



**Flanders**  
State of  
the Art

PUB. N°

**34**

# Green public procurement and the circular economy

**CE CENTER**  
CIRCULAR ECONOMY  
POLICY RESEARCH CENTER

WE MAKE  
TOMORROW  
BEAUTIFUL  
**OVAM**

DEPARTMENT OF  
ECONOMY  
SCIENCE &  
INNOVATION



VLAANDEREN  
**CIRCULAIR**

# CE CENTER

CIRCULAR ECONOMY  
POLICY RESEARCH CENTER

PUB. N°

34

## Green public procurement and the circular economy

**Maëlle Rixhon**  
**Steven Van Garsse**  
**Alexander Verschave**  
**Jonas Voorter**

UHasselt  
Research Group Centrum voor Overheid & Recht, Universiteit  
Hasselt, Martelarenlaan 42, 3500 Hasselt, Belgium

November 2024

CE Center publication N° 34

Contact information:

**Luc Alaerts**

manager Policy Research Center

✉ [luc.alaerts@kuleuven.be](mailto:luc.alaerts@kuleuven.be)

☎ +32 16 324 969

**Gweny Thomassen**

manager Policy Research Center

✉ [gweny.thomassen@ugent.be](mailto:gweny.thomassen@ugent.be)

**Karel Van Acker**

promoter Policy Research Center

✉ [karel.vanacker@kuleuven.be](mailto:karel.vanacker@kuleuven.be)

☎ +32 16 321 271

# Executive summary

The inclusion of green clauses in public procurement contracts is gradually becoming an obligation in certain sectors in the European Union. For example, the Ecodesign for Sustainable Products Regulation, which will transform the product market for both public and private buyers, includes specific provisions on the use of “Green Public Procurement” (GPP). Until quite recently, European public procurement law has been much more focused on “how to buy” than on “what to buy”. This is changing.

This report highlights the role of GPP in the transition to a circular economy through an analysis of the European regulatory framework in terms of both hard (*e.g.* Batteries Regulation, *etc.*) and soft law (working documents from the Commission). Relevant European legislation that is still in the adoption phase (*e.g.* Construction Products Regulation, *etc.*) is also considered. An overview of useful model clauses for implementing GPP shows how these clauses can contribute to promoting the circular economy in public procurement. Therefore, in this report, they have been classified according to the 9Rs strategies.

After a quick overview of the Belgian regulatory framework in this area (including good practices such as help desks and model clauses), we analysed three other European Union Member States. Italy, the first country to have made GPP progressively compulsory in a number of sectors, offers valuable insights. This analysis shows that the training of purchasers in implementing these obligations is of some importance and that courts can play an effective role in ensuring compliance. The Netherlands was analysed because of the “comply or explain” mechanism in its Public Procurement Act and the development of the MVI-tool<sup>1</sup>. Spain, given the distribution of competences plays an important role through its Autonomous Communities, which have both ambitious (clear indication in normative texts) and pragmatic (use of the “comply or explain” mechanism) approaches to greening public procurement and their contribution to a circular economy. On the other hand, the proliferation of regulatory texts at the level of the Autonomous Communities makes GPP legislation difficult to access and read.

Finally, the most common obstacles are discussed, such as financial bottlenecks, lack of training, insufficient competition and too limited monitoring/control of the performance of the GPP clause. Concrete recommendations in this regard include, among others, training both public purchasers and operational staff, organising workshops and meetings with economic operators to better understand market options, and developing contract performance model clause (*e.g.* penalty clauses, review clauses, *etc.*). These measures could make GPP a more effective tool in the circular economy transition under the Sustainable Products Initiative (SPI).

---

<sup>1</sup> <https://www.mvicriteria.nl/en>.

# Samenvatting

Het opnemen van groene clausules in overheidsopdrachten wordt geleidelijk aan een verplichting in bepaalde sectoren in de Europese Unie. Zo bevat, onder andere, de verordening *Ecodesign for Sustainable Products Regulation*, die de productmarkt voor zowel publieke als private kopers zal transformeren, specifieke bepalingen over het gebruik van “Green Public Procurement” (GPP). Tot nu toe was de Europese wetgeving inzake overheidsopdrachten veel meer gericht op “hoe te kopen” dan op “wat te kopen”. Dit is aan het wijzigen.

Dit rapport onderzoekt de rol van GPP in de transitie naar een circulaire economie door middel van een analyse van het Europese regelgevingskader in termen van zowel *hard* (e.g. *Batteries Regulation*, etc.) als *soft law* (werkdokumenten van de Commissie). Ook relevante Europese wetgeving die nog in de goedkeuringsfase zit (e.g. *Construction Products Regulation*, etc.), wordt meegenomen. Een overzicht van bruikbare modelclausules voor de implementatie van GPP laat zien hoe deze clausules kunnen bijdragen aan de bevordering van de circulaire economie bij overheidsopdrachten. Daarom zijn ze in dit rapport ingedeeld volgens de 9R-strategieën.

Na een kort overzicht van het Belgische regelgevende kader op dit gebied (inclusief goede praktijken zoals helpdesks en modelclausules), analyseerden we drie andere lidstaten van de Europese Unie. Italië, het eerste land dat GPP geleidelijk verplicht heeft gesteld in een aantal sectoren, biedt waardevolle inzichten. Uit deze analyse blijkt dat de opleiding van aankopers bij de uitvoering van deze verplichtingen belangrijk is en dat de rechtbanken een effectieve rol kunnen spelen bij het toezicht op de naleving. Nederland werd geanalyseerd vanwege het “*comply or explain*”-mechanisme in de aanbestedingswet en de ontwikkeling van de MVI-tool<sup>2</sup>. Spanje speelt, gezien de verdeling van bevoegdheden, een belangrijke rol door de Autonome Gemeenschappen, die zowel ambitieuze (duidelijke vermelding in normatieve teksten) als pragmatische (gebruik van het “*comply or explain*”-mechanisme) benaderingen hanteren voor de vergroening van overheidsopdrachten en hun bijdrage aan een circulaire economie. Anderzijds zorgt de verspreiding van regelgevende teksten op het niveau van de Autonome Gemeenschappen ervoor dat de wetgeving inzake GPP moeilijk toegankelijk en leesbaar is.

Tenslotte worden de meest voorkomende obstakels besproken, zoals financiële knelpunten, een gebrek aan opleiding, onvoldoende mededinging en een te beperkt toezicht/controle op de uitvoering van de GPP-clausule. Concrete aanbevelingen hiervoor omvatten, onder andere, het opleiden van zowel publieke inkopers als operationeel personeel, het organiseren van workshops en bijeenkomsten met ondernemers om beter inzicht te krijgen in marktopties, en het ontwikkelen van een modelclausule voor de uitvoering van opdrachten (e.g. boeteclausules, herzieningsclausules, etc.). Deze maatregelen zouden GPP in het kader van het Sustainable Products Initiative (SPI) een effectiever instrument kunnen maken in de circulaire economie transitie.

---

<sup>2</sup> <https://www.mvicriteria.nl/nl>.

# Table of contents

Executive summary .....	2
Samenvatting.....	3
Table of contents.....	4
List of abbreviations .....	7
1 Introduction.....	9
2 General framework .....	11
2.1 Current regulatory framework for public procurement at the EU level.....	11
2.1.1 Article 18(2) of the Classic Directive and the Articles referring to it .....	11
2.1.1.1 <i>Towards a general principle of sustainability? Article 18(2) and Annexe X of the Classic Directive</i> .....	11
2.1.1.2 <i>Exclusion ground, non-compliance with the obligations regarding the forementioned principle of sustainability (Article 57(4) of the Classic Directive)</i> .....	13
2.1.1.3 <i>Dismissal of abnormally low tenders (Article 69(3) of the Classic Directive)</i> .....	13
2.1.1.4 <i>Possibility to not award the contract to a tenderer that does not comply with the applicable obligations referred to in Article 18(2) (Article 56(1) of the Classic Directive)</i> .....	15
2.1.1.5 <i>Subcontractors (Article 71(1) and (6) of the Classic Directive)</i> .....	15
2.1.1.6 <i>Conclusion: Article 18(2) much ado about nothing?</i> .....	15
2.1.2 Other grounds for including clauses promoting the transition towards a circular economy in public procurement contracts.....	15
2.1.2.1 <i>The need and the ambition</i> .....	16
2.1.2.2 <i>The importance of the subject-matter of the contract</i> .....	17
2.1.2.3 <i>Miscellaneous</i> .....	19
2.2 A few words about circular economy .....	20
3 Green public procurement.....	22
3.1 GPP in EU hard law .....	23
3.1.1 The Energy Efficiency Directive (2023).....	24
3.1.2 The Batteries Regulation (2023).....	28
3.1.3 Packaging and packaging waste Regulation (pending) .....	30
3.1.4 Construction Products Regulation (pending).....	33
3.1.5 Ecodesign for Sustainable Products Regulation (pending) .....	35
3.2 GPP in EU soft law .....	37
3.2.1 Overview of GPP-criteria .....	37
3.2.2 Observations from a legal point of view .....	40



3.2.3	Clauses implementing the circular economy .....	41
3.2.3.1	<i>Road transport</i> .....	41
3.2.3.2	<i>Road lightning and traffic signals</i> .....	41
3.2.3.3	<i>Road design, construction and maintenance</i> .....	43
3.2.3.4	<i>Paints, varnishes and road marking</i> .....	44
3.2.3.5	<i>Public space maintenance</i> .....	45
3.2.3.6	<i>Office building design, construction and management</i> .....	46
3.2.3.7	<i>Imaging equipment, consumables and print services</i> .....	47
3.2.3.8	<i>Furniture</i> .....	49
3.2.3.9	<i>Food catering services and vending machines</i> .....	50
3.2.3.10	<i>Electricity</i> .....	51
3.2.3.11	<i>Data centres, server rooms and cloud services</i> .....	51
3.2.3.12	<i>Computers, monitors, tablets and smartphones</i> .....	52
3.2.3.13	<i>Indoor cleaning services</i> .....	54
3.2.3.14	<i>Textile products and services</i> .....	54
4	Towards a more circular purchasing .....	56
5	Regulation and good practices in some EU Member States.....	59
5.1	At the Belgian level.....	59
5.1.1	At the federal level .....	59
5.1.1.1	<i>Hard and soft law</i> .....	59
5.1.1.1.1	<i>How to establish effective circular public procurement practices in the current state of the Act of 17 June 2016?</i> .....	59
5.1.1.1.2	<i>Other relevant regulations</i> .....	61
5.1.1.2	<i>Other useful information</i> .....	62
5.1.2	At the regional level .....	62
5.1.2.1	<i>Introduction</i> .....	62
5.1.2.2	<i>Flanders</i> .....	63
5.1.2.3	<i>Brussels</i> .....	64
5.1.2.4	<i>Wallonia</i> .....	65
5.2	In other EU Member States.....	67
5.2.1	Italy.....	67
5.2.1.1	<i>Before the criteria were mandatory</i> .....	67
5.2.1.2	<i>Since the criteria became mandatory</i> .....	68
5.2.1.2.1	<i>Legal framework and CAMs in force</i> .....	69
5.2.1.2.2	<i>Assessment of their implementation</i> .....	70
5.2.1.3	<i>Case law</i> .....	75

