their request, “as contracting authority, in the award of Commission or interinstitutional contracts and with the award of contracts of other Union bodies”. Hence, EU agencies may participate in framework agreements concluded by the EC.

Besides, under Article 90 of Delegated Regulation (EU) 2019/715 - Procurement procedures, EU agencies may join **service level agreements** regulated in Article 43 thereof without having recourse to a public procurement procedure. Finally, EU agencies are permitted to engage in “joint procurement procedures with contracting authorities of the host Member State” to cover administrative needs.

Overall, procurement rules for EU agencies are convergent with the EU Financial Regulation and in case of joint procurements, with the 2014 EU Procurement and Concessions Directives.

In terms of transversal support for EU agencies in the procurement realm, the most significant entity is the **EU Agencies Network (EUAN)**. Established in 2012, and today comprising 39 decentralised Agencies and 9 Joint Undertakings, this provides a platform for exchange and cooperation amongst its members on matters of common interest (EUAN, nd). Within EUAN, a **Network for Agencies Procurement Officers (NAPO)** promotes cooperation, coordination and knowledge sharing on procurement related issues. The **EUAN 2021-2027 Strategy** reflects EU political priorities on “transitioning to a green and sustainable economy and a new digital world” (EUAN 2020) and increased interest in SPP.

4.3.1. European Union Agency for Fundamental Rights (FRA)

The European Union Agency for Fundamental Rights (FRA) is one of the EU’s decentralised agencies, established “to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action

³⁴ EC Delegated Regulation (EU) 2019/715 of 18 December 2018 on the framework financial regulation for the bodies set up under the TFEU and Euratom Treaty and referred to in Article 70 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council.

within their respective spheres of competence to fully respect fundamental rights.”³⁵ It is allocated funds each year by the EU budgetary authority i.e. the EP and European Council. It reports annually to the EP via submission, including on how it has implemented its budget, which was €22 million in 2019 (FRA, nd).

FRA’s procurement falls into two main categories. Firstly, **operational procurement** relates directly to the discharge of FRA’s specifically mandated thematic functions, hence comprising, for instance, outsourced research and study projects, services supporting the presentation and communication of research and analytical results, etc. **Administrative procurement**, by contrast, concerns its generic logistic and support needs, for instance, IT hardware and software, furniture, telephony, office cleaning and security, representing expenditure of about €1.2 million.

FRA: Institutional and procurement activity overview

Within FRA, procurement for contracts over a threshold of EUR 1000 is centralised, being managed by the **Finance and Contracting Sector** within the **Corporate Services Unit**. FRA’s **Procurement Steering Committee** subjects all procurement procedures above EUR 15 000 to *ex ante* review. Some procurement of IT and furniture is concluded under EC framework contracts.

FRA: Legal and policy framework

As per the general analysis relating to EU agencies procurement (above Section 4.3.), procurement by FRA is regulated by the EU Financial Regulation, the EU Procurement Directive, while Austrian national laws, including those implementing the 2014 EU Procurement and Concessions Directives must also be complied with.

Regarding specific sustainable procurement objectives, the joint priority of the EC and European Council of building a green Europe is reflected by the **FRA Strategy 2018–2022**, which highlights its development of indicators linked to the UN SDGs (FRA nd). FRA also supported the EP in preparing its opinion on the draft EU CSDDD (FRA 2022).

FRA: Current practices

At FRA, compliance with applicable environmental, social and labour law obligations is checked through **suppliers’ self-declarations** and **e-Certis**, an online tool developed by the EC to help tenderers understand and meet documentation requirements.³⁶ **Abnormally low tenders** may be scrutinised in a manner similar to that outlined above in relation to the EC (Section 4.2.3). Potential litigation risk associated with failing to implement safeguards is acknowledged in this context.

FRA is reflecting the **European Green Deal** by requiring contracting authorities to lead by example on SPP according to its EMAS report (FRA 2022, pp. 106 f). Guidance from the EC, including the Vade Mecum, is closely followed. According to interview data, where possible and cost-effective, environmental and social aspects are taken into account in the procurement process, at the level of **technical specifications, selection criteria and award criteria** and during implementation of contracts.

³⁵ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, p. 1–14; Council Regulation (EU) 2022/555 of 5 April 2022 amending Regulation (EC) No 168/2007 establishing a European Union Agency for Fundamental Rights ST/9827/2021/INIT, p. 1–12, Art 2 Objective.

³⁶ eCertis helps contracting authorities and businesses operating in the EU identify the certificates and other types of evidence requested in public procurement procedures across the Member States and EEA countries. While the basis of the public procurement regulation is based on the EU Directives, different documents are requested for different types of procedures in different countries. eCertis helps to clarify these differences both for contracting authorities and economic operators. Information about the certificates is entered and updated in the recently restricted part of the eCertis portal by editorial teams, composed of representatives of the responsible authorities of the participating countries. Once published, this information is made publicly available on the public website: European Commission (nd), eCertis, <https://ec.europa.eu/tools/ecertis/#/homePage>.

BREEAM and LEED (USBC nd) are required in FRA office building procurements, following a cooperation with DG OIB of the EC. In addition, environmental and social aspects have been considered in tenders for office cleaning services (specifically, workers retention); they have also been incorporated into framework contracts for IT and furniture concluded by the EC.

On the other hand, recourse to **sustainability labels** is diminished by the need to assess equivalence, which is time-consuming and human resources intensive.

Concerning research and studies contracts, equal opportunities issues have been considered. For example, in a procedure for a contract to develop a study on conditions experienced by Roma people in EU Member States (FRA 2021), award criteria included participation of Roma researchers.

Regarding contract monitoring, FRA relies on standard contract clauses drafted by EC DG BUDG which provide for **checks and audits** (II.24.1). During interviews it was reported that projects are subject to *ex post* evaluation based on Guidelines drafted by the EC which address sustainability aspects.

Due Diligence is understood as verifying compliance with applicable rules in the procurement process and ensuring best value for money, during the purchase phase.

4.3.2. FRONTEX

With an overall annual budget of approximately €750 million (FRONTEX 2022), the European Border and Coast Guard Agency (FRONTEX) has a wide range of operational, technical, research and cooperation functions intended to 'facilitate and render more effective the application of Union measures relating to the management of the external borders,'³⁷ in particular Regulation (EU) 2016/399,³⁸ and relating to return.

Given this, and the geographic dispersion of its operational activities, public procurement in FRONTEX is semi-centralised. Its **General Coordination and Governance Centre** houses a **Legal and Procurement Unit** that coordinates procurement activities across the Agency as well as measures to regulate compliance with EU-level legal requirements. Individual **Business Units** in FRONTEX operational divisions manage their own procurement procedures and monitor contract performance, including compliance with applicable environmental, social and other obligations, which is accordingly not centrally monitored or analysed. The **GPP Helpdesk** may be consulted on SPP issues arising in the context of individual procurement processes.

FRONTEX procurement is based on a multi-annual strategy that is subject to the positive opinion of the EC. A key distinction lies between **administrative procurement** including ancillary services such as office cleaning, maintenance and catering for the Agency headquarters in Warsaw as well as private security for personnel in some locations; and **operational procurements** necessary for the discharge of the Agency's statutory mission. Contracts executed in the support of the latter often have unique objects, for instance, EU-specific surveillance systems, besides more generic defence and security sector purchases such as personal weapons for FRONTEX standing corps, uniforms, training, transportation and accommodation for external missions. **Operational service contracts**, such as surveillance, may commit personnel through directly contracting with FRONTEX or subcontracting arrangements. Whereas subcontractors might be located outside the EU for strategic purchases, the procurement market is only open to EU companies given requirements for security clearance.

³⁷ Art. 10 of Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 PE/33/2019/REV/1, p. 1–131.

³⁸ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), p. 1–52.

FRONTEX: Legal and policy framework

Once more, the EU Financial Regulation provides the overall legal framework for FRONTEX procurement. A more detailed version was adopted (Frontex Management Board 2019), however Articles 89 and 90 relating to procurement in essence replicate the Financial Regulation's scheme.

Of additional note, however, in the context of SPP, are provisions of Regulation (EU) 2019/1896 relating to human rights. In executing its functions, under Article 5(4), "The Agency shall **contribute to the continuous and uniform application of Union law, including the Union *acquis* on fundamental rights**, in particular the Charter of Fundamental Rights of the European Union ('the Charter'), at external borders" and "Its contribution shall include the exchange of good practices".

Specific rules regulating FRONTEX procurements reflect its statutory mission and mandate to cooperate closely with Member State authorities and other EU agencies. To illustrate, **Article 63 - Acquisition or leasing of technical equipment of Regulation (EU) 2019/1896** provides that Frontex can make acquisitions

"either on its own or as co-owner with a Member State, or lease technical equipment to be deployed during joint operations, pilot projects, rapid border interventions, activities in the area of return, including return operations and return interventions, migration management support team deployments or technical assistance projects".

Under Article 63(3) Regulation (EU) 2019/1896, furthermore,

"The Agency may acquire technical equipment by decision of the executive director in consultation with the management board in accordance with the applicable procurement rules. Any acquisition or leasing of equipment entailing significant costs to the Agency shall be preceded by a thorough **needs and cost-benefit analysis ...**"

FRONTEX: Current practice

The mandate of the FRONTEX Procurement Unit refers only to legal compliance. A **standard contract clause requiring compliance with applicable environmental, social and labour law obligations** in contract execution accordingly features both in FRONTEX's contract document and its draft contract. Regarding environmental or social sustainability factors going beyond minimum standards, discretion rests with FRONTEX Business Units to select policy priorities to pursue.

In the context of administrative procurements, building leases for headquarters and other office accommodation include a requirement for BREEAM certification. On the other hand, according to interview data, FRONTEX operational procurements may not be best suited for including SPP considerations. To illustrate, after consultation with the GPP Helpdesk, it was decided that GPP criteria were not relevant in a procurement for armoured vehicles.

Due diligence is a term that is rather understood as relating to the verification of compliance with applicable rules in the procurement process (purchase phase) than as a tool for advancing responsible business conduct or respect for human rights more broadly. Besides, effective monitoring of clauses addressing conditions of production in long supply chains would be a notable challenge.

Still, FRONTEX is presently seeking **EMAS registration**; it is also a member of **EUAN's Network for Agencies Procurement Officers (NAPO)**, and specifically a member of the **NAPO Working Group on SPP**. Additionally, FRONTEX currently chairs a **NAPO Working Group on contract management** that seeks to strengthen governance in this phase in the acquisition process.

4.3.3. European Union Agency for the Space Programme (EUSPA)

The EU Agency for the Space Programme (EUSPA) provides European satellite navigation services, advances the commercialization of Galileo, EGNOS, and Copernicus data and services, engages in satellite communications (GOVSATCOM & IRIS2), and operates the EUSST Front Desk. EUSPA is also responsible for accrediting the security of all EU Space Programme components.

Its yearly procurement budget rests at approximately €1.300.000.000, of which approximately 80% comprises mission, ground and space infrastructures as well as services to citizens; and 20% administrative support services. By contrast with other agencies selected for this Study, EUSPA procurement is centralised being undertaken by the **EUSPA Legal and Procurement Department**, consisting of approximately fifteen lawyers organised in teams. Mission-related EUSPA procurements are mainly large-budget, technically- and legally complex, and consequently awarded through negotiation procedures such as **innovation partnerships**. Most such procurement proceed via *ad hoc* legal instruments.

EUSPA: Legal and policy framework

Besides the EU Financial Regulation, **Regulation (EU) No 2021/696 establishing the European Union Space Programme and the European Union Agency for the Space Programme**³⁹ applies to EUSPA procurement (Recital 28). Amongst others, these instruments reflect EUSPA's involvement in collaborative procurement activities with Member States and other entities (Article 5, see also Recital 32 and Articles 23 and 30; see also Article 13(3)).

At the same time, Article 14 of Regulation (EU) No 2021/696 sets down **Principles of procurement** for EUSPA. Here, security of supply and technological independence are paramount (Article 14(1)(b)(c)(e) and (g)), entailing the need for diversity of economic operators in the supply chain and a wide supplier base throughout the EU (Article 14(1)(a) and (d)). In addition, the Regulation requires that, as a contracting authority, EUSPA shall "satisfy **appropriate social and environmental criteria**" (Article 14(1)(h)).

Regarding GPP, as part of the **2021 Financial Partnership Agreement (FFPA)** adopted in the implementation of Regulation (EU) No 2021/696, EUSPA is collaborating with the EC and with the European Space Agency (ESA) to define modalities to contribute to reaching the 2050 climate neutrality goal. Under Article 30 of the FFPA, EUSPA is seeking **EMAS certification** by the end of the current year.

Regulation (EU) No 2023/588 establishing the **Union Secure Connectivity Programme for the period 2023-2027**⁴⁰ also refers to EUSPA procurement. Article 8 of that Regulation addresses *Environmental and space sustainability*. According to Article 8(1), "The Programme shall be implemented with a view to ensuring environmental and space sustainability". This aim has explicit implications for EUSPA procurement as, under Article 8(1), "the contracts and procedures referred to in Article 19 shall include *inter alia* provisions on (a) the **minimisation of greenhouse gas emissions generated by the development, production and deployment of the infrastructure** and (b) the **establishment of a scheme to offset the remaining greenhouse gas emissions**".

Under Article 8(3) of Regulation (EU) No 2023/588, "The Commission shall ensure that a comprehensive database of the Programme's space assets, containing, in particular, **data relating to environmental and space sustainability** aspects, is maintained". Article 20 lays down the principles of procurement.

³⁹ Regulation (EU) 2021/696 of the European Parliament and of the Council of 28 April 2021 establishing the Union Space Programme and the European Union Agency for the Space Programme and repealing Regulations (EU) No 912/2010, (EU) No 1285/2013 and (EU) No 377/2014 and Decision No 541/2014/EU.

⁴⁰ Regulation (EU) 2023/588 of the European Parliament and of the Council of 15 March 2023 establishing the Union Secure Connectivity Programme for the period 2023-2027.