5.2.2	The Netherlands .....	77
5.2.2.1	<i>Hard law</i> .....	77
5.2.2.2	<i>Good practices</i> .....	78
5.2.3	Spain .....	81
5.2.3.1	<i>Introduction</i> .....	81
5.2.3.2	<i>The Spanish Public Sector Contracts Act</i> .....	82
5.2.3.3	<i>State and Autonomous Communities law related to GPP and the circular economy</i> .....	87
5.2.3.3.1	<i>Climate law</i> .....	87
5.2.3.3.2	<i>Environmental law</i> .....	88
5.2.3.4	<i>Conclusion</i> .....	90
5.3	Main obstacles to achieving a circular economy in public procurement with the use of GPP .....	91
6	Conclusion: GPP and SPI: how can they best be combined to create an ever more circular economy? Policy recommendations .....	94
7	Bibliography .....	98
7.1	Legislation .....	98
7.1.1	EU law .....	98
7.1.2	Belgian law .....	98
7.1.3	Italian law .....	99
7.1.4	Dutch law .....	99
7.1.5	Spanish law .....	99
7.2	Case law .....	100
7.3	Legal doctrine .....	100
7.4	EU documentation .....	102
7.5	Member States reports .....	103
7.6	Website .....	104

# List of abbreviations

- AC: Award criteria
- Act of 17 June 2016: Belgian act of 17 June 2016 on public procurement, as amended
- Andalusia Climate Act: Andalusia act 8/2018 of 8 October 2018 on measures against climate change and for the transition to a new energy model in Andalusia, as amended
- Asturias Environment Act: Asturias Act 1/2023 of 15 March 2023 on Environmental Quality, as amended
- Balearic Islands Climate Act: Balearic Islands Act 10/2019 of 22 February 2019 on Climate Change and Energy Transition, as amended
- Batteries Regulation: 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, as amended
- CAM: Criteri Ambientali Minimi (Italian minimum environmental criteria)
- Canary Islands Climate Act: Canary Islands act 6/2022 of 27 December 2022 on climate change and energy transition in the Canary Islands, as amended
- Catalonia Climate Act: Catalonia Act 16/2017 of 1 August 2017 on climate change, as amended
- Classic Directive: 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, as amended
- Concession Directive: Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, as amended
- Construction Products Regulation or CPR: European Parliament legislative resolution of 10 April 2024 on the proposal for a regulation of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products, amending Regulation (EU) 2019/1020 and repealing Regulation (EU) 305/2011 (COM(2022)0144 – C9-0129/2022 – 2022/0094(COD))
- CoS: Belgian Council of State
- CPC: Contract performance clause
- CSDDD: Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, final act signed on 13 June 2024 (awaiting publication in the EU Official Journal)
- ECJ: European Court of Justice
- Ecodesign for Sustainable Products Regulation or ESPR: Regulation of the European Parliament and of the Council establishing a framework for setting ecodesign requirements for sustainable products, amending Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC (COM(2022)0142 – C9-0132/2022 – 2022/0095(COD)), final act signed on 13 June 2024 (awaiting publication in the EU Official Journal)
- Energy Efficiency Directive or EED: 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)
- GPP: Green Public Procurement



- Italian public contract Code of 2016: Legislative Decree n° 50 of 18 April 2016 – Public Contracts Code, as amended
- Italian Public Procurement Code: Legislative Decree n° 36 of 31 March 2023 – Public Contracts Code in implementation of Article 1 of Act n° 78 of 21 June 2022, delegating the Government in the field of public contracts, as amended
- MEAT: Most economically advantageous tender
- Packaging and packaging waste Regulation: European Parliament legislative resolution of 24 April 2024 on the proposal for a regulation of the European Parliament and of the Council on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC (COM(2022)0677 – C9 0400/2022 – 2022/0396(COD))
- Navarre Climate Act: Navarre Act 4/2022 of 22 March 2022 on Climate Change and Energy Transition, as amended
- TS: Technical specification
- SC: Selection criteria
- SM: Subject-matter
- Spanish Climate Act: Act 7/2021 of 20 May 2021 on climate change and energy transition, as amended
- Spanish Public Sector Contracts Act: Act 9/2017 of 8 November 2017 on Public Sector Contracts, transposing into Spanish law European Parliament and Council Directives 2014/23/EU and 2014/24/EU of 26 February 2014, as amended
- SPI: Sustainable Product Initiative
- Utilities Directive: 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, as amended

# 1 Introduction

When discussing the relevance of conducting research into (sustainable) public procurement, the importance<sup>3</sup> of public procurement to European<sup>4</sup>, national<sup>5</sup> or regional Gross Domestic Product (GDP) is frequently mentioned.

It is worth mentioning that recently the Council of the EU recalled “*the essential role which public procurement should play in achieving the green transition towards a more circular, climate neutral, less polluting, and socially responsible economy*”<sup>6</sup>.

A. SEMPLE writes it in metaphorical terms: “*harness the big beast which is public procurement, and you will surely achieve significant impacts*”<sup>7</sup>. She goes on to describe the beast not as a “*dog which can be ordered to bark*”<sup>8</sup> but as an “*octopus, with hundreds of thousands of contracting authorities across the EU acting in ways which can be difficult to track, let alone coordinate or harmonise*”<sup>9</sup>.

In that perspective the European Green Deal and the Circular Economy Action Plan are trying to make a shift in public procurement to emphasize more on “*what*” public procurers are buying, rather than to focus on “*how*” to buy it, with the goal of a transition to a circular economy.<sup>10</sup> However, there are also initiatives that are being taken that encourage the industry

---

<sup>3</sup> G. BOTTA, “Italy: Leading the Way Towards Mandatory Sustainable Public Procurement through Minimum Environmental Criteria”, *Mandatory sustainability requirements in EU public procurement law*, W. Janssens and R. Caranta (ed.), Bloomsbury Collections, Oxford, Hart Publishing, 2023, p. 189-190; A. IURASCU, “How Will the Adoption of Mandatory GPP Criteria Change the Game? Lessons from the Italian Experience”, *EPPPL*, 2023, p. 6; Y. MARIQUE and K. MUNUNGU LUNGUNGU, “Les marchés publics : un levier efficace dans la mise en œuvre des obligations sociales et environnementales ?”, *Actualités des marchés publics*, D. Batselé et al. (dir.), Bruxelles, Larcier, 2018, p. 60; F. TESTA et al., “Examining green public procurement using content analysis: existing difficulties for procurers and useful recommendations”, *Eviron. Dev. Sustain.*, 2016, p. 198.

<sup>4</sup> 16% according to the Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the regions, *Public procurement for a better environment*, COM(2008) 400 final, p. 2, available on <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52008DC0400>.

<sup>5</sup> E.g. 10% in Italy Cf. G. BOTTA, *op. cit.*, p. 189. Update: 11.8% of GDP in 2021 according to <https://www.oecd.org/publication/government-at-a-glance/2023/country-notes/italy-bbc309cd#chapter-d1e22>.

<sup>6</sup> Council Conclusions on the European Court of Auditors’ Special Report Nr 28/2023: Public Procurement in the EU: Less Competition for Contracts Awarded for Works, Goods, and Services in the 10 Years up to 2021, 24 May 2024, p. 3.

<sup>7</sup> A. SEMPLE, “Change of the Light Brigade? The Clean Vehicles Directive and the Batteries Regulation”, *Mandatory sustainability requirements in EU public procurement law*, W. Janssens and R. Caranta (ed.), Bloomsbury Collections, Oxford, Hart Publishing, 2023, p. 113. In the same sense, but less metaphorically, cf. G. BOTTA, *op. cit.*, p. 189; F. TESTA et al., *op. cit.*, p. 198.

<sup>8</sup> A. SEMPLE, *op. cit.*, p. 113.

<sup>9</sup> A. SEMPLE, *op. cit.*, p. 113.

<sup>10</sup> M. ANDHOV et al., *Shaping sustainable public procurement laws in the European Union – An analysis of the legislative development from ‘how to buy’ to ‘what to buy’ in current and future EU legislative initiatives*, November 2022, The Greens/EFA in the European Parliament, p. 13 available on [https://www.greens-efa.eu/files/assets/docs/shaping\\_sustainable\\_public\\_procurement\\_laws\\_in\\_the\\_european\\_union.pdf](https://www.greens-efa.eu/files/assets/docs/shaping_sustainable_public_procurement_laws_in_the_european_union.pdf); R. CARANTA, “Towards mandatory SPP for buildings/works”, *European Journal of Public Procurement Markets*, 2022, 4, (9) 11.

itself to take a different approach. In this context, reference is made to the new Circular Economy Action Plan that the European Commission adopted in 2020.<sup>11</sup> With this plan, the European Commission aims to further promote the growth of circularity in industry and focusses on sectors and products with a high resource demand (e.g. electronics, ICT, batteries, vehicles, packaging, textiles, plastics, construction...).<sup>12</sup>

Given the fact that there are two paths being followed, namely on the one hand by creating opportunities in the light of regulations regarding government procurement and on the other hand by imposing obligations on the industry, we investigate how these relate to each other.

Firstly, we will discuss the general context of this report by looking at how public authorities can currently purchase works, supplies and services that participate in the circular economy within the current regulatory framework for public procurement and by briefly recalling what the circular economy is. Of course, we are aware that the circular economy goes beyond GPP. Nevertheless, this report focuses on the links that might exist between the use of GPP and facilitating the transition towards a circular economy.

Secondly, we will look at GPP at European level and the importance (gradual transformation from a voluntary to an obligatory nature, instigated by the European Union) they are taking on in the regulations recently adopted or in the process of being adopted. It is also considered that it is up to public authorities to lead by example through public procurement<sup>13</sup>. We will be taking a very concrete look at the Commission's current working documents to identify the clauses that we consider can directly help public authorities to implement circular economy procurement.

Thirdly, we will then look at the SPI which encourage more circular purchasing for both public and private sector.

Fourthly, after briefly reviewing the state of regulation and good practice in Belgium, we will look at regulations and good practice in other EU member states.

Finally, in the conclusion, we will identify the main obstacles to greater circularity with the use of GPP and formulate policy recommendations.

---

<sup>11</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, *A new Circular Economy Action Plan For a cleaner and more competitive Europe*, COM/2020/98 final, available on <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0098>.

<sup>12</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, *A new Circular Economy Action Plan For a cleaner and more competitive Europe*, COM/2020/98 final, available on <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0098> and also M. LOTZ *et al.*, "Potentials and Prerequisites on the Way to a Circular Economy: A Value Chain Perspective on Batteries and Buildings", *Sustainability*, 2022/14, p. 956 sq.

<sup>13</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European economic and social Committee and the Committee of the regions, *The European Green Deal*, COM(2019) 640 final, p. 8, available on <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2019:640:FIN>.

## 2 General framework

As announced in the introduction, the general framework is divided into two parts: on the one hand, we will look at the current regulatory framework for public procurement law at EU level and, on the other, we will briefly discuss the concept of the circular economy.

### 2.1 Current regulatory framework for public procurement at the EU level

At the EU level, works, supply and services public procurements are mainly governed by the Classic Directive and the Utilities Directive, whereas works and service concessions are governed mainly by the Concession Directive. The system set out in the directives in question allows, but does not oblige, contracting authorities to introduce environmental clauses, which may be part of the circular economy, into their public procurements or concessions.

The procedural rules reflected in the Classic, Utilities and Concession Directives therefore mainly lead to a focus on how to buy green rather than what green solutions to buy and provide a more legally secure framework for the use and implementation of GPP, at least on a procedural point. Although the effectiveness of the legal framework is in doubt<sup>14</sup>, it at least has the merit of existing and allowing initiatives to be taken, both by the Member States<sup>15</sup> and by the contracting authorities themselves. Various articles of the directives in question allow the use of green clauses.

In order not to make this report too lengthy, reference will be made only to the Articles of the Classic Directive, and references to the Utilities Directive and the Concession Directive will be included in footnotes only. If there are differences between these three directives that are worth noting, they will be mentioned.

#### 2.1.1 Article 18(2) of the Classic Directive and the Articles referring to it

##### ***2.1.1.1 Towards a general principle of sustainability? Article 18(2) and Annexe X of the Classic Directive***

The principles of non-discrimination, transparency and equal treatment, as well as the principle of competition are crucial for the interpretation and application of the public procurement

---

<sup>14</sup> W. JANSSEN, “Shifting Towards Mandatory Sustainability Requirements in EU Public Procurement Law: Context, Relevance and a Typology”, *Mandatory sustainability requirements in EU public procurement law*, W. JANSSEN and R. CARANTA (ed.), Bloomsbury Collections, Oxford, Hart Publishing, 2023, p. 8-16 and 19-20; M. ANDHOV, “Contracting Authorities and Strategic Goals of Public Procurement – A Relationship Defined by Discretion?”, *Discretion in EU Procurement Law*, S. Bogojevic, X. Groussot and J. Hettne (eds.), Oxford, Hart Publishing, 2019, p. 129-132.

<sup>15</sup> Cf. *infra*.

directives and are enshrined in Article 18 (1) of the Classic Directive<sup>16</sup>. With the Classic, Utilities and Concession Directives, a new principle seems to be added in Article 18 (2) of the Classic Directive<sup>17</sup>, namely the principle of sustainability<sup>18</sup>:

*“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.”*<sup>19</sup>

With regard to the environment, the international law referred to in Annex X of the Classic Directive contains:

*“— Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer;  
— Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention);  
— Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention);  
— Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10 September 1998, and its 3 regional Protocols.”*<sup>20</sup>

The reference to European Union law and national law in Article 18 (2) of the Classic Directive is quite broad<sup>21</sup>, making this provision a tool for invoking a number of environmental provisions for setting up (expression of need, drafting of specifications, procedure for awarding the contract) and monitoring the performance of a public procurement.<sup>22</sup>

One of the criticisms of this article is that it is addressed to the Member States, which presupposes implementation measures<sup>23</sup>. We will see below that the transposition into Belgian law makes it an article aimed directly at contracting authorities, which gives it greater potential<sup>24</sup>.

Despite criticism of the article's effectiveness<sup>25</sup>, the European legislator seems to have wanted to give it a certain importance. Indeed, non-compliance with the obligations referred to in this provision can be used at various stages of the award procedure, as we shall see hereinafter.

---

<sup>16</sup> See also, M. ANDHOV, *op. cit.*, p. 127.

<sup>17</sup> Art. 18(2) of the Classic Directive; art. 36(2) of the Utilities Directive; art. 30(3) of the Concession Directive.

<sup>18</sup> R. CARANTA, “Towards mandatory SPP for buildings/works”, *European Journal of Public Procurement Markets*, 2022, 4, (9) 11.

<sup>19</sup> Art. 18(2) of the Classic Directive; art. 36(2) of the Utilities Directive; art. 30(3) of the Concession Directive.

<sup>20</sup> Annex X of the Classic Directive; Annex XIV of the Utilities Directive; Annex X of the Concession Directive.

<sup>21</sup> W. JANSSEN, *op. cit.*, p. 8-9.

<sup>22</sup> W. JANSSEN, *op. cit.*, p. 9; M. ANDHOV, *op. cit.*, p. 134.

<sup>23</sup> W. JANSSEN, *op. cit.*, p. 9; M. ANDHOV, *op. cit.*, p. 128-129.

<sup>24</sup> Art. 7 of the Act of 17 June 2016 and *infra*.

<sup>25</sup> W. JANSSEN, *op. cit.*, p. 8-11.

### **2.1.1.2 Exclusion ground, non-compliance with the obligations regarding the forementioned principle of sustainability (Article 57(4) of the Classic Directive)**

At the selection stage, Article 57(4)(a) of the Classic Directive allows non-compliance with the “*applicable obligations referred to in*”<sup>26</sup> Article 18(2) of the Classic Directive to be used as exclusion grounds. Such non-compliance must be demonstrated by the contracting authority.<sup>27</sup> Whether such an exclusion ground is mandatory is left to the discretion of the Member States.<sup>28</sup> As a result, the impact of this article is potentially limited. Prof. ARROWSMITH explains that “[t]his is probably because of the potential for abuse of the discretion that this might involve to favour national undertakings, as well as because of the impact of exclusion on the scope of competition and access to markets”<sup>29</sup>.

However, the legal literature indicates that there are possibilities to interpret this ground for exclusion in a stricter manner.<sup>30</sup> The question is whether this is also effectively desirable and whether it does not unnecessarily complicate matters for the contracting authority. After all, the risk of a dispute over exclusion, or in the other sense effective selection, cannot be ruled out. This also seems to be a further reason not to start tightening this ground for exclusion as it stands.

On the practical application of this possibility, it is worth reminding the existence of the European e-Certis database<sup>31</sup>, which makes it possible to find equivalences for different documents throughout the European Union. In practice, however, the information available is incomplete or even obsolete. Better monitoring by the Member States to keep the information up to date would be useful.

### **2.1.1.3 Dismissal of abnormally low tenders (Article 69(3) of the Classic Directive)**

At the award stage, in order to prove that its tender is not abnormally low, Article 69(2)(d) of the Classic Directive allows the economic operator to provide explanations concerning “*compliance with obligations referred to in*”<sup>32</sup> Article 18(2) of the Classic Directive. According to Article 69(3), sub. 2 of the Classic Directive:

---

<sup>26</sup> Art. 57(4)(a) of the Classic Directive; art. 80(1), sub. 3 of the Utilities Directive; art. 38(7)(a) of the Concession Directive.

<sup>27</sup> Art. 57(4)(a) of the Classic Directive; art. 80(1), sub. 3 of the Utilities Directive; art. 38(7)(a) of the Concession Directive. The latter seems more indefinite insofar as it is written: “*it can demonstrate*” (we underline) but the French version clearly refers to the contracting authority (“*le pouvoir adjudicateur peut démontrer*”) and the Dutch version uses the terms “*zij (...) aantonen*” that seem to refer to “*De aanbestedende diensten of aanbestedende instanties*”. For this reason, we do not think it is appropriate to speculate in the context of this report.

<sup>28</sup> Art. 57(4) of the Classic Directive; art. 80(1), sub. 3 of the Utilities Directive; art. 38(7) of the Concession Directive. See also ECJ, 30 January 2020, C-395/18, *Tim SpA – Direzione e coordinamento Vivendi SA v. Consip SpA, Ministero dell’Economia e delle Finanze*.

<sup>29</sup> S. ARROWSMITH, *The law of public and utilities procurement. Regulation in the EU and UK*, vol. 2, 3d ed., London, Sweet & Maxwell, 2018, p. 778-779.

<sup>30</sup> P. FRITON and J. ZÖLL, “Article 57 Exclusion Grounds”, *European Public Procurement Commentary on Directive 2014/24/EU*, R. Caranta and A. Sanchez-Graells (eds.), Cheltenham, Edward Elgar, 2021, p. 611.

<sup>31</sup> <https://ec.europa.eu/tools/ecertis/#/search>; art. 61 of the Classic Directive; art. 80(3) of the Utilities Directive.

<sup>32</sup> Art. 69(2)(d) of the Classic Directive; art. 84(2)(d) of the Utilities Directive.



*“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).”<sup>33</sup>*

The question of the effectiveness of such a provision is once again called into question. Indeed, unlike the “standard” process of investigating abnormal prices, according to the aforementioned provision, the contracting authority would have to provide proof not only of the existence of an abnormally low price, but also of a violation of, e.g. in the context of circular economy, environmental law. This burden of proof seems particularly difficult if a contracting authority is faced with a tenderer who relies on a long chain of suppliers.<sup>34</sup> However, this “double proof” strengthens the motivation for the abnormally low price.

While the criticism is audible, it is nonetheless worth considering possible solutions.

As regards the abnormal nature of the price, in Belgium, there are price observatories that can be consulted by contracting authorities to help them<sup>35</sup>.

Concerning the question of the violation of environmental law, training public purchasers in environmental law (e.g. all aspects of waste law) would be an option to reinforce the shift towards a circular economy. To this end, a database could be set up at European level, listing the various environmental obligations in the different European countries, along the model of the e-Certis database, which provides easy access to information. This database could easily be set up using European regulations and all the information already available on the transposition of European environmental law into national law. It could then be refined by the various member states.

Another option would be to train the operational staff involved in waste management within the public authority about the existence of this mechanism so that they can provide better support for public purchasers.

The increased difficulty faced by the contracting authority when a tenderer relies on a long supply chain should be resolved progressively and as far as possible if the CSDDD (while published and in force) are applied effectively<sup>36</sup>.

Another criticism is that tenderers may increase their prices so that there is no suspicion of abnormally low prices<sup>37</sup>. If these tenderers can slip through the net when it comes to checking abnormal prices, Article 56(1) of the Classic Directive outlined below should prevent them from being awarded the contract.

---

<sup>33</sup> Art. 69(3), sub. 2 of the Classic Directive; art. 84(3), sub. 2 of the Utilities Directive.

<sup>34</sup> W. Janssen, *op. cit.*, p. 11-12.

<sup>35</sup> See in the Brussels-Capital Region: <https://www.brupartners.brussels/nl/observatorium-van-de-referentieprijzen-voor-de-overheidsopdrachten>.

<sup>36</sup> *Cf. infra*.

<sup>37</sup> W. Janssen, *op. cit.*, p. 11.

#### **2.1.1.4 Possibility to not award the contract to a tenderer that does not comply with the applicable obligations referred to in Article 18(2) (Article 56(1) of the Classic Directive)**

Still at the award stage, if a contracting authority has established that the tender of the prospective successful tenderer “does not comply with the applicable obligations referred to in”<sup>38</sup> Article 18(2) of the Classic Directive, Article 56(1), sub. 2 of the Classic Directive provides that the contracting authority “may decide not to award the contract to [that] tenderer”<sup>39</sup>.