Referring to the EU Financial Regulation, it highlights the need “to enhance the safety and sustainability of outer space activities, by implementing appropriate measures in accordance with the provisions set out in Article 8” (Article 20(2)(h)). With SPP relevance, reference is also here made to the need,

“to ensure the **effective promotion of equal opportunities for all, the implementation of gender mainstreaming and of the gender dimension** and to aim to address the causes of gender imbalance, paying particular attention to ensure gender balance in evaluation panels”.

EUSPA: Current practice

GPP, and specifically CO2 emissions, have become a major focus for EUSPA procurements directly linked to space programs and are already considered in the planning stage of contract design. In the procurement proper, candidates and tenderers are then asked to develop their plan to address environmental issues and to evaluate it in award criteria. The plan becomes part of the contract, and compliance with it is checked during contract execution including, if necessary, through audit. Prime contractors are required to check that subcontractors comply with the rules. While penalties and other contract remedies are provided for in cases of non-compliance, this has not been needed so far.

Regarding monitoring of compliance with applicable **environmental and social rules**, a specific unit in EUSPA, **Cost Engineering**, maintains and checks cost sheets related to administrative functions, including, for example, salaries for temporary workers, for all procurements over €2 million. The Cost Engineering Unit develops and maintains a centralised **Cost Engineering Database** to support analysis and benchmarking and deviations may be treated and investigated as abnormally low tenders.

On the other hand, according to interview data, the EUSPA’s approach to SPP is conditioned by the EUSPA’s specific mission. Still, the limited case law, the insistence on the link to the subject matter and an **insufficiently articulated policy drive towards SPP** are limiting its uptake.

Whereas the 2021-2027 Strategy for the EU Agencies Networks moves from the assumption that “the current period is marked by a distinct set of EU political priorities, where the focus is on transitioning to a green and sustainable economy” (EUAN 2020, p.4), this is too generic to impact on the everyday operation of procurement processes.

Key findings: Due diligence in EU agencies’ procurement

- Procurement rules for EU agencies are convergent with the EU Financial Regulation and in case of joint procurements, with the 2014 EU Procurement and Concessions Directives; in other words, EU agencies are generally bound by the same procurement rules as the EP, Commission and Member State authorities when conducting procurements governed by EU law.
- EU agencies undertake procurement activities that are significant in value and impact if diverse, encompassing both general and specialist goods and services, with a highly variable sustainability risk profile.
- EU agencies, according to data available to this study, are implementing procurement approaches and standards that are generally similar to those adopted by the EP and Commission, including in areas relevant to sustainability, for instance, measures taken to address suppliers’ compliance with minimum environmental and social requirements, and scrutiny of abnormally low tenders; where possible and cost-effective, EU agencies may also take into account environmental and social aspects of their the procurements via technical specifications, selection criteria and award criteria.
- Whereas the term ‘due diligence’ is generally taken as synonymous with ensuring sound and efficient buying practices amongst EU agencies, it is not presently understood or applied with

the specific meaning given to it in recent EU and international policies on responsible business conduct.

- Consequently, policies and practices of sustainability due diligence, as that term is understood in this Study, are not as such currently observable in EU agencies' procurement.
- Accordingly, EU agencies do not themselves undertake supply chain due diligence, as articulated by international policy instruments, current and foreseen EU legislation, nor do they require it of suppliers. This entails that dedicated due diligence policies, corporate-level processes of sustainability risk identification, assessment, management, monitoring and reporting, as counselled by UN, EU and OECD standards are currently lacking. Likewise, mechanisms to facilitate complaints and remediation concerning harms linked to EU institutions' procurement are not in place.
- Further, data on the scale and character of EU agencies' procurement, its environmental and social footprint are lacking, for individual agencies and consequently also for EU agencies in aggregate.
- EU agencies remain under strong pressure to achieve missions while containing costs, which could limit or de-prioritise efforts to develop or implement due diligence policies and practices voluntarily.
- On the other hand, EU agencies' established procurement systems, institutional and professional capacity provide a strong foundation for the integration of sustainability due diligence, if mandated.
- Transversal EU institutional guidance on due diligence as well as other aspects of sustainable procurement would be well received by EU agencies.
- EUAN and its NAPO would be appropriate vehicles for cross-EU agency coordination and peer learning on due diligence and SPP while recourse to Helpdesk function might contribute to their uptake.
- Seeking and sustaining EMAS certification has been a significant driver for GPP activity which is correspondingly more extensive and mature in policy and practical terms than SRPP.
- The use by EU agencies of framework contracts negotiated by the EC or other entities could help to consolidate the use of due diligence and SPP and its impact, even if some EU agencies' procurement occurs within a limited geographical market.

4.4. GPP Helpdesk

The GPP Helpdesk has a transversal function across EU institutions. Originating as a pilot project of the EP in 2015, today it functions pursuant to a framework agreement that requires a contracted entity to offer assistance in response to requests from 28 EU institutions and bodies such as the EP, EC, Committee of the Regions and the CJEU. The GPP Helpdesk deals with between 100 and 150 requests for assistance each year. The largest number comes from the EP, but of late an increasing number of cases originates from the Commission. Depending on the complexity of the case, advice is given by email, by phone or in person. It mostly refers to the preparation of contract documents (technical specifications, award criteria, contract performance clauses), but in complex cases the advice of the GPP Helpdesk may be solicited in the evaluation of tenders as well. The contractor also provides training on GPP. Some participants in past training have become active in requiring advice. The focus has been expanded to include SRPP and during interview it was reported that a small number of inquiries concerning due diligence issues were raised in recent years. Thus far, however, engagement by EU institutions with the due diligence topic has not been the subject of any proactive promotion by the Helpdesk.

5. EVALUATION AND RECOMMENDATIONS

The EP's objectives in seeking this study are to identify international standards on due diligence and public procurement; to ascertain the scope for EU institutions to implement supply chain due diligence within existing EU laws; and to understand whether foreseen changes to EU law might positively influence the potential for due diligence in the purchase by EU bodies of goods and services.

Consequently, in its preceding chapters, this study has clarified the legal and policy framework for EU institutions' own-account procurement, including EU-level general and sustainable procurement standards and national practices (Chapter 2), as well as international norms and guidance on human rights and sustainability due diligence (Chapter 3). Next, this study has, based on interviews with procurement personnel, and the review of procurement materials specific to individual EU institutions, specifically the EP, Commission, FRA, FRONTEX and EUSPA, (Chapter 4), undertaken a detailed assessment of the extent of the integration of due diligence into EU institutions' current procurement rules and practices.

In turn, this Chapter synthesises these findings in order to identify scope for further integrating due diligence into EU institutions' procurement, and related challenges and opportunities. Hence, it presents recommendations, taking into account the constraints and flexibilities offered by the existing regulatory framework, but also spotlighting steps that might be taken to promote its progressive development in the future.

This Chapter is structured as follows. The first part focuses on measures that can be taken within the existing legal and policy framework for sustainable procurement by EU institutions. This includes, firstly, **EU institutions establishing their own supply chain sustainability due diligence processes** (section 5.1). Secondly, it encompasses measures that can be adopted more rigorously to **secure compliance by EU institutions' suppliers with existing minimum legal obligations**, both statutory and contractual, using tools that are already available and without legislative reform (section 5.2). To this end, measures to enhance recourse to existing legal scope to effect supplier exclusions should be taken (section 5.2.1); monitoring of suppliers during contract performance should be instituted (section 5.2.2); accessible whistleblowing and remediation mechanisms need to be available (section 5.2.3); and greater reliance should be put on SPP contract clauses (5.2.4).

The second focus is on **measures to align EU institutions' own-account procurement law with EU sustainability and due diligence standards**. Here are highlighted the need to integrate due diligence and binding sustainable procurement goals into the EU Financial Regulation (5.3.1); to ensure the Financial Regulation is continuously updated to articulate with EU sustainable procurement requirements (5.3.2); to extend mandatory exclusions (5.3.3); to integrate sustainable procurement into general EU budgetary control mechanisms (5.3.4); measures to link EU institutions' own procurement with the anticipated EU CSDDD (5.3.5); and finally, to revise the 2014 EU Procurement Directives (5.3.6).

Thirdly, this chapter highlights the need to strengthen efforts and capacity of **EU institutions on due diligence and SPP** (section 5.4). This is an immediate imperative, in terms both of securing compliance with existing law, as well as to support the effectiveness and impact of any future legislative or policy changes. Whereas some initiatives to foster mutual support and dissemination on SPP across EU bodies are already underway, greater effort is needed to secure cross-institutional policy coherence, while more synergy in SPP measures would likely enhance both their cost-effectiveness and their sustainability impacts. Development of guidance, trainings and exchange of good practices form one discrete area of requirements (section 5.4.1).

5.1. Supply chain due diligence for EU institutions

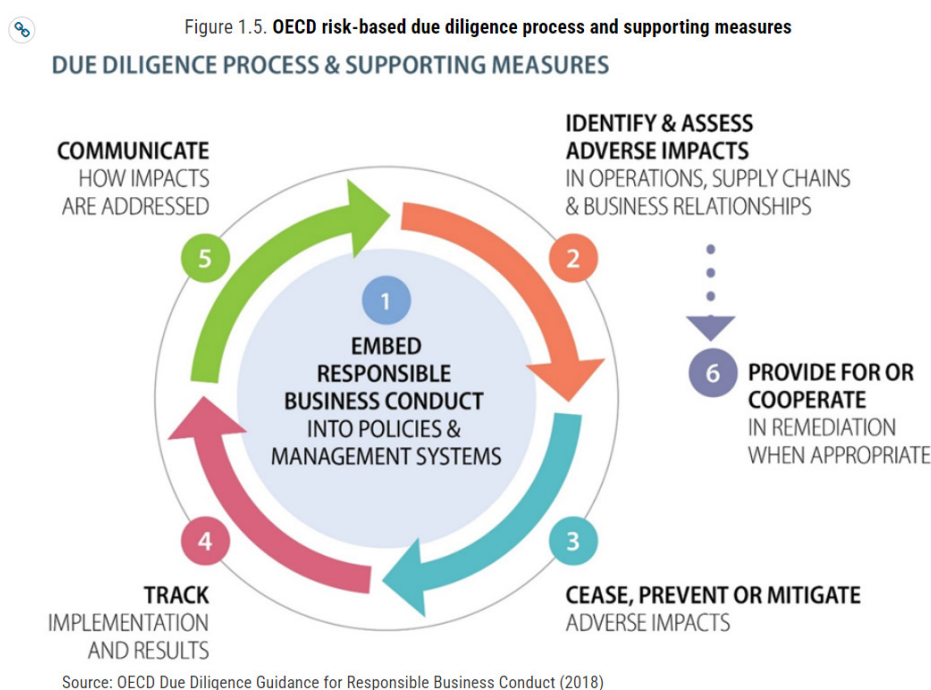
As relayed in detail in Chapters 2 and 3 of this Study, UN, EU, Council of Europe and OECD instruments adopted since 2011 entail that all businesses should carry out risk-based supply chain due diligence to avoid and address adverse impacts associated with their operations, supply chains and other business relationships. Given their own legal duties, governments are expected by such norms to ‘promote respect for human rights by business enterprises with which they conduct commercial transactions’ (UNGP 6) and ‘to exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services’ (UNGP 5). At the same time, as the OECD observes, likewise, ‘Given the power of public procurement to act as a lever for change, there is a growing expectation that governments uphold RBC commitments in their role as an economic actor, through public procurement’ (OECD 2020, Section 1.1).

Accordingly, under the 2015 OECD Public Procurement Recommendation, adherents are recommended inter alia to:

- Develop an appropriate strategy for the integration of secondary objectives into public procurement systems;
- Establish appropriate planning, baseline analysis, risk assessment and target outcomes as the basis for the development of action plans or guidelines for implementation;
- Employ appropriate impact assessment methodology to measure the effectiveness of procurement in achieving secondary policy objectives;
- Measure the results according to appropriate milestones to provide policy makers with necessary information regarding the benefits and costs of such use, addressing both the level of individual procurements, and against policy objective target outcomes;
- Periodically assess the aggregate effect of pursuing secondary policy objectives on the public procurement system to address potential objective overload (OECD 2015, 12).

As can be seen from the diagram below, these steps serve as a functional analogue to the corporate due diligence cycle.

Figure 1: OECD risk-based due diligence process and supporting measures



Hence, public procurers can draw both on guidance and good practices addressed specifically to public buyers (Danish Institute for Human Rights 2020, OECD 2020, EC 2016, EC 2020, EC 2021b) but also more generally on corporate due diligence guidance provided by international organisations (OECD 2018, OECD nd) and other stakeholders, of which there is by now a great wealth focused on specific products, services, commodities and value chains.

As this study has disclosed, while they take various measures to address suppliers' compliance with minimum labour and environmental standards, and also to integrate green objectives, EU institutions have not established discrete, dedicated or systematic supply chain due diligence processes. This omission does not owe to the legal environment in which they operate, as this poses no appreciable obstacle in this regard. On the other hand, there are clear potential benefits to EU bodies of initiating coordinated **cross-institutional due diligence processes**, which are widely analysed as an effective mechanism for the management of operational, litigation and reputational risks, amongst others.

This would besides provide an externally as well as internally transparent and consistent basis for EU contract monitoring commitments and targets that would be rationally linked to material risks of environmental or social harms associated with EU procurements.

Recommendation

EU institutions, in particular the EP, Commission and EU agencies, should take steps to implement dedicated supply chain due diligence processes. In line with international and EU policies, these processes should encompass a clear policy commitment; risk identification and assessment; measures to cease, prevent or mitigate identified supply chain risks; tracking and implementation of results; and both internal and external communication of results, on an iterative basis; as well as steps to provide for or cooperate in remediation. It should also take into account the possible extent, severity and irremediability of the potential impacts on human rights or the environment associated with the purchase of goods or services by EU institutions.

Identifying the need to better align EU institutions' procurement efforts and supply chain management with EU social and environmental goals is easier to articulate than to deliver in practice. Undertaking supply chain due diligence takes time, particularly in larger organisations with complex functions and spending profiles. Indeed, during interviews undertaken for this study, EU institutions' procurement personnel highlighted that even spot checks and inspections of suppliers, as permitted by existing EU procurement law, require time, skills and resources that EU individual operational units frequently lack. Wider research echoes this finding, with resource constraints frequently cited as an impediment to engagement with sustainable procurement practices in general (OECD 2020, DIHR 2020, UNEP 2022, Sack and Sarter 2022). While this institutional reality underlines the value of pooling of resources, burden-sharing and a coordinated cross-EU approach to supply chain due diligence, it also entails EU institutions will require to allocate sufficient additional resources to support the establishment of supply chain due diligence processes within and across EU institutions. Unless this condition is met, supply chain due diligence is likely to remain a paper exercise, that will not deliver the on-the-ground change that provides its essential rationale.

Recommendation

- According to their respective competences, EU institutions should ensure the responsible entities are adequately resourced to prepare, initiate and implement supply chain sustainability due diligence processes as indicated above.

5.2. Extending EU institutions' recourse to sustainable procurement approaches available under the existing legal framework

Applying due diligence will likely highlight the need for EU institutions to adopt new approaches in order to address and remediate human rights and environmental risks associated with their purchasing activity effectively. However, not all mechanisms deployed by EU procuring authorities to control social or environmental risks will be novel. Indeed, this study has disclosed that a range of measures that are already available to EU institutions under existing EU procurement law can be more fully and frequently utilised to secure sustainable procurement objectives, as highlighted by recommendations in this section.

5.2.1. Exclusions of suppliers from EU institutions' tenders

Exclusion of economic actors from participation in public tenders is provided for by existing EU procurement rules. Companies convicted of certain offences may be excluded from EU tender procedures. Concerning EU institutions specifically, exclusionary grounds under the EU Financial Regulation (Article 136) include grave professional misconduct and serious breach of contract. ECA compliance audits (Statement of assurance audits for Administrative Expenditure of EU Institutions) include verification of compliance with the Financial Regulation of winning tenders, which extends to documents proving compliance with environmental and social obligations.

The **Early Detection and Exclusion System (EDES)** is an internal information tool that helps the EC and executive agencies identify third parties that pose financial or other risks foreseen by Article 136 of the Financial Regulation. Yet the ECA has called for EDES to be strengthened as it does not reflect complete inputs from Member States. In addition, whereas supplier self-certifications are generally checked via the **e-Certis repository**,⁴¹ there are shortcomings in the quantity and quality of information on this platform (Telles 2021).

In principle, the framing of Article 136 of the EU Financial Regulation, with reference to 'grave professional misconduct and serious breach of contract' is broad enough to capture most breaches of environmental and social obligations and to justify suppliers' exclusion from EU institutions' own account tenders on that basis. This however assumes that buyers know this and are able in practice to identify offending companies and prove their status.

Yet, individual EU contracting authorities are poorly equipped for this task, which requires information from multiple Member States and third countries, which can trigger delays to procurement processes that risk making the whole exercise impracticable. While exclusions on grounds of social, labour and environmental breaches by businesses are already provided for by the 2014 Directives and the Financial Regulation, further action is thus needed to use available technologies, secure cross-institutional coordination and pool resources to realise consistent enforcement of this aspect of existing EU procurement law. A mechanism currently being developed to support application of the EU Deforestation Regulation (Regulation (EU) 2023/1115, Article 25) includes a database managed by the EC that collates information from the Member States. Such an approach could also be considered as a model.

During some interviews, apprehension was expressed that more assertive use of existing provisions permitting exclusions under the Financial Regulation could increase litigation and limit the number of economic operators available to compete for public contracts. While this is understandable, existing EU law and policy clearly precludes that EU institutions promote competition at the expense of the

⁴¹ See footnote 35 above.

Union's foundational duties and values relating to human rights and non-discrimination as provided for under the ECHR and Charter, for example. Moreover, the EU's stated strategic goals and policy commitments are advanced, not retarded, if EU institutions' procurement power is used to increase the costs for businesses of acting irresponsibly, thereby contributing to securing a level playing field, while remedial measures and prevention of future harms are also more likely, supporting the rule of law and good governance, which are both important for businesses to thrive.

Additionally, the following recommendations are in line with obligations under the World Trade Organisation Agreement on Government Procurement. Article VIII — Conditions for Participation thereof provides that, "4. Where there is supporting evidence, a Party, including its procuring entities, may exclude a supplier on grounds such as: ... (d) professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier". Finally, the EU Financial Regulation (Article 136(6) and (7)) introduces exceptions in the general interest to exclusion and foresees self-cleaning (i.e. the possibility to remedy past wrongdoings), so that adequate safeguards for suppliers are also provided.

Recommendations

EU institutions should identify and implement measures to improve information available to EU procurers relevant to exclusionary grounds provided for EU Financial Regulation Article 136.

EDES should be refined to address breaches of applicable environmental and social obligations and, in line with the ECA report, reinforced by strengthening data inputs from Member States.

New public guidance to EU institutions on sustainable procurement should be developed that explicitly gives a broad interpretation of Article 136 Financial Regulation in light of EU legal duties on human rights and the environment and policy commitments to responsible business conduct and corporate sustainability due diligence.

To limit the risk of non-compliance during contract execution, access to information on the **e-Certis repository** should become routine also during the implementation of long duration contracts to check that information on compliance with relevant obligations supplied at the award stage remains up to date. This might raise red flags and prompt the contract officer to perform audits with reference to all contracts awarded to the relevant economic operator.

Recourse to exclusions should be subject to periodic monitoring and public reporting across EU institutions.

5.2.2. Monitoring suppliers' compliance with minimum standards during contract performance

The EU Financial Regulation (Recital 103 and Point 16.4. of Annex I) requires the compliance of suppliers to EU bodies with applicable obligations in the fields of environmental, social and labour law. This not only contributes towards sustainability, but is prerequisite to fair competition, a level playing field among economic operators and corruption prevention. Competition is distorted, after all, where a company engages in unlawful labour practices to reduce its production costs and secures greater profits than can be generated by law-abiding economic actors (Methven O'Brien and Martin-Ortega 2019).

Monitoring of compliance with minimum environmental, social and labour standards during contract execution is therefore a crucial element of effective and coherent SPP practice. According to this study's findings, however, EU institutions generally assume such compliance is verified by the competent

national authorities where services or goods are delivered, even in relation to service sectors (e.g. office cleaning, catering, security) or product categories (e.g. apparel manufacture, agricultural produce) where risks of abuse are widely documented to be significant (OECD 2020, Fig 1.4, from ILO 2017, 20). Although it cannot be specifically verified, this may offer some explanation as to why the reported incidence of cases of contractor non-compliance leading to application of penalty clauses or even contract termination was, in this study, found to be negligible.

By contrast, public authorities in several EU Member States have embarked on collective initiatives to facilitate monitoring in supply chains prioritised for investigation following risk assessment, even where production sites are geographically distant. The benefits of such actions include sharing of costs and administrative burdens across a group of buyers; enhancement of buyer leverage over supplier conduct, given greater purchasing power; and the scope to deploy longitudinal and programmatic engagements that would not be possible for individual contracting authorities, given human and financial resource constraints (Gothberg 2019, OECD 2020).

Recommendations

EU institutions should, undertake proactive monitoring of supplier compliance with minimum environmental, labour and social standards, linked to prioritised material risks identified during due diligence processes.

Consideration should be given in this context to establishing cross-institutional programmes of supplier monitoring to capture efficiencies and enhance impact, and collaboration with third parties, such as NGOs and multi-stakeholder initiatives.

Reasonable and proportionate targets for monitoring across EU institutions should be established and monitoring activity subject to regular public reporting.

5.2.3. Accessible whistleblowing and remedial mechanisms

Whistle-blowing mechanisms provide a further important tool for identifying supplier non-compliance with existing regulations and contract terms. Hence, they are also a vehicle, in the procurement context, for safeguarding public value for money as well as policing corrupt practices. Remediation mechanisms accessible to victims of environmental and human rights harms have been recognised as a critical element for the effectiveness of due diligence (OECD 2018), while they are also necessary in upholding the rule of law (European Parliament 2020) and rights effectiveness (Methven O'Brien and Weatherburn 2023). Recent work amongst public buyers and stakeholders has underscored these points (BHRE, Electronics Watch and DIHR 2022, UNI Global Union Europa 2023).

According to interviews undertaken for this study, current approaches to whistleblowing across EU institutions are somewhat divergent. Yet in common they may only be activated by employees of EU institutions, not by those working with contractors or subcontractors or by competitors or members or organisations of the civil society. This curtails the impact of established whistleblower protections because other actors, such as workers, trade unions, NGOs or the media can often provide information about possible breaches of environmental, labour or social obligations.

Recommendation

EU institutions should consider extending the scope of **whistleblowing and remedial mechanisms to workers, trade unions and NGOs** to help contracting authorities become aware of possible breaches of environmental, social and labour obligations, at minimum for contracts executed on the premises of EU institutions, bodies and agencies.

A link with the Early Detection and Exclusion System (EDES) should be established by amending Article 135 of the Financial Regulation and explicitly giving workers, trade unions and relevant NGOs the possibility to raise complaints with the competent authorising officer, the Ombudsperson and the Court of Auditors.

5.2.4. Contract clauses

The EU Financial Regulation and the 2014 EU Procurement and Concessions Directives allow contracting authorities to provide for SPP clauses throughout the contract award stages, i.e. design and technical specification, exclusion grounds and selection criteria, award criteria and contract performance conditions. This means that EU institutions, in their own-account procurements, can prescribe social and environmental standards for suppliers beyond the applicable minimum environmental, social and labour obligations.

Holding suppliers to specific social and environmental standards can be important for the realisation of wider legal duties and policy commitments, as well as value for money broadly construed. For example, in non-EU countries where environmental and social standards may be lower or the enforcement of such rules lax, if EU institutions do not require higher standards of production via contracts, this may expose local communities to harmful externalities, in breach of EU human rights commitments or sustainable development objectives. At the same time, it may disadvantage EU businesses, workers and taxpayers. Accordingly, sourcing less sustainable products at lower cost is not just unethical but self-defeating for the EU and its Member States, whatever the short-term cost-savings, as demonstrated for instance by recent scandals over procurement of healthcare PPE during the COVID-19 pandemic (OECD 2020, 31).

The use of contract clauses by public buyers to advance sustainability considerations is a well-established international good practice. Public buyers may use clauses to require a supplier:

- To demonstrate that it has established specific policies or procedures relating to human rights and the subject matter of the contract;
- To disclose the performance of sub-contractors working under the contract in question to the public buyer on a continuous basis;
- To disclose [...] incident and/or remediation reports on labour issues, discrimination, harassment, issues with regulators;
- To conduct audits...;
- To implement capacity building initiatives, such as worker education.

Social labels and certifications can also be used as contract performance conditions...' (DIHR 2020).

Box 12: Electronics Watch contract clauses

The Electronics Watch Code of Labour Standards establishes, via contract clauses, supplier obligations to:

- Comply with all applicable labour, anti-slavery and human trafficking laws;
- Exercise due diligence to identify and mitigate the risk of potential breaches of the code;
- Include provisions obliging sub-contractors to produce goods in accordance with the code;
- Implement an appropriate system of training of employees to ensure compliance with the code;
- Use reasonable and proportionate measures to ensure that subcontractors engage with Electronics Watch in remedying adverse impacts and preventing breaches of the code.

Contractors are also required, within 25 working days of the date of the contract, to complete a disclosure form informing Electronics Watch and the contracting authority of the names and addresses of factories where goods are produced, as well as the specific products and components produced in each factory. The contractor shall also “use reasonable and proportionate endeavours to disclose the compliance findings in summary or in whole (or, if available for disclosure, the audit reports) relating to the factories conducted within the previous 24 months which it is able to discover and obtain through reasonable enquiries” relating to the factories where the goods are produced. Updated information relating to sub-contractor compliance with the code shall also be provided every six months’ (Electronics Watch 2019, DIHR 2020).

In addition, various initiatives are underway to devise contract clauses to support corporations discharge their duties arising under new due diligence statutes, which may be of relevance also to EU institutions in this context (e.g. Responsible Contracting Project, nd).

Recommendation

EU institutions should increase their deployment of contract clauses while meeting the link to the subject matter and transparency requirements. Concerning environmental aspects, reference could be made to the EU GPP criteria mentioned above (section 2.3.2).

5.3. Aligning EU procurement law with EU sustainability and due diligence standards

In tandem with organisational leadership, the legal framework for public procurement is a critical driver for the adoption of sustainable procurement approaches. As Chiappinelli observes, “...the legislative framework...influences... familiarity with SP policies and, consequently, the development and implementation of strategies. SP is found to be implemented to a larger extent in countries where policies and regulations exist, especially if the regulations are mandatory (vs voluntary) in nature” (Chiappinelli 2022).

Procurement by EU institutions should adhere to the same sustainability standards that EU law imposes on contracting authorities and entities in the Member States. Divergences, on the other hand, are likely to undermine the ‘compliance pull’ of EU sustainable procurement, responsible business conduct and due diligence norms for national public buyers, as well as economic operators.

This study has identified variable sustainable procurement practices across EU institutions, with instances of good practice but also clear oversights in some areas, notably social procurement, as well as gaps in data. It has also found significant omissions, in relation to due diligence standards issued by

international organisations and the EU itself to businesses. This suggests that sustainability procurement requirements and goals require a stronger anchor in the Financial Regulation, as this instrument defines the most important rules applicable to EU institutions' own-account procurement.

5.3.1. Integrating due diligence and binding sustainable procurement goals into the EU Financial Regulation

The recast EU Financial Regulation (COM/2022/223 final) has been recently approved.⁴² Centring sustainability in terms of how the EU budget is spent was already among the reasons for its latest revision. Under Recital 23a “**specific performance indicators** for the Union budget should be introduced to track the spending on gender equality, as well as on climate change mitigation and adaptation and the protection of biodiversity” (see also Article 33(3)). Recital 24 clarifies that:

“Considering the importance of addressing climate and environmental challenges and in order to ensure that budget implementation contributes to the achievement of the European Green Deal as well the Unions’ climate and energy targets and to the achievement of climate neutrality by 2050 latest, **the concept of performance as regards the budget should be extended to include the implementation of programmes and activities in a sustainable way**, which would not hinder the achievement of the environmental objectives of climate change mitigation, climate change adaptation, the sustainable use and protection of water and marine resources, the transition to a circular economy, pollution prevention and control and the protection and restoration of biodiversity and ecosystems [reference omitted]”.