Once again and pragmatically, to be effective, this provision requires public purchasers to be trained.

#### **2.1.1.5 Subcontractors (Article 71(1) and (6) of the Classic Directive)**

It should be noted that where subcontractors are used, they must also comply with the obligations referred to in Article 18(2) of the Directive<sup>40</sup>. In order to avoid breaches of these obligations, “appropriate measures may be taken, such as:

1. *Where the national law of a Member State provides for a mechanism of joint liability between subcontractors and the main contractor, the Member State concerned shall ensure that the relevant rules are applied in compliance with the conditions set out in Article 18(2).*
2. *Contracting authorities may (...) verify or may be required by Member States to verify whether there are grounds for exclusion of subcontractors pursuant to Article 57. (...)”<sup>41</sup>*

Regarding Article 57 of the Classic Directive, we refer to the explanations above.

#### **2.1.1.6 Conclusion: Article 18(2) much ado about nothing?**

Although Article 18(2) seems to introduce a principle of sustainability, it seems to add little value in practice. This is because that provision amounts to requiring the entrepreneur to comply with other (mandatory) regulations, which should essentially be self-evident. However, this provision does send a signal, in particular to the contracting authorities, which will also be obliged to check whether the economic operator, tenderer or contractor complies with the requirements set out in Article 18(2).

### **2.1.2 Other grounds for including clauses promoting the transition towards a circular economy in public procurement contracts**

---

<sup>38</sup> Art. 56(1), sub. 2 of the Classic Directive; art. 76(6) of the Utilities Directive.

<sup>39</sup> Art. 56(1), sub. 2 of the Classic Directive; art. 76(6) of the Utilities Directive.

<sup>40</sup> Art. 71(1) of the Classic Directive; art. 88(1) of the Utilities Directive; art. 42(1) of the Concession Directive.

<sup>41</sup> Art. 71(6) of the Classic Directive; art. 88(6) of the Utilities Directive; art. 42(4) of the Concession Directive

Under this heading, we will examine the various articles making up the legal framework favorable to the development of GPP. When choosing in the GPP toolkit, as when drawing up specifications in general, it is important for the contracting authority to know what it needs. As stated above, we underline that the circular economy itself goes beyond the GPP itself. In this heading we will look at the specific articles and provisions that can be used to include clauses that could lead to a further transition towards a circular economy in the public procurement contracts.

#### **2.1.2.1 The need and the ambition**

From a circular economy perspective, the first question a contracting authority should ask itself is what their needs and ambitions are and whether a (public) contract is necessary. If a public contract is necessary, what is it necessary to buy? For example, is it necessary to buy one printer per office, or would one printer per floor suffice? The "need" aspect must also be measured against ambitions. When certain ambitions are expressed, they should also be translated into the public contract. Although, in our opinion, the starting point should always be a "necessity" on the basis of which the ambitions can be further realised. For example, if there is no need for a building because there is adequate space available elsewhere, then there is no need to put it. However, if there is a need for a new building, then the question can be raised of how circular solutions can add value in the procurement process.

Again, with a view to the circular economy, consulting the market before or during the drafting of the specifications, in compliance of course with the Articles 40 and 41 of the Classic Directive<sup>42</sup>, means that the specifications can be drawn up realistically, for example with regard to the availability of reused materials. This reduces the risk of greenwashing on the part of the contracting authority.

In this respect, reference can be made, for example, to a set of frequently asked questions that was drawn up as part of "*de Proeftuin Circulair Bouwen & de Green Deal Circulair Bouwen*"<sup>43</sup>. The authors argue that authorities should ask themselves several questions in order to understand and assess their needs, such as:

- "- What do I understand by circular economy and circular construction?*
- What ambitions do I have for the project?"<sup>44</sup>*
- What role will I take on myself and what will I leave to the market?*
- What solutions are available?*
- Is there room to include criteria around circularity and where do I best include them?*
- How do I deal with data?"<sup>45</sup>*

---

<sup>42</sup> Art. 58 and 59 of the Utilities Directive.

<sup>43</sup> B. VANHEUSDEN, S. VAN GARSSE and J. VOORTER, *Draaiboek circulaire aanbesteden. Juridische FAQ*, available on: [https://bouwen.vlaanderen-circulair.be/src/Frontend/Files/userfiles/files/20221215\\_Draaiboek%20Circulair%20Aanbesteden\\_Q%26A\\_FINCL\\_EANV2\\_interactive\(2\).pdf](https://bouwen.vlaanderen-circulair.be/src/Frontend/Files/userfiles/files/20221215_Draaiboek%20Circulair%20Aanbesteden_Q%26A_FINCL_EANV2_interactive(2).pdf).

<sup>44</sup> "The ambition map can provide a useful tool for this purpose: <https://aankopen.vlaanderen-circulair.be/nl/aande-slag/de-ambitiokaart>. This ambition map will also have a specific translation for the construction sector." (free translation of the footnote)

<sup>45</sup> *Ibidem*, p. 6 (free translation).

### 2.1.2.2 The importance of the subject-matter of the contract

On the basis of the above, in order for environmental considerations, including the circular economy, to be included in the tender documents, the contracting authority must clearly state the subject of the contract, and even indicate its circular economy approach in the title of the contract. This sends a strong signal to the market and prevents a disappointed tenderer from appealing on the grounds that such a clause or criterion is not related to the subject-matter of the contract.

The link with the subject-matter of the contract is a condition that recurs in many of the Classic Directive's provisions when it comes to introducing environmental considerations.

- Article 42(3) of the Classic Directive regarding the technical specifications states that: *"(...) the technical specifications shall be formulated in one of the following ways: (a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract (...)"*<sup>46</sup>;
- Article 43(1) of the Classic Directive regarding the labels states that: *"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, provided that all of the following conditions are fulfilled: (a) the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract (...)"*<sup>47</sup>;
- Article 58(1), sub. 2 of the Classic Directive regarding the selection criteria states that: *"All requirements shall be related and proportionate to the subject-matter of the contract."*<sup>48</sup>
- Article 67(2) of the Classic Directive regarding the contract award criteria states that: *"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 contract in question. (...)"*<sup>49</sup>

With regard to the link with the subject-matter of the contract, Article 67(3) of the Classic Directive 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*

---

<sup>46</sup> We underline. See also art. 60(3) of the Utilities Directive; art. 36(1), sub. 2 of the Concession Directive.

<sup>47</sup> We underline. See also art 61(1) of the Utilities Directive.

<sup>48</sup> We underline. See also art. 80(2) of the Utilities Directive; art. 38(1) of the Concession Directive.

<sup>49</sup> We underline. See also art. 82(2) of the Utilities Directive. Compar. art. 41(2) of the Concession Directive.

*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.*"<sup>50</sup>

- Article 70 of the Classic Directive regarding the conditions for performance of contracts states that: *"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."*<sup>51</sup>

It is important to note that a framework is provided in the public procurement regulations, where the contracting authority has some discretion. Indeed, it can freely determine the content of the technical specifications, the implementing provisions as well as the selection and award criteria. The only restriction really provided for in the regulations is that each of these criteria and provisions must be *"linked to the subject-matter of the contract"*. This is a vague boundary, which means that in practice for the implementation of circular principles, it is often testing whether the proposed criteria and provisions are sufficiently *"linked to the subject-matter of the contract"*. Already here, consideration can be given as to whether it might not be useful to provide further starting points – in other regulations, if necessary – on the basis of which contracting authorities can further commit to using circular principles in public procurement.

The landmark ECJ cases *EVN et Wienstrom*<sup>52</sup> and *Max Havelaar*<sup>53</sup> set out the conditions for environmental clauses to be linked to the subject-matter of the contract. Although there have been developments in the case-law of the Member States<sup>54</sup>, some maintain a restrictive interpretation of the subject-matter of the contract, excluding the possibility of incorporating environmental clauses<sup>55</sup>. This leads a number of GPP experts to argue that:

*"For reasons of clarity and to enhance SPP [=sustainable public procurement], it is recommended that the L2SM [=link to the subject-matter of the contract] is abandoned. Reference in Art. 42, 43, 45, 67, 678 (sic) and 70 of Directive 2014/24/EU is made to 'the product, service or works during (or and) its life cycle' rather than to the L2SM."*<sup>56</sup>

---

<sup>50</sup> We underline. See also art. 82(3) of the Utilities Directive.

<sup>51</sup> We underline. See also art. 87 of the Utilities Directive.

<sup>52</sup> ECJ, 4 December 2003, C-448/01, *EVN AG and Wienstrom GmbH v. Republik Österreich, Stadtwerke Klagenfurt AG*, § 34. See also, F. LICHÈRE and O. SULPICE, "Mandatory Requirements in Public Procurement Law: The Role of Remedies, Courts and Public Interest Litigation", *Mandatory sustainability requirements in EU public procurement law*, W. Janssens and R. Caranta (ed.), Bloomsbury Collections, Oxford, Hart Publishing, 2023, p. 244-245; B. DESCAMPS, "Duurzame overheidsopdrachten in de EU: de blijvende zoektocht naar een evenwicht tussen de primaire en de secundaire aanbestedingsdoelstellingen van de rechtspraak van het Hof van Justitie", *MER*, 2022, p. 9-10.

<sup>53</sup> ECJ, 10 May 2012, C-368/10, *European Commission v. Kingdom of the Netherlands*, § 89-92. See also, F. LICHÈRE and O. SULPICE, *op. cit.*, p. 244-245; B. Descamps, *op. cit.*, p. 10-12.

<sup>54</sup> F. LICHÈRE and O. SULPICE, *op. cit.*, p. 243-244.

<sup>55</sup> X. LAZO VITORIA, *op. cit.*, p. 230-231. Compar. CoS, 22 February 2023, case 255.878, p. 17-18.

<sup>56</sup> M. ANDHOV *et al.*, *op. cit.*, p. 59. Compar. with the in-depth analysis made on this topic in EU and French law by K. B. P. LASMOTHEY, *Analyse environnementaliste du droit de la commande publique*, Phd thesis publicly defended on 16 December 2022 (unpublished), p. 147-201.

In addition, everything proposed in the tender documents must also be verifiable<sup>57</sup>. By this we mean that if certain technical requirements are imposed in the tender documents or certain criteria are imposed in the context of the selection or award, these should be objectively verifiable. In practice, this is more than often a problem because all too often it is necessary to rely on mere assertions made by the tenderer. This arises in particular when space is left to the tenderer to propose a solution, for instance when it is asked for a solution consisting of a specific percentage of recycled materials, for example. It is up to the contracting authority to check whether the solution offered also meets those requirements as set out in the tender documents. Where applicable, the contracting authority has the duty to verify that the solution offered in the tender actually complies with what is stated in the technical provisions.<sup>58</sup>

### 2.1.2.3 Miscellaneous

In the context of this report, the following provisions should also be noted:

- Article 62 of the Classic Directive regarding the “*Quality assurance standards and environmental management standards*”<sup>59</sup> and Annex XII<sup>60</sup>; and
- Article 68 of the Classic Directive regarding the “*Life-cycle costing*”<sup>61</sup>.

Regarding the LCC, it is worth noted that the European Commission developed tools on excel files to calculate the LCC in different sectors (vending machines, outdoor lightning, indoor lightning, imaging equipment and computers)<sup>62</sup>. However, these tools are limited when it comes to taking the various environmental externalities into account.

In the current working documents of the EU Commission regarding the GPP (*cf. infra*), there is information about the LCC at the end of the documents in almost all the sectors for which there are currently up-to-date GPP (road lighting and traffic signals; road transport; textile products and services; indoor cleaning services; computers, monitors, tablets and smartphones; data centres, server rooms and cloud services; food, catering services and vending machines; furniture; imaging equipment, consumables and print services; office building design, construction and management; paints, varnishes and road marking; public space maintenance; Road design, construction and maintenance).

Within life cycle costs as an award criterion within the scope of the directives, a further distinction is made according to whether they are acquisition costs, operation and maintenance costs, or costs attributable to external environmental impacts. The most relevant for this contribution are operation and maintenance costs and costs attributable to environmental externalities. When looking at operation and maintenance costs, for example, when designing

---

<sup>57</sup> ECJ, 4 December 2003, C-448/01, *EVN AG and Wienstrom GmbH v. Republik Österreich, Stadtwerke Klagenfurt AG*, § 52. See also, F. LICHÈRE and O. SULPICE, *op. cit.*, p. 244-245; B. Descamps, *op. cit.*, p. 9-10.

<sup>58</sup> S. MORAS *et al.*, “De openbare en niet-openbare plaatsingsprocedures: de voornaamste wolfijzers en schietgeweren in de nieuwe regelgeving”, *TBO*, 2018, p. 103.

<sup>59</sup> See also art. 81 of the Utilities Directive. There is no equivalent in the Concession Directive.

<sup>60</sup> See also article 80(3) of the Utilities Directive *juncto* article 60(1) of the Classic Directive.

<sup>61</sup> See also art. 83 of the Utilities Directive. There is no equivalent in the Concession Directive.

<sup>62</sup> These tools are available on: [https://circabc.europa.eu/ui/group/44278090-3fae-4515-bcc2-44fd57c1d0d1/library/1fac691f-005a-4396-b275-0c234ff55c4f?p=1&n=10&sort=modified\\_DESC](https://circabc.europa.eu/ui/group/44278090-3fae-4515-bcc2-44fd57c1d0d1/library/1fac691f-005a-4396-b275-0c234ff55c4f?p=1&n=10&sort=modified_DESC).



a building towards, energy efficiency factors can be considered, which will reduce certain energy costs during re/use. Also towards sustainability, a higher investment cost can lead to lower costs during use and maintenance, allowing that investment to be recovered at that point as well. However, some caution must be exercised when using such an award criterion. This is because this criterion is not blissful. If a certain maintenance cost is low, given that replacing the material is more advantageous than repairing it, then the use of such an award criterion may be less interesting from the point of view of other wishes one may have as a procurer, for example with regard to circularity.<sup>63</sup>

In addition, it is not obvious to calculate the actual life-cycle cost and this approach may not lead to the most sustainable investment. If certain parameters (externalities) are included little or not at all in the calculation of the life-cycle cost, this may give a wrong picture. It is therefore important, when setting up an award criterion based on life-cycle costs, to clearly identify the way in which these are calculated and also check them against the usual parameters and taking into account the actual lifetime of the good being tendered.

## 2.2A few words about circular economy

After an in-depth analysis of a lot of definitions, the legal doctrine have defined the circular economy as follows:

*“The circular economy is an economic system that represents a change of paradigm in the way that human society (business models and consumer behaviour) is interrelated with nature and aims to replace the ‘end-of-life’ concept with reducing, alternatively reusing, recycling and recovering resources, energy and materials, thus operating at the micro level (products, companies, consumers), meso level (eco-industrial parks) and macro level (city, region, nation and beyond), in order to accomplish sustainable development, which implies creating environmental quality, economic prosperity and social equity, to the benefit of current and future generations.”<sup>64</sup>*

In the context of this research, given that the aim is to examine the links between GPP and the circular economy, only the environmental aspect of the circular economy is addressed.

A practical tool for finding the path to the circular economy is the “9Rs strategy”, which is represented in various forms and of which we have chosen the following form<sup>65</sup>, which we consider was the most explicit.

---

<sup>63</sup> See also A. VERSCHAVE, *Selectie- en gunningscriteria*, Brussels, Politeia, 2021, p. 54.

<sup>64</sup> A. IURASCU, S. VAN GARSSE and J. VOORTER, “The concept “circular economy”: towards a more universal definition”, *Ius publicum*, 2021/2, p. 26.

<sup>65</sup> J. POTTING et al., *Circular economy: measuring innovation in the product chain. Policy report*, January 2017, p. 5, available on: <https://www.pbl.nl/uploads/default/downloads/pbl-2016-circular-economy-measuring-innovation-in-product-chains-2544.pdf>.

### Circularity strategies within the production chain, in order of priority

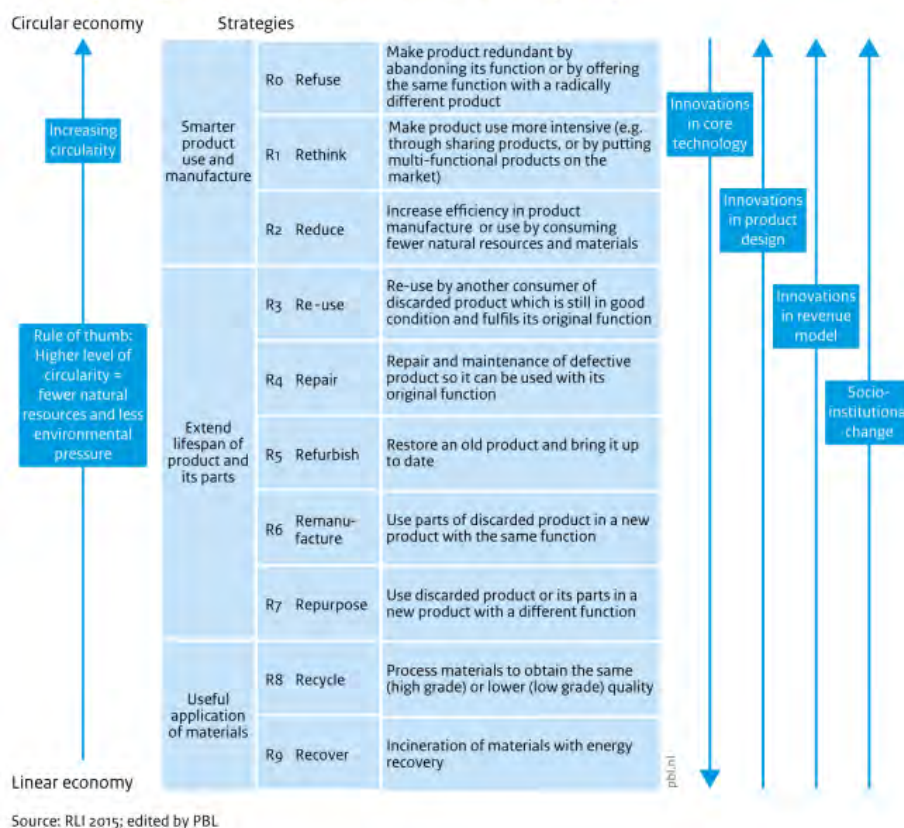


Figure 1. Circularity strategies within the production chain<sup>66</sup>

This strategy will be used later in the report to classify the different GPP clauses drafted in the EU Commission working documents to enable concrete guidance for contracting authorities towards clause models that would enable them to meet their needs and achieve their objectives with regard to the circular economy.

<sup>66</sup> J. POTTING *et al.*, *Circular economy: measuring innovation in the product chain. Policy report*, January 2017, p. 5, available on: <https://www.pbl.nl/uploads/default/downloads/pbl-2016-circular-economy-measuring-innovation-in-product-chains-2544.pdf>.

# 3 Green public procurement

When it comes to defining green public procurement, reference is generally made to the definition given by the European Commission:

*"Public procurement is essentially a process (...), GPP can therefore be understood as: "...a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured.""*<sup>67</sup>

From that definition it can be deduced that the *"basic concept of GPP relies on having clear, verifiable, justifiable and ambitious environmental criteria for products and services, based on a life-cycle approach and scientific evidence base"*<sup>68</sup>. The way GPP is structured at the moment is rather voluntarily based. When we look for example at the Classic, Utilities or Concession Directive, it is striking that there are no specific provisions that impose any obligation on the contracting authority to further focus on GPP.

It is worth noting that the procurement directives of 2014 are based on the Commission Green paper on *"The modernization of EU public procurement policy – Towards a more efficient European Procurement Market"*<sup>69</sup>. In that Green paper references are made to the *"Europe 2020 strategy for smart, sustainable and inclusive growth"*<sup>70</sup> and *"two possible ways to use public procurement in order to achieve the Europe 2020 policy objectives"*<sup>71</sup>, were defined namely:

- *"provide contracting authorities with the wherewithal to take into account those objectives under procedural public procurement rules ("how to buy");*
- *impose mandatory requirements on contracting authorities or provide for incentives to steer their decisions as to which goods and services should be procured ("what to buy")"*.<sup>72</sup>

---

<sup>67</sup> Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the regions, *Public procurement for a better environment*, COM(2008) 400 final, p. 4, available on <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52008DC0400>. See also, [https://green-business.ec.europa.eu/green-public-procurement\\_en](https://green-business.ec.europa.eu/green-public-procurement_en); W. JANSSEN, "Shifting Towards Mandatory Sustainability Requirements in EU Public Procurement Law: Context, Relevance and Typology", *Mandatory sustainability requirements in EU public procurement law*, W. Janssens and R. Caranta (ed.), Bloomsbury Collections, Oxford, Hart Publishing, 2023, p. 5; A. IURASCU, *op. cit.*, p. 7; F. TESTA *et al.*, *op. cit.*, p. 197-198.

<sup>68</sup> European Commission, *Green and Sustainable Public Procurement*, available on [https://ec.europa.eu/environment/gpp/versus\\_en.htm](https://ec.europa.eu/environment/gpp/versus_en.htm).

<sup>69</sup> European Commission, *Green paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market*, COM(2011) 15 final, 27 January 2011, available on: <https://op.europa.eu/en/publication-detail/-/publication/04a30c4a-e533-41ec-a039-231f1aa39645/language-en#>.

<sup>70</sup> *Ibidem*, p. 3.

<sup>71</sup> *Ibidem*, p. 34.

<sup>72</sup> *Ibidem*, p. 34.