New point (d) added to Article 33(2) of the EU Financial Regulation explicitly links sound financial management and sustainability by providing that:

“programmes and activities shall, where feasible and appropriate, in accordance with the relevant sector-specific legislation, be implemented to **achieve their set objectives without doing significant harm to the environmental objectives** of climate change mitigation, climate change adaptation, the sustainable use and protection of water and marine resources, the transition to a circular economy, pollution prevention and control and the protection and restoration of biodiversity and ecosystems[reference omitted]”.

Compared with the original proposal from the Commission, a ‘shall’ took the place of a ‘should’, but the reference to ‘where feasible and appropriate’ was added, thus somewhat weakening the provision. However, two further points were added (da) and (db) to the effect that:

“programmes and activities shall, where feasible and appropriate, in accordance with the relevant sector-specific legislation, be implemented **to achieve their set objectives respecting working and employment conditions under applicable national law, Union law, ILO conventions and collective agreements**” and that

“programmes and activities shall, where feasible and appropriate in accordance with the relevant sector-specific rules, be implemented **taking into account the principle of gender equality and in accordance with an appropriate gender mainstreaming methodology**”.

With specific reference also to public procurement, Recital 158 of the recast EU Financial Regulation indicates that,

⁴² It was not however published in the Official Journal of the European Union at the time this Study was finalised, so that the citations following may require revision.

“In line with the objectives of the Communication on the European Green Deal, progress towards implementation of greening aspects should be ensured by including, when relevant, for the calls for tenders, green selection or award criteria, which will incentivise the economic operators to offer more sustainable options”.

This is a clear policy indication. However, it could be further strengthened by a direct reference to the EU GPP criteria and indicating, for instance, a preference for comprehensive criteria. Moreover, the EU Financial Regulation’s current lacunae, as regards sustainability due diligence, and alignment to the full scope of human rights, social and environmental harms as articulated by relevant EU instruments, including, but not limited to the foreseen EU CSDDD, should be redressed.

Recommendations

The EU Financial Regulation should

- establish mandatory sustainable procurement requirements with reference to the existing EU GPP criteria;
- include a requirement that EU programmes and activities should be implemented in accordance with EU corporate sustainability due diligence standards;
- include a clause, mirroring the agreed Art 33(2) regarding the ‘do no significant harm’ principle, addressing potential harms to human rights
- In Recitals 23a and 24, align to the scope of social and environmental matters articulated by the foreseen EU CSDDD, in place of its current focus only on environmental and gender-related concerns.

5.3.2. Keeping rules for EU institutions’ own-account procurement up to date with EU sustainable procurement law

According to the new Recital 254 of the recast Financial Regulation,

“In its Communication on the European Green Deal, the Commission encourages the renovation of buildings in order to reduce their emissions and make them more energy efficient. Taking into account the rapid evolution of the market for energy efficient buildings, there is an acute need for the Union institutions to incorporate the Green Deal commitments in their own building policy and to renovate their buildings ...”.

Here, the commitment to energy efficiency in construction represents a positive step, however the wider Green Deal commitment should be mainstreamed in Recital 254, thereby spanning also renewable energy, batteries and deforestation, and the other SPP recently approved or to be approved soon (above 2.3.2.).

In the recast EU Financial Regulation, the new Recital 148 reproducing previous Recital 96 indicates that

“Procurement rules and principles applicable to public contracts awarded by Union institutions on their own account should be based on the rules set out in Directive 2014/23/EU of the European Parliament and of the Council 43 and Directive 2014/24/EU”.

Also, the new Article 165 mimics current Article 161 of the Financial Regulation (see above section 2.2.1) in charging the EC with alignment of the rules in Annex I with the EU Procurement and Concessions Directives. However, today many EU rules on sustainable procurement are found outside the 2014 EU Procurement Directives, as they are interspersed across many other legislative instruments, both

regulations and directives. For the EU institutions to lead by example, it will hence be necessary to clarify how authorising officers are to include requirements from such instruments in EU institutions' own-account procurement.

Recommendations

The scope of the relevant Recital and Article of the EU Financial Regulation should be explicitly extended beyond the 2014 EU Procurement Directives so as to identify all EU legislation providing for mandatory sustainable procurement requirements.

Consideration should be given to empowering the Commission a) to specify how such requirements are to be applied to EU institutions' own procurement and b) to periodically publish an updated list of those measures.

Regarding due diligence, Point 16.4. of Annex I of the EU Financial Regulation should be explicitly extended to cover breaches of the CSDDD.

5.3.3. Strengthening mandatory exclusions of tenderers from procurement by EU institutions

As was remarked earlier (section 2.3.2), in its current form the EU Financial Regulation does not foresee a specific mandatory exclusion clause for tenderers found in breach of the "applicable obligations in the fields of environmental, social and labour law" as this is instead provided under Article 57(4)(a) of Directive 2014/14/EU.

At the same time, Article 57(4)(c) of Directive 2014/14/EU gives each contracting authority (Case C-66/22, *Infraestruturas de Portugal SA*, ECLI:EU:C:2023:1016), the power to exclude tenderers having been found in breach of the "applicable obligations in the fields of environmental, social and labour law". Member States may make this power a duty. Still, there is no exactly corresponding provision in the Financial Regulation (see above section 2.3.2.).

Recommendation

In light of the expectation on public buyers, including EU institutions, to 'lead by example', a new clause should be added to Article 136(1) of the EU Financial Regulation making mandatory the exclusion of economic operators having been found in breach of the "applicable obligations in the fields of environmental, social and labour law" and not having taken the remedial measures foreseen in Article 136(7).⁴³

As exclusions are dealt with in the body of the EU Financial Regulation rather than in Annex I, such a change could probably not be effected by the Commission alone through changes to Annex I. However, as already indicated, Point 16.4. of Annex I could and should be expressly extended to cover breaches of the CSDDD. Besides, changes to the 2022 *Guide for Socially Responsible Public Procurement at the European Parliament* and to the *Vade Mecum* should also be made to refer to non-compliance with the foreseen CSDDD, and other relevant instruments such as the foreseen EU Forced Labour Regulation, as mandatory grounds for exclusion in EU institutions' own-account procurement.

⁴³ The references will be Article 139(1) and (9) of the recast Financial Regulation

Recommendation

Point 16.4. of Annex I and EU institutions SPP guidance materials should be expressly extended to cover breaches of the CSDDD and other relevant EU instruments such as the foreseen EU Forced Labour Regulation.

In their next revisions, the EU Procurement and Concessions Directives should follow the model provided by Point 16.4. of Annex I Financial Regulation to enhance the impact of contracting authorities on sustainability.

5.3.4. Integrating sustainable procurement into general budgetary control mechanisms

To avoid green- and blue-washing, the EU's general budgetary control mechanisms should extend beyond financial data to focus also on how different aspects of sustainability are pursued and accounted for in the actions of EU institutions, bodies and agencies.

Concerning the ECA, this proposal is consistent with Article 287 TFEU. This provision tasks the Court of Auditors with examining whether expenditures are "incurred in a lawful and regular manner and whether the financial management has been sound". In procurement, sustainability is often mandated by law and otherwise required by policy mandates, including from the European Green Deal, and implementing it is a requirement of sound administration and financial management (Article 310(5) TFEU).

Further steps may be taken in this regard. Some meaningful sustainability audit has been undertaken by ECA, for instance, concerning specific agri-environment-climate commitments under the CAP, which includes findings regarding breaches of the eligibility requirements (ECA 2021a, pp. 193 f). Another good example is the 2014 ECA Report *How do the EU Institutions and Bodies Calculate, Reduce and Offset their Greenhouse Gas Emissions?* (ECA 2014). However, the ECA's *Annual reports on the implementation of the EU budget for the 2021 financial year and on the activities funded by the 8th, 9th, 10th and 11th European Development Funds (EDFs) for the 2021 financial year* of the Court of Auditors (ECA 2021b) make very few references to 'sustainable' or 'sustainability', and even these refer to aspects of the financial sustainability of expenses, rather than their actual sustainability impact.⁴⁴

Notably, as related above (section 3.3), EU laws require that economic operators periodically disclose data on their non-financial performance, according to increasingly standardised formats, and subject to external assurance, while corporate disclosures concerning supply chain due diligence and management of material risks are also an integral element of the foreseen EU CSDDD as well as sector-specific due diligence regimes. By contrast, evidence was not found by this study that analogous reporting or audit practices are currently implemented respectively by EU institutions or the ECA.

Also relevant in this context, under the heading of 'budgetary transparency' (Point 16), the 2020 inter-institutional agreement between the EP, European Council and EC⁴⁵ charges the EC with preparing an annual report to accompany the EU general budget, which must include information on: (d) climate expenditure (e) expenditure contributing to halting and reversing the decline of biodiversity, and (f)

⁴⁴ Except where reference is made by name to the European Fund for Sustainable Development (EFSD) and to the NDICI-European Fund for Sustainable Development Plus (EFSD+). The ECA report recalls "the Cohesion Fund (CF), which, in the interest of promoting sustainable development, finances environment and transport projects" (p. 143); that among the CAP's objectives features "the sustainable management of natural resources and climate action, with a focus on greenhouse gas emissions, biodiversity, soil and water" (p. 184); and that sustainable growth is among the *raisons d'être* of the NGEU and of the RFF.

⁴⁵ Interinstitutional agreement of 16 December 2020 between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources ([https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020Q1222\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020Q1222(01)&from=EN)).

the promotion of equality between women and men as well as rights and equal opportunities for all. This provides a strong base for reporting obligations about a number of aspects related to SPP and Due Diligence.

Recommendation

Article 33(2)(d)(da) and (db)⁴⁶ of the recast Financial Regulation will require the Court of Auditors to focus more strongly on sustainability aspects, including with reference to public procurement, but more should be done in setting and auditing those aspects.

Future discharge reports should evaluate if existing indications regarding due diligence in the recent SRPP Guide are heeded; and evaluate EU institutions' own-account procurement activity benchmarked against applicable rules and best practices.

5.3.5. EU institutions' own-account procurement and the EU CSDDD

Under the December 2023 political agreement, the EU CSDDD will require EU Member States to permit their contracting authorities to link public procurement to economic operators' due diligence in two ways: firstly, via contract performance conditions for economic operators bound by the national rules adopted under the Directive, obliging them comply with those rules (above section 3.4). Secondly, via award criteria that valorise voluntary compliance by economic operators not bound by the Directive.

The CSDDD is not directly binding on EU institutions' own procurement. However, given the EU's general legal duties as articulated in this study, and the expectation that public buyers fulfil an exemplary sustainable procurement role (ED 2019a), as well as the need for policy coherence, EU procurement should be reliably and transparently articulated with the requirements of the CSDDD. Hence, EU institutions, agencies and bodies should integrate due diligence performance clauses (above 5.3.2.) and set award criteria (above 5.2.2) to encourage voluntary compliance with corporate sustainability due diligence standards.

Under Article 18 of the agreed CSDDD text, specific supervisory authorities should verify businesses' compliance with the Directive and sanction breaches. Moreover, under Article 20(4), decisions on penalties should be public. Such decisions would also be sent to the European Network of Supervisory Authorities. Therefore, EU institutions should have access to information about breaches by companies of the CSDDD. Correspondingly, they should exclude sanctioned economic operators under Article 136(1)(c) of the EU Financial Regulation for "grave professional misconduct by having violated applicable laws or regulations or ethical standards of the profession" established by a final administrative decision.

Recommendation

EU institutions should in their own-account procurement exclude economic operators defaulting on due diligence duties under the EU CSDDD.

EU institutions should in their own-account procurement adopt award criteria that valorise voluntary compliance with the EU CSDDD by economic operators outside its scope.

The EP, EC and EU agencies should coordinate their approach in relation to the development and implementation of such measures.

⁴⁶ "[P]rogrammes and activities should be implemented to achieve their set objectives without doing significant harm to the environmental objectives of climate change mitigation, climate change adaptation, the sustainable use and protection of water and marine resources, the transition to a circular economy, pollution prevention and control and the protection and restoration of biodiversity and ecosystems, as set out in Article 9 of Regulation (EU) 2020/852 of the European Parliament and of the Council".

5.3.6. Updating the EU Procurement Directives

Ultimately, reform should be considered to the 2014 EU Public procurement directives should be considered to align them to the new SPP requirements, including the CSDDD. More specifically, the requirement of the link to the subject matter will have to be reconsidered, allowing taking into the consideration the CSR of suppliers.

Recommendation

In the revision of the 2014 directives do not reiterate the last phrase in Recital 97 of Directive 2014/24/EU and fully align the new directives to EU SPP provisions, including the CSDDD.

5.4. Strengthening efforts and capacity across EU institutions

Interview and documentary data across the surveyed EU institutions have revealed that, within the existing legal framework, EU procurement entities have pursued different approaches to integrating green and social considerations into purchasing activities, with variable intensities and priorities. Some important initiatives in support of cross-institutional harmonisation have already been undertaken. These include publication of the 2020 *Implementation Guide on Green Public Procurement* and the 2022 *Guide for Socially Responsible Public Procurement at the European Parliament*. The Network for Agencies Procurement Officers (NAPO) plays a role in facilitating information exchange on a peer basis, as do networks of procurement services at the European Parliament.

However, the effort level observed amongst EU institutions is not commensurate to existing legal requirements on sustainable procurement or EU policy ambitions. Further, in the absence of coordinated monitoring and reporting efforts, it is not possible to evaluate the specific or aggregate success of approaches pursued, their costs or impacts. On the other hand, it seems likely that higher impact and lower costs could be achieved by greater harmonisation of SPP goals, targets, templates and reporting requirements across EU institutions. Accordingly, more dedicated support is needed for transversal SPP and due diligence collaboration, monitoring, reporting and evaluation. The core of that effort should be a cross-EU institutional sustainable procurement due diligence process, as already recommended above. A number of ancillary measures can also be identified, however, to provide support in tandem.

5.4.1. Guidance, training and exchange of good practices

It should be acknowledged that the extension of SPP and due diligence objectives introduces further legal and technical complexity, as well as operational and resource challenges, to the procurement process. It is therefore critical to the success of SPP that procurement personnel are supplied with needed tools and resources (Sack and Sarter 2021; Andhov et al 2021).

This goes beyond formal measures to institutional leadership, support and exchange. To illustrate, there are already many sustainability labels or certificates that suppliers can refer to in demonstrating their satisfaction of award criteria. However, interviewees in this Study highlighted this plethora of labels and certification schemes as challenging to navigate, particularly given national variations. Moreover, under Point 17.7. of Annex I to the Financial Regulation, equivalent standards must be accepted, which implies complex verifications. Where production and delivery occur outside the Union, or virtually, compliance monitoring may be complex; Member States authorities may hardly help in checking compliance here, and third countries authorities might not have an interest or incentive in doing so.

Joint procurement, as undertaken with IT procurement by DG DIGIT, means larger contracts, or framework agreements, which reduces the additional per unit staff hours and other costs needed to pursue SPP. Joint procurements should become more widespread. However, collaboration might take different forms and plays a role in different phases of the procurement process up to and including contract monitoring quite independently from joint procurement.

Experience sharing too is already helping the uptake of SPP as shown by the case of NAPO, helping EU agencies to develop common working tools and to benefit from each other's experiments with SPP. To ensure effectiveness of SPP, data are also very important. Collecting and sharing data on costs and benefits may help to both identify dishonest economic operator and fine tune SPP preferences. The experience of the Cost Engineering Database with EUSPA is worth considering for possible adaptation and adoption.

Recommendations

SPP and supply chain due diligence guidance and training must be developed and rolled out for all EU institutions, agencies and bodies.

The EP should revise its Guide for Socially Responsible Public Procurement at the European Parliament (SRPP Guide 2022) to include indications in line with the CSDDD.

The EC Central Financial Service within the EC's DG BUDG should revise the *Vade Mecum on Public Procurement in the Commission* in line with the CSDDD.

The EUAN NAPO Working Group on SPP should design guidance in line with the CSDDD.

The role and remit of the GPP Helpdesk could be extended to SPP and due diligence, and to embrace all EU institutions, bodies and agencies, with resources extended accordingly. Likewise, consideration should be given to supporting sustainable procurement due diligence initiatives via EUAN and NAPO.

Informed by due diligence, joint procurements should be extended and may serve as pilot exercises for due diligence approaches.

6. CONCLUSIONS

The analysis and interviews undertaken for this study permit clear conclusions to be drawn concerning current practices of supply chain sustainability due diligence by EU institutions in their own-account procurement, and conditions for their implementation in future. In closing, this chapter identifies key conclusions in answer to the main research questions originally posed for this study by the European Parliament's Terms of Reference.

1. What recommendations are made by international guidance concerning the exercise of due diligence in and through public procurement (TOR qu 3)?

Human rights treaties and the EU's founding legislation establish responsibilities for governments to respect human rights and imply that non-state actors, including businesses, should do likewise. Since 2011, international actors including the UN, OECD, regional bodies including the EU and Council of Europe, as well as individual states in Europe and globally have adopted legal and policy instruments directing that all businesses undertake processes of 'due diligence' to give practical effect to their corporate responsibilities to respect human rights, the environment and good governance (above section 3.1). Consequently, businesses should seek to prevent or mitigate impacts that they have "caused or contributed to", as well as those "directly linked" to their operations, products or services through their business relationships, whether contractual or non-contractual (UNHRC 2011, GP13). The notion of responsible business conduct due diligence has been articulated in new standards advanced by the OECD and includes, but goes beyond internationally-recognised human rights, to embrace a wider range of environmental and governance objectives (EC 2011b; OECD 2018). A central concern of all due diligence standards and authoritative guidance, however, is to control harms linked to businesses' supply chains, and hence, procurement.

At the same time, the UNGPs (UN 2011) encourage states to 'promote respect for human rights by business enterprises with which they conduct commercial transactions' (UNGP 6) and 'to exercise adequate oversight...to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services' (UNGP 5). Nevertheless, a first wave of due diligence laws failed to advance these norms. Equally, the 2014 EU Public Procurement Directive intentionally excluded the possibility for contracting authorities to refer to "criteria and conditions relating to general corporate policy" (Directive 2014/24, Rec. 97). Despite its suggestion by the European Parliament,⁴⁷ due diligence was not addressed by the European Commission's draft Corporate Sustainability Due Diligence Directive; nor by the European Council's position on the same.⁴⁸

On the other hand, attitudes in this area appear gradually to be reversing. Germany's supply chain law, for instance, provides for due diligence-based exclusions from public procurement (Section 22). The most recent political agreement on the terms to be adopted by the EU CSDDD now likewise anticipates measures articulating suppliers' compliance, or non-compliance, with statutory corporate due diligence duties, to the public procurement process (section 3.4 above). The OECD, UN and other international organisations have also recognised the need for greater policy coherence in this area. Public authorities are already engaging in innovative supply chain due diligence practices, individually and collectively, in a growing range of countries, in and beyond the EU. While EU institutions cannot be said to have been amongst the vanguard in this respect, some EU bodies at least have now started to recognise the need to raise awareness and capacity in relevant respects.

⁴⁷ European Parliament, Parliament Resolution Recommendations for Drawing up A Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability; European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Article 18.

⁴⁸ Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – General Approach, Recital 63.

2. What does EU law already permit by way of references to sustainability or responsible business conduct due diligence in EU institutions' own-account procurement and in procurement by the contracting authorities of Member States, and how could foreseen changes in the EU legal framework facilitate recourse to due diligence in those procurements (TOR qu 4 and 9)?

The requirement of the link to the subject matter of the contract as understood in Recital 97 of Directive 2014/24/EU is the main obstacle faced by EU institutions and by contracting authorities in requiring sustainability or responsible business conduct due diligence in their procurement activities.

According to the last phrase in Recital 97, “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”.

As clarified in *Sophia Group* (Case T-578/19 *Sophia Group* ECLI:EU:T:2021:77), criteria concerning the working conditions of employees providing services may be considered as linked to the subject matter of the contract (paragraphs 109 ff). Therefore, only criteria and requirements that refer to working conditions and social rights of workers engaged in the production or delivery of purchased goods and services are to be considered as linked to the subject matter of the contract, and the same must be true for environmental and other sustainability considerations.

As discussed in this study, such a narrow focus on the specific contract is artificial and impractical. Sustainability due diligence and even sectoral tools such as EMAS are normally designed to encompass all the activities of one economic operator rather than just some activities of only one of its specific units. As a result, the link to the subject matter requirement hampers public buyers from integrating due-diligence related terms in their tenders, and hence diminishes the role of public procurement as a lever to advance responsible business conduct.

Under the present legislative framework, due diligence may only be indicated as a possible means of proof that the economic operator complies with such specific and linked to the subject matter requirements as are indicated in the contract documents. However, in analogy with points 20.4 and 20.5 of Annex I of the Financial Regulation, other evidence of compliance with relevant European standards, including EMAS, must be accepted. The contracting authority shall also accept other evidence of equivalent measures from an economic operator that has demonstrably no access to such certificates or has no possibility of obtaining such certificates within the relevant time limits, for reasons that are not attributable to that economic operator and provided that the economic operator proves that the proposed measures are equivalent to those foreseen in the relevant European standards.

These strict limits do not apply in cases in which EU sectoral legislation itself provides for forms of due diligence, as is the case with the EU conflict minerals Regulation,⁴⁹ the EU Deforestation Regulation,⁵⁰ and the EU Batteries Regulation, for example.⁵¹ These provisions, as well as the 2023 EU Corporate

⁴⁹ Regulation (EU) 2017/821 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

⁵⁰ Regulation (EU) 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.

⁵¹ Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC.

Sustainability Reporting Directive,⁵² are part of the ‘applicable obligations’ under Article 18(2) of Directive 2014/24/EU and point 16.4(e) of the Financial Regulation.

The agreed CSDDD is expected however to change this picture (below n. 5).

3. To what extent is due diligence presently used in EU institutions’ procurements, how has this use changed in recent years and what have been the drivers of any such change (such as international guidance, policy or normative changes at EU or domestic level, peer dynamics or imitation) (TOR qu 1, 2, 3 and 8)?

Interviews undertaken for this study have clarified that, amongst EU institutions, in the context of their own-account procurement, due diligence is understood as synonymous with compliance with the principles of economy, efficiency and effectiveness spelt out in Article 33 of the Financial Regulation, rather than connoting the kind of sustainability-focused due diligence processes to which recent international and EU due diligence standards refer. Moreover, neither such processes, nor measures approximating to the same or a similar function, were observable from documentary or other data. Reinforcing this finding, during an interview with the GPP helpdesk it was further indicated that only a small handful of due diligence-related queries had been received over recent years, of a total of 150 - 200 queries received per year.

4. What are the specific modalities of the use of due diligence in the procurement practice of EU institutions, agencies and bodies, and what practical lessons may be drawn from national or other relevant ‘good practices’, including as regards monitoring and evaluation (TOR qu 5, 6, 7)?

As related in answer to the previous question, due diligence is not currently used in the procurement practice of EU institutions, so the issue of its specific modalities lacks pertinence.

As regards good public procurement practices, on the other hand, these have been by now well documented by international organisations (OECD 2020, UNSCEB 2022, OSCE 2022), stakeholders (DIHR 2020) and scholars (Martin-Ortega and Methven O’Brien 2019), as well as by EU actors (EC 2016, 2020b, 2021a; see further above sections 3.4 and 5.1).

5. What changes, whether in legal or policy norms, or practice, could support EU institutions to extend the exercise of due diligence in their procurements?

With the anticipated enactment of cross-sectoral EU corporate due diligence legislation, in addition to existing sectoral due diligence requirements and wide-ranging EU green, human rights and other sustainable development commitments, the lacunae identified by this study may not appear durable. EU bodies are after all bound by general legal duties concerning human rights, the environment, sustainable development and good governance, while they are also expected to realise an exemplary role; their expenditures can make a significant contribution to green transition; and policy incoherence in the area of procurement undermines the efficiency and effectiveness of overall EU expenditure.

Kick-starting the uptake of due diligence in the procurement of EU institutions, bodies and agencies will require both legislative changes (below, qu. 5) and unequivocal policy indications, as well as institutional strengthening measures and resource enhancements. Accordingly, the measures indicated in Chapter 5 of this Study are recommended for adoption by EU institutions.

⁵² Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

As regards the EU CSDDD specifically, as already recalled (section 3.4.), the CSDDD is not anticipated directly to bind EU institutions in relation to their own-account procurement. Nonetheless, the CSDDD has a wider systemic relevance. Due diligence originated in human rights instruments but today extends more broadly Article 1 of the Directive 2022/2464/EU on corporate sustainability reporting amended Directive 2013/34/EU to the effect that “sustainability matters” means environmental, social, human rights, and governance factors, including sustainability factors defined in point (24) of Article 2 of Regulation (EU) 2019/2088”.⁵³

This convergence between due diligence and general corporate policy was identified in this study as an obstacle to referring to due diligence in public procurements (section 3.4., with reference to Recital 97 of Directive 2014/24/EU). As previously discussed, such a limitation is artificial and entails divergences between EU procurement law and other EU and international policies calling on corporations to act responsibly.

While confirmation by the EU co-legislators and technical scrutiny remain pending, Article 24 of the agreed CSDDD seems to indicate that provisions on due diligence must be enforced as contract performance conditions and, possibly more importantly, voluntary adherence to due diligence may be considered in award criteria. This would effectively evacuate the interdiction in Recital 97 of content thence realigning public procurement law to wider responsible business conduct policies. Legal certainty would be further improved if the relevant part of Recital 97 were actually to be deleted. More generally, the 2014 EU procurement Directives should be reformed fully to align them with the new EU SPP, CSDDD and other relevant regulatory requirements.

⁵³ In July 2023, the Commission adopted the **European Sustainability Reporting Standards (ESRS)** for use by all companies subject to the [Corporate Sustainability Reporting Directive \(CSRD\)](#), which subject many disclosures to a materiality assessment.