The Green paper further clarifies that the focus of the procurement directives is mainly on procedural rules related to “*how to buy*”, leaving “*the contracting authorities free in their basic decision of “what to buy”*”<sup>73</sup>. However, the “*EU public procurement legislation also allows incentives for procurement in line with the [overall policy] objectives [set out] (...) either at European or at national level*”<sup>74</sup> “*or the imposition of obligations on the contracting authorities on “what to buy”*”<sup>75</sup>. Rather than imposing mandatory rules on what to buy, it was thought better to leave sector-specific legislation to set mandatory criteria and targets on what to buy.<sup>76</sup>

In this chapter, we will examine the regulations recently adopted or in the process of being adopted which contains explicit mentions to the GPPs and emphasise therefore “*what*” can or should be procured. Through these regulations, the gradual transformation from the voluntary nature of GPP in certain sectors to a mandatory nature can be observed. We will then be taking a very concrete look at the Commission's current working documents to identify the clauses that we consider can directly help public authorities to implement circular economy procurement.

## 3.1 GPP in EU hard law

While the procurement directives allow for broad discretion on what contracting authorities can procure, we see trends where that discretion is being curtailed.<sup>77</sup> Indeed, certain European regulations provide “*what*” contracting authorities must procure (at least) and, in addition, intervene on “*how*” this should be further procured. In certain regulations, the link to GPP is made. Below, we list some examples, where, on the one hand, there is further provision on what the contracting authority should take into account in the context of selection and award of public contracts (on “*how*” this is procured) and, on the other hand, where there are technical provisions that are included (on “*what*” is procured). It is already possible to conclude now that this approach has a direct impact on the discretion of contracting authorities. They are more and more forced to make certain choices, consider certain things and generally also more limited in “*what*” they can procure.

We have chosen not to present certain texts insofar as they either do not directly promote GPP (for example, it is not clear whether GPP will become mandatory in this context) and/or the link with the circular economy was not obvious. However, their existence should not be forgotten. We quote them below, giving the reader a few references for further reading:

---

<sup>73</sup> *Ibidem*, p. 34. See also: P. TREPTE, “The Contracting Authority as Purchaser and Regulator: Should the Procurement Rules Regulate what we Buy?” in G. SKOVGAARD ØLYKKE, C. RISVIG HANSEN, CH. D. TVARNØ, *EU Public Procurement Modernisation, Growth and Innovation: Discussions on the 2011 Proposals for Procurement Directives*, DJØF Publishing, 2012, p. 85.

<sup>74</sup> European Commission, *Green paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market*, COM(2011) 15 final, 27 January 2011, p. 34 available on: <https://op.europa.eu/en/publication-detail/-/publication/04a30c4a-e533-41ec-a039-231f1aa39645/language-en#>.

<sup>75</sup> *Ibidem*, p. 34.

<sup>76</sup> R. CARANTA, “Towards mandatory SPP for buildings/works”, *European Journal of Public Procurement Markets*, 2022, 4, (9) 11.

<sup>77</sup> See also W. JANSSEN, *op. cit.*, p. 6.

- the clean vehicles directive (see recitals 2, 7, 8, 10, 13, 14, 16, 17, 18, 21, 22, 24, 25 and amendment to Article 5 (Minimum procurement targets) of Directive 2009/33/EC)<sup>78</sup>;
- the farm to fork strategy<sup>79</sup>;
- the deforestation regulation (see the twelve-months temporary exclusion from public procurements and concessions in Article 25)<sup>80</sup>;
- the CSDDD (see recital 92 and Article 31 according to which compliance with the CSDDD may be taken into account as an award criterion when awarding public contracts or concessions and as an environmental CPC)<sup>81</sup>;
- *etc.*<sup>82</sup>

Below, we map out some guidelines and regulations, each time linking GPP and circular economy. In order to give the reader direct access to the texts themselves, have included quotations *in extenso* from the relevant provisions.

### 3.1.1 The Energy Efficiency Directive (2023)

A first directive we would like to highlight is the 2023 Energy Efficiency Directive. This is an update of the existing framework, specifically the one in place with Directive 2012/27/EU, which entered into force in December 2012. This required Member States to set indicative national energy efficiency targets to ensure that the EU would achieve its headline target of reducing energy consumption by 20% by 2020<sup>83</sup>. Originally, that directive did not explicitly mention a “circular” economy. Rather, the 2012 directive emphasised a “low-carbon” economy<sup>84</sup>. However, the link to the circular economy was made there with the revision of the directive in 2018. Thus, it was included in the recitals that when implementing Directive 2012/27/EU, as amended by the directive, Member States should pay special attention to synergies between energy efficiency measures and the efficient use of natural resources according to the principles of the circular economy.<sup>85</sup> However, the link between the use of public procurement and the pursuit of a circular economy was not explicit.

---

<sup>78</sup> 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. For comments of the new directive in comparison to the previous one, see: A. SEMPLE, *op. cit.*, p. 115-122; M. ANDHOV *et al.*, *op. cit.*, p. 32-34 and 68.

<sup>79</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system (COM/2020/381 final). For comments on the farm to fork strategy, see: H. SCHEBESTA and M.J. PLANA CASADO, “Food: Mandatory EU Public Procurement Criteria for Food after the Farm to Fork Strategy”, *Mandatory sustainability requirements in EU public procurement law*, W. Janssens and R. Caranta (ed.), Bloomsbury Collections, Oxford, Hart Publishing, 2023, p. 127-145; M. ANDHOV *et al.*, *op. cit.*, p. 37-40 and 69-70.

<sup>80</sup> 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) N° 995/2010.

<sup>81</sup> Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, final act signed on 13 June 2024 (awaiting publication in the EU Official Journal), recital 92 and art. 31.

<sup>82</sup> For a more exhaustive list and analyse, see M. ANDHOV *et al.*, *op. cit.*, *passim*.

<sup>83</sup> Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, recital 2.

<sup>84</sup> *Ibidem*, recital 57.

<sup>85</sup> Energy Efficiency Directive, recital 92.

However, this is changing with the Energy Efficiency Directive, which explicitly names the link between a circular economy and the use of public procurement. One example is recital 53 of the Energy Efficiency Directive, where this link is made explicit:

*“The European Green Deal recognises the role of the circular economy in contributing to overall Union decarbonisation objectives. The public sector and, in particular, the transport sector, should contribute to those objectives by using their purchasing power to, where appropriate, choose environmentally friendly products, buildings, works and services via available tools for green public procurement, and thus making an important contribution to reduce energy consumption and environmental impacts.”<sup>86</sup>*

In addition, the further recitals also point out that member states should provide sufficient support to their contracting authorities *“in the uptake of energy efficiency requirements in public procurement and, where appropriate, in the use of green public procurement”*<sup>87</sup>. Therefore Member States should provide *“necessary guidelines and methodologies on carrying out the assessment of life-cycle costs and environment impacts and costs. Well-designed tools, in particular digital tools, are expected to facilitate the procurement procedures and reduce the administrative costs especially in smaller Member States that may not have sufficient capacity to prepare tenders. In this regard, Member States should actively promote the use of digital tools and cooperation amongst contracting authorities including across borders for the purpose of exchanging best practices.”*<sup>88</sup>

We can only approve of such intentions. Later in the report, we will explore digital tools and other best practices in some EU Member States.

In this directive, Article 7 must be highlighted insofar as it concerns both public contracts (Classic Directive and Utilities Directive) and concessions (Concession Directive) – above European thresholds – and it refers directly to GPP:

*“1. Member States shall ensure that contracting authorities and contracting entities, when concluding public contracts and concessions with a value equal to or greater than the thresholds laid down in Article 8 of Directive 2014/23/EU, Article 4 of Directive 2014/24/EU and Article 15 of Directive 2014/25/EU, 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, unless it is not technically feasible.*

*Member States shall also ensure that in concluding the public contracts and concessions with a value equal to or greater than the thresholds referred to in the first subparagraph, contracting authorities and contracting entities apply the energy efficiency first principle in accordance with Article 3, including for those public contracts and concessions for which no specific requirements are provided for in Annex IV.*

---

<sup>86</sup> Energy Efficiency Directive, recital 53, we underline.

<sup>87</sup> Energy Efficiency Directive, recital 54, we underline.

<sup>88</sup> Energy Efficiency Directive, recital 54, we underline.



2. The obligations referred to in paragraph 1 of this Article shall not apply if they undermine public security or impede the response to public health emergencies. The obligations referred to in paragraph 1 of this Article shall apply to the contracts of the armed forces only to the extent that their application does not cause any conflict with the nature and primary aim of the activities of the armed forces. The obligations shall not apply to contracts for the supply of military equipment as defined in Directive 2009/81/EC of the European Parliament and of the Council (39).

3. Notwithstanding Article 29(4), Member States shall ensure that contracting authorities and contracting entities assess the feasibility of concluding long-term energy performance contracts that provide long-term energy savings when procuring service contracts with significant energy content.

4. Without prejudice to paragraph 1 of this Article, when purchasing a product package fully covered by a delegated act adopted under Regulation (EU) 2017/1369, Member States may require that the aggregate energy efficiency take priority over the energy efficiency of individual products within that package, by purchasing the product package that complies with the criterion of belonging to the highest available energy efficiency class.

5. Member States may require that contracting authorities and contracting entities, when concluding contracts as referred to in paragraph 1 of this Article, take into account, where appropriate, wider sustainability, social, environmental and circular economy aspects in procurement practices with a view to achieving the Union's decarbonisation and zero pollution objectives. Where appropriate, and in accordance with Annex IV, Member States **shall** require contracting authorities and contracting entities to take into account **Union green public procurement criteria** or available equivalent national criteria.

To ensure transparency in the application of energy efficiency requirements in the procurement process, Member States shall ensure that contracting authorities and contracting entities make publicly available information on the energy efficiency impact of contracts with a value equal to or greater than the thresholds referred to in paragraph 1 by publishing that information in the respective notices on Tenders Electronic Daily (TED), in accordance with Directives 2014/23/EU, 2014/24/EU and 2014/25/EU, and Commission Implementing Regulation (EU) 2019/1780 (40). Contracting authorities may decide to require that tenderers disclose information on the life cycle global warming potential, the use of low carbon materials and the circularity of materials used for a new building and for a building to be renovated. Contracting authorities may make that information publicly available for the contracts, in particular for new buildings having a floor area larger than 2 000 m<sup>2</sup>.

Member States **shall** support contracting authorities and contracting entities in the uptake of energy efficiency requirements, including at regional and local level, by providing clear rules and guidelines including methodologies on the assessment of life cycle costs and environment impacts and costs, setting up competence support centres,

encouraging cooperation amongst contracting authorities, including across borders, and using aggregated procurement and digital procurement where possible.

6. Where appropriate, the Commission may provide further guidance to national authorities and procurement officials in the application of energy efficiency requirements in the procurement process. Such support may strengthen existing fora for the purpose of supporting Member States, such as by means of concerted action, and may assist them in taking the **green public procurement criteria** into account.