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ANNEX I: COMPARATIVE TABLE OF EU LEGISLATION

Directive 2014/24	Financial Regulation
	<p>Rec. 103</p> <p>In order to ensure that, when executing contracts, economic operators comply with the applicable environmental, social and labour law obligations established by Union law, national law, collective agreements or the international social and environmental conventions listed in Annex X to Directive 2014/24/EU, such obligations should be part of the minimum requirements defined by the contracting authority and should be integrated in the contracts signed by the contracting authority</p> <p>Annex I Art. 16.4. The draft contract shall: (e) specify that the contractor shall 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 social and environmental conventions listed in Annex X to Directive 2014/24/EU;</p> <p>Rec. 123</p> <p>In order to achieve a balance between the need for transparency and greater coherence of procurement rules on the one hand, and the need to provide flexibility on certain technical aspects of those rules on the other, the technical rules on procurement should be set out in an annex to this Regulation and the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of amendments to that Annex.</p> <p>Art. 161 Annex on procurement and delegation of powers</p> <p>Detailed rules on procurement are laid down in Annex I to this Regulation. To ensure that Union institutions, when awarding contracts on their own account, apply the same standards as those imposed on contracting authorities covered by Directives 2014/23/EU and 2014/24/EU, the Commission is empowered to adopt delegated acts in accordance with Article 269 of this Regulation to amend Annex I to this Regulation, in order to align that Annex to amendments to those Directives and to introduce related technical adjustments.</p> <p>Rec. 173</p> <p>In order to adapt the rules applicable to certain Union bodies, the detailed rules on procurement and the detailed conditions and the minimum ratio for the effective provisioning rate, the power to adopt acts in</p>

	<p>accordance with Article 290 TFEU should be delegated to the Commission in respect of the framework financial regulation for bodies set up under the TFEU and the Euratom Treaty, the model financial regulation for public-private partnership bodies, amendments to Annex I to this Regulation</p>
<p>Principle</p>	
<p>Art. 18(1)</p> <p>1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.</p> <p>The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.</p>	<p style="text-align: center;">CHAPTER 7</p> <p style="text-align: center;">Principle of sound financial management and performance</p> <p style="text-align: center;"><i>Article 33</i></p> <p style="text-align: center;">Performance and principles of economy, efficiency and effectiveness</p> <p>1. Appropriations shall be used in accordance with the principle of sound financial management, and thus be implemented respecting the following principles:</p> <ul style="list-style-type: none"> (a) the principle of economy which requires that the resources used by the Union institution concerned in the pursuit of its activities shall be made available in due time, in appropriate quantity and quality, and at the best price; (b) the principle of efficiency which concerns the best relationship between the resources employed, the activities undertaken and the achievement of objectives; (c) the principle of effectiveness which concerns the extent to which the objectives pursued are achieved through the activities undertaken. <p>2. In line with the principle of sound financial management, the use of appropriations shall focus on performance and for that purpose:</p> <ul style="list-style-type: none"> (a) objectives for programmes and activities shall be established <i>ex ante</i>; (b) progress in the achievement of objectives shall be monitored with performance indicators; (c) progress in, and problems with, the achievement of objectives shall be reported to the European Parliament and to the Council in accordance with point (h) of the first subparagraph of Article 41(3) and with point (e) of Article 247(1). <p>3. Specific, measurable, attainable, relevant and time-bound objectives as referred to in paragraphs 1 and 2</p>

	<p>and relevant, accepted, credible, easy and robust indicators shall be defined where relevant.</p> <p style="text-align: center;"><i>Article 34</i></p> <p style="text-align: center;">Evaluations</p> <p>2. [...].</p> <p>For major programmes or activities that are expected to have significant economic, environmental or social impacts, the <i>ex ante</i> evaluation may take the form of an impact assessment that, in addition to meeting the requirements set out in the first subparagraph, analyses the various options concerning the methods of implementation.</p> <p>3. Retrospective evaluations shall assess the performance of the programme or activity, including aspects such as effectiveness, efficiency, coherence, relevance and EU added value. Retrospective evaluations shall be based on the information generated by the monitoring arrangements and indicators established for the action concerned. They shall be undertaken at least once during the term of every multiannual financial framework and where possible in sufficient time for the findings to be taken into account in <i>ex ante</i> evaluations or impact assessments which support the preparation of related programmes and activities.</p>
<p>Rec. 2</p> <p>Art. 18(2)</p> <p>Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.</p>	<p>Rec. 102</p> <p>The contribution of contracting authorities to the protection of the environment and the promotion of sustainable development, while ensuring that they obtain the best value for money for their contracts, in particular through requiring specific labels or through the use of appropriate award methods, should be clarified.</p> <p>Rec. 103</p> <p>In order to ensure that, when executing contracts, economic operators comply with the applicable environmental, social and labour law obligations established by Union law, national law, collective agreements or the international social and environmental conventions listed in Annex X to Directive 2014/24/EU, such obligations should be part of the minimum requirements defined by the contracting authority and should be integrated in the contracts signed by the contracting authority [...].</p>

	<p style="text-align: center;">Fin Reg <i>Article 166</i></p> <p style="text-align: center;">Preparation of a procurement procedure</p> <p>2. In the procurement documents, the contracting authority shall identify the subject matter of the procurement by providing a description of its needs and the characteristics required of the works, supplies or services to be bought, and shall specify the applicable exclusion, selection and award criteria. The contracting authority shall also indicate which elements define the minimum requirements to be met by all tenders. Minimum requirements shall include compliance with applicable environmental, social and labour law obligations established by Union law, national law, collective agreements or the applicable international social and environmental conventions listed in Annex X to Directive 2014/24/EU.</p> <p>Annex I Art. 16.4(e) Draft contract shall: specify that the contractor shall 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 social and environmental conventions listed in Annex X to Directive 2014/24/EU</p>
<p>Technical specifications</p>	
<p>Art. 42</p> <p>1. [...]. The technical specification shall lay down the characteristics required of a works, service or supply.</p> <p>Those characteristics may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.</p> <p>[...] For all procurement which is intended for use by natural persons, whether general public or staff of the contracting authority, the technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users.</p> <p>Where mandatory accessibility requirements are adopted by a legal act of the Union, technical specifications shall, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto.</p>	<p>Annex I § 17</p> <p>17. Technical specifications</p> <p>17.1.[...]. Technical specifications shall include the characteristics required for works, supplies or services, including minimum requirements, so that they fulfil the use for which they are intended by the contracting authority.</p> <p>17.2.The characteristics referred to in point 17.1 may include as appropriate: [...].</p> <p>(b) environmental performance and climate performance;</p> <p>(c) for purchases intended for use by natural persons, the accessibility criteria for people with disabilities or the design for all users, except in duly justified cases;</p>

<p>Labels</p>	
<p>Art. 43</p> <p>1. Where contracting authorities intend to purchase works, supplies or services with specific environmental, social or other characteristics they may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, services or supplies correspond to the required characteristics [...].</p>	<p>Annex I</p> <p>. Where a contracting authority intends to purchase works, supplies or services with specific environmental, social or other characteristics, it may require a specific label or specific requirements from a label, provided that all of the following conditions are satisfied [...].</p>
<p>Exclusion of tenderers</p>	
<p>Art. 56(1) last phrase</p> <p>Contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with the applicable obligations referred to in Article 18(2).</p>	<p>Art. 167 Award of contracts</p> <p>1. Contracts shall be awarded on the basis of award criteria provided that the contracting authority has verified the following: [...]</p> <p>(b) the candidate or tenderer is not excluded under Article 136 or rejected under Article 141; [...]</p>
<p>Art. 57(1)(f)</p> <p>Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with Articles 59, 60 and 61, or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for one of the following reasons:</p> <p>[...]</p> <p>(f) child labour and other forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council</p>	<p>Art. 136(1)(d)(vi)</p>
<p>Art. 57(4)(a) and (c)</p> <p>4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:</p> <p>(a) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2);</p> <p>(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;</p>	<p>NB, under Art. 136(1) Fin Reg exclusion is mandatory in case:</p> <p>(e) the person or entity has shown significant deficiencies in complying with main obligations in the implementation of a legal commitment financed by the budget which has:</p> <p>(i) led to the early termination of a legal commitment;</p> <p>(ii) led to the application of liquidated damages or other contractual penalties; or</p> <p>(iii) been discovered by an authorising officer, OLAF or the Court of Auditors following checks, audits or investigations;</p>

	<p>NB there is no clause of exclusion in the Fin Reg perfectly mirroring Art. 57(4)(a) of Directive 2014/24/EU</p>
	<p>Art. 136(2)</p> <p>[...] the authorising officer responsible shall exclude a person or entity referred to in Article 135(2) on the basis of a preliminary classification in law of a conduct as referred to in those points, having regard to established facts or other findings contained in the recommendation of the panel referred to in Article 143.</p>
<p>Selection Criteria</p>	
<p>Art. 62(2) Quality assurance standards and environmental management standards</p> <p>Where contracting authorities require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management systems or standards, they shall refer to the Eco-Management and Audit Scheme (EMAS) of the Union or to other environmental management systems as recognised in accordance with Article 45 of Regulation (EC) No 1221/2009 or other environmental management standards based on the relevant European or international standards by accredited bodies. They shall recognise equivalent certificates from bodies established in other Member States.</p> <p>Where an economic operator had demonstrably no access to such certificates, or no possibility of obtaining them within the relevant time limits for reasons that are not attributable to that economic operator, the contracting authority shall also accept other evidence of environmental management measures, provided that the economic operator proves that these measures are equivalent to those required under the applicable environmental management system or standard.</p>	<p>Annex I</p> <p>20.5. Where the contracting authority requires the provision of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management systems or standards, it shall refer to the European Union Eco-Management and Audit Scheme or to other environmental management systems as recognised in accordance with Article 45 of Regulation (EC) No 1221/2009 of the European Parliament and of the Council ⁽⁶⁾ or other environmental management standards based on the relevant European or international standards by accredited bodies. Where an economic operator had demonstrably no access to such certificates, or no possibility of obtaining them within the relevant time limits for reasons that are not attributable to that economic operator, the contracting authority shall also accept other evidence of environmental management measures, provided that the economic operator proves that those measures are equivalent to those required under the applicable environmental management system or standard.</p>
<p>Award Criteria</p>	
<p>Art. 67(2)</p> <p>2. The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public</p>	<p>Rec. 106</p> <p>Contracts should be awarded on the basis of the most economically advantageous tender in line with Article 67 of Directive 2014/24/EU</p>

<p>contract in question. Such criteria may comprise, for instance:</p> <p>(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions; [...]</p>	
<p>Art. 67(3)</p> <p>3. Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in:</p> <p>(a) the specific process of production, provision or trading of those works, supplies or services; or</p> <p>(b) a specific process for another stage of their life cycle,</p> <p>even where such factors do not form part of their material substance.</p>	<p>Art. 167 Award of Contract</p> <p>3. The contracting authority shall apply the award criteria to evaluate the tender.</p> <p>4. The contracting authority shall base the award of contracts on the most economically advantageous tender, which shall consist in one of three award methods: lowest price, lowest cost or best price-quality ratio.</p> <p>For the lowest cost method, the contracting authority shall use a cost-effectiveness approach including life-cycle costing.</p> <p>For the best price-quality ratio, the contracting authority shall take into account the price or cost and other quality criteria linked to the subject matter of the contract.</p> <p>Annex I</p> <p>21. Award criteria</p> <p>21.1. Quality criteria may include elements such as technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics, production, provision and trading process and any other specific process at any stage of the life cycle of the works, supplies or services, organisation of the staff assigned to performing the contract, after-sales service, technical assistance or delivery conditions such as delivery date, delivery process and delivery period or period of completion.</p>
<p>Life-cycle costing</p>	
<p>Art. 68</p> <p>1. Life-cycle costing shall to the extent relevant cover parts or all of the following costs over the life cycle of a product, service or works:</p>	<p>Annex I</p> <p>21.4. Life-cycle costing shall cover parts or all of the following costs, to the extent relevant, over the life cycle of works, supplies or services:</p>

<p>(a) costs, borne by the contracting authority or other users, such as: [...]</p> <p>(ii) costs of use, such as consumption of energy and other resources, [...]</p> <p>(iv) end of life costs, such as collection and recycling costs.</p> <p>(b) costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.</p> <p>2. Where contracting authorities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents the data to be provided by the tenderers and the method which the contracting authority will use to determine the life-cycle costs on the basis of those data.</p> <p>The method used for the assessment of costs imputed to environmental externalities shall fulfil all of the following conditions:</p> <p>(a) it is based on objectively verifiable and non-discriminatory criteria. In particular, where it has not been established for repeated or continuous application, it shall not unduly favour or disadvantage certain economic operators;</p> <p>(b) it is accessible to all interested parties;</p> <p>(c) the data required can be provided with reasonable effort by normally diligent economic operators, including economic operators from third countries party to the GPA or other international agreements by which the Union is bound.</p> <p>3. Whenever a common method for the calculation of life-cycle costs has been made mandatory by a legislative act of the Union, that common method shall be applied for the assessment of life-cycle costs.</p> <p>A list of such legislative acts, and where necessary the delegated acts supplementing them, is set out in Annex XIII. The Commission shall be empowered to adopt delegated acts in accordance with Article 87 concerning</p>	<p>(a) costs, borne by the contracting authority or other users, such as: [...]</p> <p>(ii) costs of use, such as consumption of energy and other resources; [...]</p> <p>(iv) end-of-life costs, such as collection and recycling costs;</p> <p>(b) costs attributed to environmental externalities linked to the works, supplies or services during their life cycle, provided their monetary value can be determined and verified</p> <p><i>21.5 is the same as Art. 68(2) and (3)</i></p>
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<p>the update of that list, when an update of the list is necessary due to the adoption of new legislation making a common method mandatory or the repeal or modification of existing legal acts.</p>	
<p>Abnormally low tenders</p>	
<p>Art. 69</p> <p>1. Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.</p> <p>2. The explanations referred to in paragraph 1 may in particular relate to: [...]</p> <p>(d) compliance with obligations referred to in Article 18(2);</p> <p>(e) compliance with obligations referred to in Article 71;</p>	<p>Annex I</p> <p>23.1.</p> <p>If, for a given contract, the price or costs proposed in a tender appears to be abnormally low, the contracting authority shall request in writing details of the constituent elements of the price or costs which it considers relevant and shall give the tenderer the opportunity to present its observations.</p> <p>The contracting authority may, in particular, take into consideration observations relating to: [...]</p> <p>(d) compliance of the tenderer with applicable obligations in the fields of environmental, social and labour law;</p> <p>(e) compliance of subcontractors with applicable obligations in the fields of environmental, social and labour law;</p>
<p>Art. 69(3) [...]</p> <p>Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 18(2).</p>	<p>Annex I</p> <p>23.2.</p> <p>[...] The contracting authority shall reject the tender where it has established that the tender is abnormally low because it does not comply with applicable obligations in the fields of environmental, social and labour law.</p>
<p>Conditions for performance of contracts</p>	<p>NB The Commission's Vade-mecum does not distinguish CPC from tech specs - see at p. 87</p>
<p>Art. 70</p> <p>Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract within the meaning of Article 67(3) and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.</p>	
<p>Subcontracting</p>	
<p>Art. 71(1)</p>	<p><i>Article 137</i></p>

<p>1. Observance of the obligations referred to in Article 18(2) by subcontractors is ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit.</p>	<p style="text-align: center;">Declaration and evidence of absence of an exclusion situation</p> <p>1. A participant shall declare whether it is in one of the situations referred to in Articles 136(1) and 141(1) [...].</p> <p>A participant shall also declare whether the following persons or entities are in one of the exclusion situations referred to in points (c) to (h) of Article 136(1):</p> <ul style="list-style-type: none"> (a) natural or legal persons that are members of the administrative, management or supervisory body of the participant or that have powers of representation, decision or control with regard to that participant; (b) beneficial owners, as defined in point (6) of Article 3 of Directive (EU) 2015/849, of the participant. <p>[...]</p> <p>Where appropriate, the candidate or tenderer shall provide the same declarations referred to in the first and second subparagraphs signed by a subcontractor or by any other entity on whose capacity it intends to rely, as the case may be</p>
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ANNEX II: STATE OF THE ART AND STAKEHOLDER VIEWS

A. Scientific state of the art and scholarly debate

Gimeno Feliu has rightly stressed the need to consider procurement as an investment rather than as an expense, the latter being more typical of a bureaucratic, economic vision of bidding processes (2020). Accordingly, we need to focus on the real costs, including societal and environmental costs, and not so much on the price tag of what is bought through public procurement (Caranta, 2023) and use public procurement to drive change in the market (Medina 2011). As Barnard puts it, “Procurement is no longer just about securing equal treatment of tenderers and transparency in the procurement process but it is also about delivering social (and environmental) objectives” (2017, p. 211; also Dimand 2023).

Also in the US the necessity to do away with the ‘tyranny of the lowest price’ and the narrow economic focus has been forcefully argued (Schooner and Speidel (2020) 37; concerning the EU Feliu (2022)). Business scientists too are generally favourable to SPP (see the review by Schotanus and Nicolas 2023), so much so that EU institutions have been recently criticised for not doing enough at least concerning GPP (Badell and Rosell 2021). From the point of view of human rights, in international law, and in EU law, the feasibility of aligning public procurement to a greater extent with state and EU human rights duties have been highlighted (Martin-Ortega and Methven O’Brien 2017, 2019, 2021).

Criticisms for the perceived lack of efficiency and/or efficacy of SPP are voiced by some economists. Many economists prefer soft instruments (such as nudging through tax incentives) to hard regulations (such as standard setting) to limit constraints on free market play. However, as Carreras and Vannoni rightly point out, “understanding the effectiveness and cost-effectiveness of GPP is for a large part an empirical task. Unfortunately, the empirical literature on the effects of specific GPP policies is rather scant” (2023; see also Chiappinelli 2022; Cheng et al. 2018). The little case studies we have on GPP often disprove general theoretical economic assumptions strongly tilted against regulatory action. Carreras and Vannoni provide a very articulated analysis of the different degrees of effectiveness and efficiency expected from GPP and SRPP and, within the latter, from *hardcore* social objectives (e.g. respect for human and labour rights) and the goals of promoting inclusion and supplier diversity (e.g. SMEs, women or minority owned businesses) through *set asides* (i.e. the reservation of given contracts or of a percentage of the contracts passed by one contracting authority to the benefit of some firms, e.g. women or minority owned companies) and similar tools. Some evidence from (limited) case studies seem to question the efficacy of the latter facet of SRPP only (Carreras and Vannoni 2023). What is lacking is proper econometric analysis. As Chiappinelli too has shown, the very few research pieces going beyond case studies (Lundberg et al. 2013) only focus on one aspect of GPP and are contradicted when another aspect is instead taken into consideration (2022).

It is to be remarked that the general principle of equal treatment in EU law very much limits the possibility to have US-style *set asides* which did not meet the standard of effectiveness in the works referred to by Carreras and Vannoni. Due diligence instead refers to the protection of *hardcore* (environmental and) human and social rights. Moreover, “GPP holds great potential to decarbonise the economy, also relative to other decarbonization policies that are currently being implemented or discussed” (Chiappinelli and Zipperer 2017).

The limited economic evidence does not allow to definitively conclude that SPP is effective and/or efficient compared to other regulatory tools, but in doubt, strong ethical reasons push to leave nothing untried in fighting against climate change, for social justice and to address the present global challenges.

Concerning critics among the lawyers, a fair starting point has been marked by Telles and Ølykke arguing that the answer to the question whether public procurement is the best way (i.e. the most efficient) to achieve wide societal policy goals requires support “from other disciplines such as economics” (Telles & Ølykke 2017, p. 251). The problem is that, as just shown, economics only helps to a limited extent, on balance supporting SPP or most of its components. Moreover, in a number of

Member States there is a legal notion of efficiency that does not necessarily coincide with the economic notion, as it is linked to good administration (Gimeno Feliu (2022)).

Halonen took heed from Telles and Ølykke and provided a law and economics analysis of a very specific issue potentially affecting the effectiveness of SPP, namely the substitution effect/risk (Halonen 2021). Put it simply, the substitution effect relates to the risk that growing public demand will lead to price increases for more sustainable products and thus less private demand with no end benefit for sustainability (esp. at 549 ff.). However, Halonen has to concede that the evidence from economic studies is very limited as some of them point to a lack of substitution effect, as a higher demand for organic public canteen food has led to conversion of more farmland to organic agriculture (at p. 551) which is exactly what SPP wants to achieve. As Carreras and Vannoni indicate, GPP can be expected to stimulate innovation, so that we can conclude that transformation effects are much more probable than the feared substitution effect.

The most articulated legal criticism of SPP is due to Albert Sanchez Graells (2018a; see also Vaysse 2021). His analysis moves from the assumption that Article 18(1) of Directive 2014/24/EU “has now consolidated the principle of competition”, placing it “on a par with those of equality, non-discrimination, proportionality and transparency” (p. 81). Under the second phrase of Article 18(1), “The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operator”. This place made to competition is translated into “a rebuttable presumption⁵⁴ of *artificial restrictiveness* in cases where the tendering procedure has been designed in a manner that is *in fact* restrictive of competition – as evidenced by counterfactual or ‘but for’ or benchmark analysis”. This would be the case where not all economic operators can meet a given SPP requirement. To disprove that rebuttable presumption, a contracting authority to justify the exercise of its executive discretion, proving “the existence of objective, legitimate and proportionate reasons for the adoption of criteria restrictive of competition” (p. 97, *emphasis* in the text). Basically, according to Sanchez Graells, any SPP clause having the effect to exclude any number of economic operators should be considered as ‘artificially’ restricting competition and as such presumed to be unlawful. Adopting this approach will have a clear chilling effect for contracting authorities, as it implies that sustainability concerns are an exception and inserting them needs to be justified by providing reasons capable of withstanding judicial review.

The author however, recognises some weaknesses in his proposals (p. 98) and earlier articulations of Sanchez Graells’ approach had in turn met fierce criticism (Kunzlik 2013). It is still debatable why ‘competition’ should take precedence over ‘sustainability’. Indeed, a number of issues needs to be highlighted with reference to this approach, the first being that the assumption that Article 18(1) of Directive 2014/24/EU has enshrined a principle of competition independent from non-discrimination, transparency, etc. is highly contested (see the discussion in Risvig Hamer 2021, 196 ff). However, even admitting the existence of such a principle, there is no indication in Article 18 that competition is any way higher ranking than sustainability, which is in turn provided for in Article 18(2) of the Directive.

After the chapter (and the book) by Sanchez Graells had been published, in *TIM* the Court of Justice strongly supported sustainability, holding that “that such a requirement constitutes, in the general scheme of that directive, a cardinal value with which the Member States must ensure compliance” (Case C-395/18, *Tim SpA*, ECLI:EU:C:2020:58: para 38). While admittedly, the exact consequences of such broad *dictum* are difficult to gauge – and the same issues affect Article 18(2) – for sure a ‘cardinal value’ cannot be subordinated to competition. In the end, State support, via public contract awards, for

⁵⁴ I.e. the burden of proof will be put on the shoulder of the contracting authority contradicting the rules normally applicable to such burden.

companies that are violating basic human rights, labour rights, social protections and environmental standards is anyway market distorting (Methven O'Brien and Martin-Ortega 2017, 2019b, 2021).

It is not only the Directives – which in the EU legal order are secondary law – but the Treaty itself must be considered. To the least, competition and sustainability are both given consideration in Article 3(3) TEU: “The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment”. The market economy shall be social no less than competitive and the quality of the environment must be improved. Articles 11 and 114(3) TFEU further highlight the non-secondary character of environmental considerations (Barnard 2017, 2015). The analysis can be pushed further in an appropriate publication, but it is clear that **competition takes no precedence over sustainability under EU public procurement law nor under EU law more generally.**

As is shown by Sabockis (2022) in what is the most thoughtful work on GPP in the past years, the balance between competition and sustainability is not so much struck in the general principles as in the actual detailed provisions in the EU directives, such as for instance Article 42 of Directive 2014/24/EU for technical specifications, Article 43 for labels, Article 67 for award criteria and Article 70 for contract performance conditions (2022). Besides the ‘general’ requirement of a link to the subject matter of the contract – to be understood according to Article 67(3) as relating “to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle” – those provisions lay down specific and often procedural requirements that contracting authorities must abide with. For instance, Article 70 requires that contract management conditions (be they linked to sustainability requirements or not) are “indicated in the call for competition or in the procurement documents”. And the balance struck in 2014 is not wrought in stones - nor the only one consistent with the Treaties - and may well be changed in the future.

This indication has been acted upon here, as we do not further delve on the issues of whether SPP is efficient and/or desirable - the latter being clearly a policy and often an ethical choice - but the focus is firmly on the present - and foreseeable in the future - rules in the applicable legislation, including those introducing forms of mandatory SPP which are making arguments against SPP moot. The approach is shared by the researchers including PHD candidates currently working in the SAPIENS ITN Network, an EU financed network in 10 universities in 7 Member States and the UK and comprising 18 partner organisations.⁵⁵

Amongst criticisms of SPP it is true it increases both the complexity of the procurement system and the workload on contracting authorities (Telles and Ølykke 2017 p. 251). There is wide consensus on this point (e.g. Testa et al 2016; Revez et al 2023). Indeed, “the main perceived barrier is the technical complexity of GPP combined with a low administrative capacity” (Chiappinelli 2022). This should not be an alibi not to pursue SPP but rather a strong reason to provide contracting authorities with tools such as standard clauses and assessment methods and to invest in formation. Concerning the latter, proponents of SPP are not shy in highlighting the need not just for formation (Andhov et al. 2020), but also for incentivising procurers to choose more sustainable options (Klinger and Schooner 2022). Chiappinelli highlights that “awareness of GPP guidelines and regulations and training on GPP adoption are found to be important drivers” (2022; Grandia 2015). Also important is leadership support (e.g. Dimand 2023).

⁵⁵ For further information see: [SAPIENS-International Training Network \(SAPIENS-ITN - H2020 – MSCA ITN: Grant 956696\)](#),

Concerning standardisation it is interesting to remark that even some of those lukewarm towards SPP indicate that if SPP is chosen it is better pursued through mandatory standards since, “if applications of GPP criteria are random and approaches adopted by different contracting authorities vary, the incentive factor often associated with GPP can be diminished. Thus, standardized, unified approaches such as general EU GPP criteria and sectoral legislation could be viewed as more direct and appealing ways to pursue sustainability goals” (Halonen 2021, p. 548; also Lichère 2022a).

Today the research agenda no longer ‘for’ or ‘against’ SPP. The legislative framework has to be carefully interpreted, in the light of the challenges we are facing and of the variety of values enshrined in the EU Treaties. Capacity challenges amongst public procurers are noted (Sack and Sarter 2022). More generally, “We need to talk - seriously, thoughtfully - about climate change and sustainable procurement, particularly early in the acquisition planning process. We need to rethink the value proposition, particularly with regard to factoring in the social costs of continuing to rely on solutions that generate GHGs (greenhouse gases) with regard to public health, our quality of life, national security, and global stability. We need to think in terms of life cycle cost (or total cost of ownership) analysis, which accounts for externalities or effects such as the social cost of GHGs—rather than focusing on and celebrating low purchase prices” (Schooner, 2021). Indeed, there is a wide academic consensus on the need to use SPP to fight climate change (Lazo Vitoria 2022; Martinez Romera and Caranta 2017).

At the same time, the distinction in the law between the treatment of workers affected to the implementation of a specific procurement contract on the one hand and the general CSR policy of a company on the other hand is **highly artificial and often impractical**.

It is artificial because it is hardly possible to pursue equal treatment or combatting sexual harassment - to make two instances- on a ‘on and off’ basis, “yes if a company is performing a public procurement and no if the one and same company is performing other contracts”, with the contracting authority turning its gaze away from discrimination and/or sexual harassment just because the concerned workers were not working on its contract. It is impractical, because many workers, such as e.g. the accountants, receptionists or live service operators may be working for many of the company’s clients rather than being exclusively affected to the implementation of a specific procurement contract.

Recital 95 of Directive 2014/24/EU acknowledges that “It is of utmost importance to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 strategy for smart, sustainable and inclusive growth”. However, **given the differences between individual sectors and markets, the lawmakers considered it not appropriate “to set general mandatory requirements for environmental, social and innovation procurement”**.

While some of the legislative measures described above (§ 2.3.4.) might not specifically refer to SPP, they are still relevant as part of “applicable obligations in the fields of environmental, social and labour law established by Union law” recalled in Article 18(2) of Directive 2014/24/EU. For instance, economic operators are expected to be prohibited from placing and making available in the Union market made with forced labour (Proposal for a Regulation on prohibiting products made with forced labour on the Union market COM(2022) 453 final). This prohibition will inevitably communicate itself to public procurement even if the Regulation does not in the end refer to public procurement as the Member States will have to take appropriate measures to ensure that in the performance of public contracts economic operators do not supply products made with forced labour. This will also be the case with reference to product standards devised by the European Commission following the adoption of the proposal for a Regulation establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EU (COM(2022) 142 final).

Indeed, forthcoming rules can be read as permitting, if not requiring, wider scrutiny of the CSR credentials of tenderers, thus extending the potential scope for Due Diligence.

B. Stakeholder points of view

Concerning stakeholders, results from the 2022 UNEP Global SPP Review indicate that about 80% of those interviewed considered SPP to be either more or much more important since 2017 (UNEP 2022, figure 2.6. at p. 14). While these data are global, it is a fair assumption they represent the EU situation. Moreover, “All stakeholders, both public and private, indicated that the achievement of the SDGs was a key consideration in their SP policies. SDG 12 on responsible consumption and production and SDG 13 on climate action were most frequently reported, although recent policies also consider responsible business conduct (SDG 8 on decent work and economic growth) and innovation and competitiveness (SDG 9 on industry, innovation and infrastructure)” (UNEP 2022, pp. iv f).