7. Member States shall establish the legal and regulatory provisions, and administrative practices, regarding public purchasing and annual budgeting and accounting, necessary to ensure that individual contracting authorities are not deterred from making investments in improving energy efficiency and from using energy performance contracting and third-party financing mechanisms on a long-term contractual basis.

8. Member States shall remove any regulatory or non-regulatory barriers to energy efficiency, in particular as regards legal and regulatory provisions, and administrative practices, regarding public purchasing and annual budgeting and accounting, with a view to ensuring that individual public bodies are not deterred from making investments in improving energy efficiency and from using energy performance contracting and third-party financing mechanisms on a long-term contractual basis.

Member States shall report to the Commission on the measures taken to address the barriers to uptake of energy efficiency improvements as part of their integrated national energy and climate progress reports submitted pursuant to Article 17 of Regulation (EU) 2018/1999.”<sup>89</sup>

The paragraph 5 is clear. In certain circumstances, there is an obligation for the Member States that their contracting authorities take into account Union (or national equivalent) GPP criteria.

This provision is into force since the 10 October 2023<sup>90</sup> and has to be transposed by the Member States by 11 October 2025<sup>91</sup>. For those Member States that do not yet have national GPPs, it goes without saying that the European Commission's working documents presented in this report (*cf. infra*) will be of significant use.

The first comments the Energy Efficiency Directive in the legal doctrine were when it was still in the process of being adopted<sup>92</sup>. GPP Experts considers that this Energy Efficiency Directive,

---

<sup>89</sup> Energy Efficiency Directive, art. 7 (we underline).

<sup>90</sup> Art. 39, sub. 1 of the EED. See also: [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:JOL\\_2023\\_231\\_R\\_0001](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:JOL_2023_231_R_0001).

<sup>91</sup> Art. 36(1), sub. 1 of the EED.

<sup>92</sup> About the EU subsidiarity principle in the context of the Energy Efficiency Directive: T. VAN DEN BRINK, “Subsidiarity Lost Along the Way? EU Public Procurement Legislation on the Road to Sustainability”, *Mandatory sustainability requirements in EU public procurement law*, W. Janssens and R. Caranta (ed.), Bloomsbury Collections, Oxford, Hart Publishing, 2023, p. 49-53. A presentation of the proposal was made in: D. GRUYAERT and V. PISSIERSENS, “Transforming the Construction Sector Through Minimum Requirements”, *Mandatory sustainability requirements in EU public procurement law*, W. Janssens and R. Caranta (ed.), Bloomsbury Collections, Oxford, Hart Publishing, 2023, p. 175-176 and in M. ANDHOV *et al.*, *op. cit.*, p. 25-27.

as it “adheres to a minimum harmonization approach[,] (...) can be a model for other legislative initiatives”<sup>93</sup>. We will see hereinafter that change is continuing in this direction.

### 3.1.2 The Batteries Regulation (2023)

After an evaluation of the directive 2006/66/EC, the Commission concluded that there was positive results but also some limitations<sup>94</sup>. It was time for a new instrument: the Batteries Regulation. As it is a regulation, there is no need for implementation.

The legal doctrine points out the key obligations that the Batteries Regulation imposes “on firms placing batteries on the EU market”<sup>95</sup>. They “include supply chain due diligence; restrictions on hazardous substances; recycled content labelling with minimum recycled content for lead, cobalt, nickel and lithium being phased in; carbon footprint labelling with a maximum carbon footprint being phased in; minimum electrochemical performance and durability; extended producer responsibility for collection and recycling used batteries; recycling efficiency requirements; and a QR code/digital battery ‘passport’ to record key information”<sup>96</sup>. They are several requirements promoting the circular economy.

In this regulation, Article 85 must be highlighted as it refers directly to GPP:

*“1. Contracting authorities, as defined in Article 2(1), point (1), of Directive 2014/24/EU or Article 3(1) of Directive 2014/25/EU, or contracting entities, as defined in Article 4(1) of Directive 2014/25/EU shall, when procuring batteries or products containing batteries in situations covered by those Directives, 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.*

*2. From 12 months after the date of entry into force of the first delegated act referred to in paragraph 3 of this Article, establishing award criteria for procurement procedures, the obligation laid down in paragraph 1 of this Article shall be fulfilled through the application of those award criteria. Any procurement procedure carried out by contracting authorities or contracting entities for the purchase of batteries, or products containing batteries, that fall within the scope of Articles 7 to 10 shall make reference in its technical specifications and award criteria to that first delegated act to ensure that those batteries, or products containing batteries, are procured with significantly lower environmental impacts over their life cycle.*

*3. The Commission shall, 12 months after the adoption of the latest of the delegated acts referred to in Article 7(2), fourth subparagraph, point (a), Article 8(1), Article 9(2) and*

---

<sup>93</sup> M. ANDHOV *et al.*, *op. cit.*, p. 67.

<sup>94</sup> Commission staff working document on the evaluation of the Directive 2006/66/EC on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC, SWD(2019) 1300 final, 9 April 2019. See also, M. ANDHOV *et al.*, *op. cit.*, p. 35 and [https://commission.europa.eu/news/commission-publishes-evaluation-eu-batteries-directive-2019-04-09\\_en#:~:text=The%20evaluation%20concludes%20that%20the,for%20batteries%20and%20recycled%20materials.](https://commission.europa.eu/news/commission-publishes-evaluation-eu-batteries-directive-2019-04-09_en#:~:text=The%20evaluation%20concludes%20that%20the,for%20batteries%20and%20recycled%20materials.)

<sup>95</sup> A. SEMPLE, *op. cit.*, p. 123.

<sup>96</sup> *Ibidem*, p. 123, we underline.

*Article 10(5), adopt delegated acts in accordance with Article 89 supplementing this Regulation by establishing **award criteria** for procurement procedures for batteries, or products containing batteries, based on the sustainability requirements laid down in Articles 7 to 10.*<sup>97</sup>

Regarding the exercise of the delegation, Article 89 paragraph 2 sets forth that:

*“The power to adopt delegated acts referred to in (...) Article 85(3) shall be conferred on the Commission for a period of five years from 17 August 2023 [i.e. until 17 August 2028]. The Commission shall draw up a report in respect of the delegation of power no later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension no later than three months before the end of each period.”*<sup>98</sup>

This regulation came into force on 17 August 2023 and is in application since 18 February 2024<sup>99</sup>. We therefore consider that Article 85(1) is in application since that latter date in all EU Member State but that delegated acts will set compulsory TS and AC in a certain timeframe as provided by Article 85(2) and (3). Contracting authorities should therefore pay particular attention to public procurements involving batteries. It is recommended to carefully read the regulations in their entirety, which set out various deadlines for the obligations placed on the private sector under the Regulations to come into effect<sup>100</sup>. In this way, they will know what they must require of the private sector. Some private sector players are likely to be ahead of the game and able to respond successfully to contracting authorities that proactively launch contracts that include extensive circular economy requirements.

We assume that the Commission will use its GPP working documents (*infra*) as a basis for drafting its delegated acts, even if detailed GPP “*criteria covering the full range of battery types covered by the Regulation do not currently exist at the EU level, although some of the key environmental impacts of batteries are addressed in other criteria sets.*”<sup>101</sup>.<sup>102</sup>

To illustrate the entry into force and application of Article 85 of the Batteries Regulation itself, we made the following diagram:

---

<sup>97</sup> Batteries Regulation, art. 85, we underline. For a comment of the evolution of the text during its adoption process, see A. SEMPLE, *op. cit.*, p. 123-125.

<sup>98</sup> Batteries Regulation, art. 89, § 2.

<sup>99</sup> Batteries Regulation, art. 96.

<sup>100</sup> See *i.a.*, Batteries Regulation, art. 7, 8, 9 and 10.

<sup>101</sup> For example, EU GPP criteria on computers SWD(2021) 57; EU GPP criteria on road transport vehicles SWD (2021) 296.

<sup>102</sup> A. SEMPLE, *op. cit.*, p. 124.

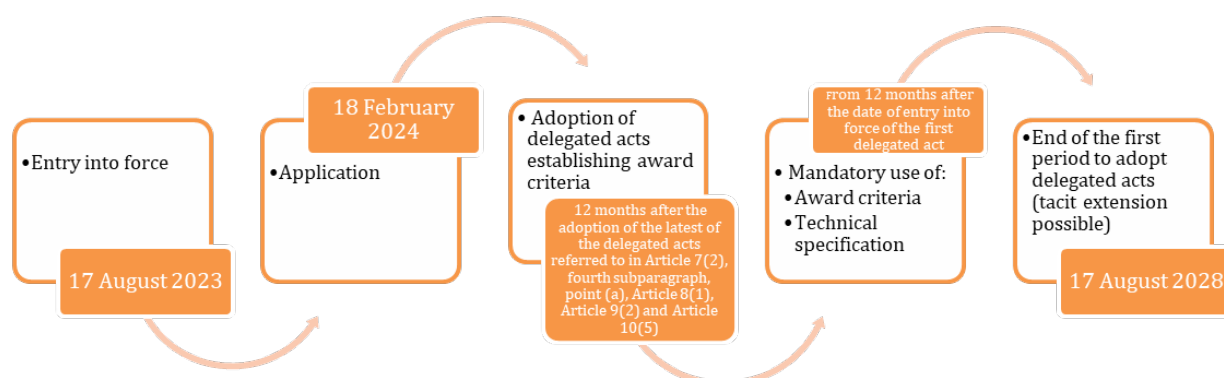


Figure 2. Diagram illustrating the entry into force and application of Article 85 of the Batteries Regulation

### 3.1.3 Packaging and packaging waste Regulation (pending)

The European Commission presents its objective through this new Regulation as follows:

*“The proposed revision of the EU legislation on Packaging and Packaging Waste has three main objectives. First, to **prevent** the generation of packaging waste: reduce it in quantity, restrict unnecessary packaging and promote reusable and refillable packaging solutions. Second, to boost high quality (‘closed loop’) **recycling**: make all packaging on the EU market recyclable in an economically viable way by 2030. And finally, to **reduce** the need for primary natural resources and create a well-functioning market for secondary raw materials, increasing the use of recycled plastics in packaging through mandatory targets.”<sup>103</sup>*

This regulation will thus clearly contribute to the transition to an even more circular economy.

On 22 November 2023, the European Parliament adopted the proposal and referred it back to the committee responsible<sup>104</sup>.

On 19 March 2024, the aforementioned committee approved the text. On 24 April 2024, the European Parliament adopted the proposal as amended. The quotations hereafter are extracted from this text.

The intention of the legislator to make GPP mandatory in this sector with the aim of transitioning to a circular economy is clearly set out in recital 174:

*“Public procurement amounts to 14 % of the Union’s GDP. In order to contribute to the objective of reaching climate neutrality, improving energy and resource efficiency and **transitioning to a circular economy** that protects public health and biodiversity, the power to adopt implementing acts should be conferred on the Commission, to require, where appropriate, contracting authorities and entities as defined in Directive*

<sup>103</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_7155](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7155) (we underline).