At the same time, significant concerns are consistently expressed by public procurers and observed by studies, regarding capacity and resource constraints, as well as scope to achieve meaningful coherence in practice amongst multiple overlaid and potentially conflicting secondary objectives (EU Committee of the Regions 2012, Sack and Sarter 2022). Demonstrating value added and the feasibility of applying due diligence in the public procurement, and providing meaningful benchmarks in this area, is therefore crucial to supporting a wide range of EU legal requirements and policy goals.

Still bottom up initiatives to develop and share SPP best practices abound in Europe, involving hundreds of contracting authorities and thousands of procurers in the EU. Since 1996 ICLEI - a global network of more than 2500 local and regional governments committed to sustainable urban development - has been advocating for, promoting and demonstrating the value of sustainable, innovation, circular and strategic procurement.⁵⁶ Initiatives are also being developed at Member State level, such as the Spanish *Carta de Zaragoza: Manifiesto por una compra pública responsable*, which is driven by contracting authorities to promote GPP and SRPP as an instrument for a more just, equitable and sustainable economy.⁵⁷

These findings are confirmed by the interviews made for this Study and by a recent report on the *Environnementalisation des marchés publics* (Lichère 2022b). The report is based on semi-structured interviews with public buyers in France (but also in Italy and Portugal among the EU Member States). Based on a survey of the literature and the interviews, the report underscores the growing interest for GPP and highlights three main obstacles to GPP, namely (a) insufficient expertise and training; (b) time constraints and (c) difficulties to assess compliance with environmental rules and clauses at both the award and the execution stages of procurement contracts (at p. 127). On the other hand, legislative mandate and policy support, together with solutions allowing information exchanges and cooperation among public buyers are considered as the strongest enablers for the uptake of SPP (at pp. 133 ff).

Finally, a Study conducted for the Committee on Employment and Social affairs, Policy Department for Economic, Scientific and Quality of Life Policies of the European Parliament found that “The stakeholders and experts consulted, overall, believe that the instruments available in Directive 2014/24/EU on public procurement may be sufficient to achieve social impact, and that the focus should be on how rules are applied and implemented, how they are used and why they are not used. **While the 2014 Directive created more opportunities to procure more sustainably, it is still not used to its full potential. Its social impact partly depends on the level of voluntary versus mandatory application of social considerations**” (Caimi and Sansonetti 2023, at p. 16; with specific reference to exclusions see (Turudic & Dragojevic 2023)). Besides that, stakeholders interviewed for that Study converge on what is needed to enhance SRPP on the same points highlighted in the French Study concerning GPP. An interesting addition, particularly relevant for some SRPP aspects such as

⁵⁶ For further information see: [Sustainable procurement platform](#).

⁵⁷ For further information see: [Carta de Zaragoza: Manifiesto por una compra pública responsable](#)

labour standards, employment - including of members of disadvantaged groups - and workers retention, is the finding that SRPP is enhanced by “collaboration between public procurement offices and departments responsible for employment, social and gender equality policies, as well as ongoing consultations and dialogues with independent experts, stakeholders (including NGOs, social economy actors, user groups, social partners and other authorities), potential bidders and groups of potential users of the products/services/works to be procured (before launching calls, to assess a certain contract / policy etc.)” (at p. 68).

In its conclusions of 30 November 2020 on *Public Investment through Public Procurement: Sustainable Recovery and Reboosting of a Resilient EU Economy*, the European Council has called “on the Commission to consider human rights safeguards and human rights due diligence standards” (2020/C 412 I/01, point 11) and emphasised that “that public purchases can and should be used to support social considerations and the protection of human rights in global supply chains, social inclusion and fair employment to counter the socioeconomic effects of the crisis” (*ibid.*, point 13).

Policy instruments such as UNEP’s Sustainable Public Procurement Implementation Guidelines indicate the need to develop policy commitments and strategies for SPP at country and organisational levels (pp. 30 ff).

This narrowly focused procurement approach is conflicting with the standard approach to Due Diligence - but also to labels and EMAS - which instead considers the overall corporate structure of a company. The enactment of Due Diligence legislation requires reconsidering the narrow procurement approach (below § ...).

As further discussed in the Study, Recital 97 corresponds to the standard approach in public procurement followed in the past 50 years to limit the scrutiny of tenderers to most heinous crimes (now in Article 57(1) of Directive 2014/24/EU; Article 136(1) of the Financial Regulation casts the net wider, making mandatory grounds of exclusion which are not such under Article 57(4) of the Directive) to reduce the risk of discrimination and ensure the widest access possible to procurement markets. Beyond the list of criminal activities, exclusion is at the discretion of contracting authorities, unless it is a Member State making them mandatory (now in Article 57(1) of Directive 2014/24/EU). Following Recital 97, contracting authorities are not allowed to introduce requirements asking tenderers to adhere to higher than mandatory standards throughout their corporate structure. Those higher standards may instead be required with reference to the corporate unit responsible for implementing a specific contract (below 2.3.3).

The application of due diligence requirements to suppliers in public procurement regulated under EU law implies considering their overall corporate sustainability rather than just focusing on the part of the business organisation charged with the implementation of the specific procurement contract and is as such inconsistent with Recital 97.

However, as discussed in this Study, this solution will have to be reconsidered in light of the agreed CSDDD.

ANNEX III: SCHEDULE OF INTERVIEWS

Officials from the following DGs or units of the European Parliament were interviewed:

- DG COMM
- DG Finance
- DG ITEC
- DG INLO
- EMAS and Sustainability Unit within the General Secretariat

Concerning the European Commission, interviews focused on:

- DG BUDG (email exchange)
- DG DIGIT
- DG OIB
- EMAS Unit within DG Human Resources (HR).

ANNEX IV: INTERVIEW QUESTIONNAIRE

Due diligence in EU institutions procurement rules and practices

Negotiated procedure IP/D/CONT/IC/2023-014

Draft guidelines for semi-structured interviews

The following questions are meant as an *aide mémoire* and broad guide for the semi-structured interview. Interviewees are not expected to answer all questions. The questionnaire will be shared with the interviewees in advance, so that they can collect relevant materials to be shared with the Team (e.g. data, contract notice provisions or contract clauses). In case procurement officials from the same institutions/agencies have complementary knowledge, the interview may be conducted with more than one official together.

0. General

1. How is the procurement function organised within your institution?
2. What is your annual procurement budget?
3. Can you illustrate the typical or general breakdown of your procurement spend by segment?

I. General legal and policy framework for procurements

- 1.1 Besides the Financial Regulation (FR), are there any other 'primary' legal rules governing your procurements?
- 1.2 Are there 'secondary' (institution or agency-specific or other) rules or guidance documents that are also applicable to your procurements?
- 1.3. Do the rules and guidance documents discussed so far apply to all procurements by your organisation?

II. Sustainable and strategic procurement

- 2.1 How are sustainability requirements or considerations addressed in the general legal and policy procurement frameworks discussed so far?
- 2.2 Are there other standards or approaches that your entity applies concerning sustainable procurement?
 - 2.2.1 Does your entity have its own sustainable procurement policy? If so, what does it address?
- 2.3 Do you in your procurement activity address the green dimension of sustainable procurement, including climate change? If so, in which contract phase and how?
 - 2.3.1 Do you in your procurement activity address the social dimension of sustainable procurement? If so, in which contract phase and how?
 - 2.3.2 Are there other non-economic issues, besides green and social issues, that you consider under the heading of sustainable procurement?
 - 2.3.3 Have you integrated sustainability considerations when evaluating MEAT under Article 167(4) FR?

2.3.4 Have you applied circular procurement, whole lifecycle or LCC analysis when evaluating the sustainability profile of tenders?

2.3.5 Do your entity's contracts for suppliers include

- a. Standard sustainability clauses
- b. Contract-specific sustainability clauses?
- c. KPI concerning sustainability considerations?

2.3.6 How do you check that your contractor complies "with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international social and environmental conventions listed in Annex X to Directive 2014/24/EU"? (Article 16.4.e. of Annex I to the FR)

2.3.7 Do you have recourse to labels (Article 17.6 of Annex I to the FR) or environmental management certificates (Article 20.2.i) to assess compliance with standards or capacity of tenderers?

2.4 What contractual remedies are foreseen in case sustainability clauses are not complied with or sustainability KPIs are not met?

2.5 Is performance against sustainability metrics in your procurements tracked and evaluated? If so, how?

2.5.1 Is ex post evaluation ex Article 34(4) FR applied to the outcomes from procurement contracts?

2.6 What might be considered some of the main impacts or harms in terms of sustainability of your procurements?

2.6.1 Are you applying the DNSH when designing and awarding contracts and how?

2.7 What might be considered some of the main opportunities in terms of sustainability of your procurements?

2.8 Has your organisation's approach to sustainability in procurement changed or evolved? If so, why?

III. Due diligence

3.1 What do you understand by the term 'due diligence' in the context of procurements undertaken by your organisation?

3.2 Does your procuring entity apply due diligence in its own purchasing practices? If so, how?

3.2.1 Have you undertaken a general risk assessment addressing potential negative sustainability impacts connected to your procurements?

- a. If so, what risks did it address?
- b. If so, how many tiers of the supply chain did the risk assessment extend to?
- c. If not, what might you consider to be the main sustainability risks linked to your procurements?

3.3. Do you in your procurement practice address responsible business conduct, human rights or sustainability due diligence by your suppliers? If so, how?

3.3.1 Do you have a supplier code of conduct or other standard requirements for suppliers that address sustainability considerations or due diligence?

3.3.2 Do you require suppliers to provide information on their sustainability profile or performance as part of

- a. The pre-qualification phase

- b. The award phase
- c. The post-award phase?

3.3.3. Do you undertake contract-specific risk assessments? If so, what risks do they address and how?

3.3.4 If you have identified negative sustainability impacts in the context of specific contracts, have you applied measures to reduce, mitigate or eliminate these impacts? If so, what measures did you apply, when and how?

3.3.5 Do you monitor or control suppliers' performance of contracts to evaluate sustainability impacts or considerations? If so, how?

3.3.6 Do you require suppliers to report to you on sustainability performance in the context of specific contracts? If so, in what format?

3.4 Is there any responsible business conduct, human rights or sustainability due diligence guidance that you refer to in your procurement practice?

3.5 Have you applied supplier exclusions linked to sustainability considerations? If so, what did they relate to?

3.6 If you do not address responsible business conduct, human rights or sustainability due diligence by suppliers in your purchasing practices, why is this?

3.7 Have you terminated or rescinded any contracts on sustainability grounds? If so, following what process?

3.8 Does your entity have or participate in any third-party complaint or grievance mechanism whereby workers or other stakeholders impacted negatively by the operations of companies in your supply chains may seek remediation?

3.9 Does your entity have or participate in any whistleblower mechanism whose scope extends to sustainable procurement issues?

IV. Challenges

4.1 Do you encounter any dilemmas or challenges in implementing sustainable purchasing practices, including due diligence?

4.2 Do you see any challenges or limitations affecting your ability to implement sustainability or due diligence in your procurements deriving from the applicable legal and policy frameworks?

4.2.1 In particular, do you see any challenges or limitations relating to

- a. Pre-qualification criteria
- b. Link to the subject matter requirement
- c. Exclusions
- d. MEAT
- e. Enforcing sustainability clauses in contract implementation

4.3 Do you see any challenges or gaps institutionally or in terms of capacity, human or financial resources?

V. Opportunities

5.1 What opportunities do you see for advancing sustainability in your procurements?

5.2 Are there elements that would support you to further advance sustainable purchasing practices, in particular in relation to:

- a. The legal and policy framework
- b. Guidance or advice facilities
- c. Training or other human resource considerations
- d. Budget

5.3 Do you see due diligence as having a role to play in this context?

5.4 Do you engage in experience sharing, dialogue, networking or peer exchange with any other actors regarding sustainable procurement and due diligence? If so, which actors and how?

VI. Examples

6.1 Can you relate specific examples of procurements where you have included or attempted to integrate sustainability considerations?

6.2 What were the sustainability risks or opportunities that were addressed?

6.3 How were they addressed?

6.4 Was the approach adopted successful? If so, why? If not, why?

6.5 Were there any lessons learned from this case?

6.6 How could the sustainability profile of similar procurements be further improved in future?

ANNEX V: TERMS OF REFERENCE (EXCERPT)

The study should address, inter alia, the following questions:

1. To what extent are due diligence and responsible business conduct principles integrated in EU institutions' public procurement rules and practices?
2. How have such policies and practices evolved over time?
3. To what extent are international guidelines and standards (such as OECD recommendations on due diligence and responsible business conduct, and the UN Guiding Principles on Business and Human Rights) used by EU institutions for their public procurement policies and practices?
4. What are the potential implications and constraints resulting from already established legal frameworks (such as the EU Taxonomy and the Interinstitutional Agreement of 16 December 2020 on budgetary discipline), as well as from the ECJ jurisprudence on due diligence in EU institutions procurement rules and practices?
5. What are the main modalities and features underpinning such integration in the EU institutions?
6. To what extent is such integration disclosed and made available to public inquiry, both ex ante (policy design level) and ex post (number and features of procurement contracts subject to due diligence rules and practices as well as the overall impact assessment of such integration)?
7. What 'best practices' can be identified in Member States and more broadly in OECD countries?
8. To what extent is such integration based on compliance with minimum standards and/or alternatively with a 'leading by example' rationale?
9. What impact could be expected from forthcoming legislative frameworks such as the recent Commission's proposal for a Directive on corporate sustainability due diligence and the proposal for a Regulation on the placing in the market of products made using forced labour?

This study, commissioned by the European Parliament's Committee on Budgetary Control (CONT), investigates whether EU institutions implement human rights and sustainability due diligence when they purchase goods and services. Based on documentary analysis and interviews, this study finds that sustainability due diligence is lacking in procurement carried out by the European Parliament, the European Commission and the EU agencies. Accordingly, it makes recommendations to promote better integration of due diligence into the procurement of goods and services by the EU institutions.

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