<sup>104</sup> [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0396\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0396(COD)&l=en).

2014/24/EU of the European Parliament and of the Council and Directive 2014/25/EU of the European Parliament and of the Council, to align their procurement with specific minimum mandatory green public procurement requirements, to be set out in the implementing acts adopted pursuant to this Regulation. Compared to a voluntary approach, mandatory requirements should ensure that the leverage of public spending to boost demand for better performing packaging is maximised. The requirements should be transparent, objective and non-discriminatory. Requirements may refer to technical specifications, selection criteria or contract performance conditions and not necessarily be required cumulative. Contracting authorities and entities should be able to, while observing the general rules laid down in the Treaty and complying with the provisions set out in this Regulation, adopt provisions which go beyond the minimum green public procurement requirements laid down in this Regulation."<sup>105</sup>

Article 63 of the Packaging and packaging waste Regulation Proposal deals specifically with GPP and provides that:

"In order to incentivize the supply and demand for environmentally sustainable packaging, the Commission shall, by ... [60 months from the date of entry into force of this Regulation], adopt implementing acts specifying minimum mandatory requirements for public contracts falling within the scope of Directive 2014/24/EU for packaging or packaged products or for services using packaging or packaged products or Directive 2014/25/EU, and awarded by contracting authorities, as defined in Article 2(1) of Directive 2014/24/EU or Article 3(1) of Directive 2014/25/EU, or contracting entities, as defined in Article 4(1) of Directive 2014/25/EU, in which the packaging or packaged products represent more than 30% of the estimated contract value or of the value of products used by the services object of the contract. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 65(3).

2. The requirements set out in the implementing acts under paragraph 1 shall apply to procedures for the awarding of public contracts referred to in that paragraph initiated 12 months or later after the date of entry into force of the respective implementing act.

3. The minimum mandatory green public procurement requirements shall be based on the requirements set out in Articles 5 to 11 and on the following elements:

- (a) the value and volume of public contracts awarded for packaging or packaged products or for the services or works using packaging or packaged products;
- (b) the economic feasibility for contracting authorities or contracting entities to buy more environmentally sustainable packaging or packaged products, without entailing disproportionate costs;
- (c) the market situation at Union level of the relevant packaging or packaged products;
- (d) the effects of the requirements on competition;
- (e) packaging waste management obligations.

4. The minimum mandatory green public procurement requirements may take the form of:

<sup>105</sup> Packaging and packaging waste Regulation Proposal, recital 174 (we underline).



- (a) **technical specifications** within the meaning of Article 42 of Directive 2014/24/EU and of Article 60 of Directive 2014/25/EU;
- (b) **selection criteria** within the meaning of Article 58 of Directive 2014/24/EU and of Article 80 of Directive 2014/25/EU; or
- (c) **contract performance conditions** within the meaning of Article 70 of Directive 2014/24/EU and of Article 87 of Directive 2014/25/EU.

Those minimum mandatory green public procurement requirements shall be developed in accordance with the principles contained in Directive 2014/24/EU and in Directive 2014/25/EU to facilitate the achievement of the objectives of this Regulation.

5. Contracting authorities and contracting entities referred to in paragraph 1 may, in duly justified cases, derogate from the mandatory requirements specified in a implementing act referred to in paragraph 1 on the grounds of public security or public health. Contracting authorities and contracting entities may also, in duly justified cases, derogate from the mandatory requirements, when those would lead to unresolvable technical difficulties."<sup>106</sup>

As the text currently stands, we will first have to wait for the Commission to adopt implementing acts before there are minimum GPP requirements. Articles 5 to 11, on which these minimum requirements will be based, currently relate to:

- requirements for substances in packaging (Article 5);
- recyclable packaging (Article 6);
- minimum recycled content in plastic packaging (Article 7);
- bio-based feedstock in plastic packaging (Article 8);
- compostable packaging (Article 9);
- packaging minimisation (Article 10);
- reusable packaging (Article 11).

It is clear from this list that the circular economy is being promoted.

It is interesting to note that these minimum GPP requirements *may* take the form of TS, SC and CPC. We assume that, since this is a faculty, there is nothing to prevent AC also being included.

Paragraph 5 introduces the “comply or explain” mechanism into this proposal. This mechanism was not present in the initial version of the text<sup>107</sup>. The cases in which derogations may be made from the principle provide contracting authorities with a degree of flexibility to deal with difficulties on the ground. It is to be hoped that they will not abuse this flexibility or develop standard clauses to derogate from it. It seems to us that in the latter cases, national courts could penalise recalcitrant contracting authorities.

In the initial version of the text of Article 62(1), one of the penalty for breaching the regulation was the twelve-months temporary exclusion from public procurements and concessions<sup>108</sup>. This sanction has been deleted from the current proposal. The process has to be monitored to see whether it can be reinstated.

<sup>106</sup> Packaging and packaging waste Regulation Proposal, art. 63 (we underline).

<sup>107</sup> Proposal for a regulation of the European Parliament and of the Council on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC, COM(2022) 677 final, 2022/0396 (COD), 30 November 2022, art. 57.

<sup>108</sup> *Ibidem*, art. 62, § 1, sub. 2, (c).

### 3.1.4 Construction Products Regulation (pending)

The European Commission presents its objective through this new Regulation as follows:

*“New product requirements will ensure that the design and manufacture of construction products is based on state of the art to make these more durable, repairable, recyclable, easier to re-manufacture.”<sup>109</sup>*

This regulation will thus also clearly contribute to the transition to an even more circular economy.

On 11 July 2023, the European Parliament adopted the proposal and referred it back to the committee responsible. On 13 February 2024, the aforementioned committee approved the text. On 10 April 2024, the European Parliament adopted the proposal as amended. The quotations hereafter are extracted from this text.

Once again, the intention of the legislator to make GPP mandatory in this sector with the aim of transitioning to a circular economy is clearly set out in recitals 99 and 100. Article 83 of the Construction Products Regulation Proposal deals specifically with GPP and provides that:

*“1 The Commission shall adopt delegated acts in accordance with Article 89 to supplement this Regulation by specifying **mandatory minimum environmental sustainability requirements** for construction products.*

*2. For procurement procedures falling within the scope of Directives 2014/24/EU or 2014/25/EU of the European Parliament and of the Council, where contracts require minimum environmental sustainability performance for construction products as regards their essential characteristics covered by harmonised technical specifications, contracting authorities and contracting entities **shall apply the mandatory minimum environmental sustainability requirements** laid down in the delegated acts referred to in paragraph 1.*

*This shall not prevent contracting authorities and contracting entities from establishing:*

*(a) more ambitious environmental sustainability requirements related to essential characteristics referred in the first subparagraph; or*

*(b) additional environmental sustainability requirements related to other essential characteristics than those referred in the first subparagraph.*

*3. Member States and the Commission shall provide technical assistance and advice to national contracting authorities in charge of public procurement on how to comply with mandatory minimum environmental sustainability requirements laid down in the delegated acts referred to in paragraph 1.*

*4. Mandatory minimum environmental sustainability requirements laid down in the delegated acts referred to in paragraph 1 for public contracts awarded by contracting authorities or contracting entities may, as appropriate to the product family or category concerned, take the form of:*

---

<sup>109</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_2013](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2013) (we underline).

(a) 'technical specifications' within the meaning of Article 42 of Directive 2014/24/EU and Article 60 of Directive 2014/25/EU;

(b) 'selection criteria' within the meaning of Article 58 of Directive 2014/24/EU and Article 80 of Directive 2014/25/EU;

(c) 'contract performance clauses' within the meaning of Article 70 of Directive 2014/24/EU and Article 87 of Directive 2014/25/EU;

(d) 'contract award criteria' within the meaning of Article 67 of Directive 2014/24/EU and of Article 82 of Directive 2014/25/EU.

5. When establishing mandatory minimum environmental sustainability requirements pursuant to paragraph 1 for public contracts, the Commission shall, in line with paragraphs 13 and 28 of the Interinstitutional Agreement of 13 April 2016 on Better Law-Making, consult experts designated by each Member State and relevant stakeholders, carry out an impact assessment and take into account at least the following criteria:

(a) the value and volume of public contracts awarded for the relevant product family or category;

(b) the environmental benefits resulting from the uptake of products in the highest two performance classes;

(c) the need to ensure sufficient demand for more environmentally sustainable products;

(d) the economic feasibility, for contracting authorities or contracting entities, of buying more environmentally sustainable products, without entailing disproportionate costs, and the availability of those products on the market;

(e) the market situation at Union level of the relevant product family or category;

(f) the effects of the requirements on competition;

(g) the impact on, and needs of, SMEs;

(h) the Members States' regulatory needs and different climate conditions.

The first impact assessment shall be launched by the Commission by 31 December 2026.

6. Contracting authorities and contracting entities may on an exceptional basis decide not to apply paragraph 1 of this Article where, after preliminary market consultation in line with Article 40 of Directive 2014/24/EU and Article 58 of Directive 2014/25/EU, it was found that:

(a) the required construction product can only be supplied by a specific economic operator, and no reasonable alternative or substitute exists;

(b) no suitable tenders or no suitable requests to participate have been submitted in response to a previous public procurement procedure;

(c) the application of paragraph 1 or the incorporation of the required construction product in construction works would oblige that contracting authority or contracting entity to incur disproportionate costs, or would result in incompatibility or technical difficulties.

Contracting authorities and contracting entities may presume that estimated contract value differences above 10 %, based on objective and transparent data, are disproportionate.

When contracting authorities and contracting entities use the derogation in this paragraph, the procurement procedure **cannot be considered to be environmentally sustainable** in relation to the construction products to which the exceptions have been applied.

*Every three years, Member States shall report to the Commission about the use of this provision, in accordance with Article 83 of Directive 2014/24/EU.*

*This paragraph shall be without prejudice to the possibility of excluding abnormally low tenders under Article 69 of Directive 2014/24/EU and Article 84 of Directive 2014/25/EU.*

*7. The Union Ecolabel and other national or regional EN ISO 14024 type I ecolabelling schemes officially recognize in accordance with Article 11 of Regulation (EC) 66/2010 of the European Parliament and of the Council may be used to demonstrate compliance with the minimum environmental sustainability requirements where such label complies with the requirements set out in Article 19 of this Regulation.”<sup>110</sup>*

Although paragraph 3 still contains a similar idea, the previous version of paragraph 1 of this article was clearer on the need to train staff in charge of GPP (“to **upskill and reskill the staff in charge of green public procurement**”<sup>111</sup>). It also stated that financial support was needed for this<sup>112</sup>. The vagueness of paragraph 3, with no mention of financial support, is disappointing, as it does not send out such a clear message.

Another difference with the previous version is the introduction of the “comply or explain” mechanism, which gives contracting authorities so much leeway that it is not certain that the Article can have any real effect.

As in its previous version, the Article provides for an impact assessment, which is always a useful step.

### 3.1.5 Ecodesign for Sustainable Products Regulation (pending)

In this section, we will only look at the Ecodesign for Sustainable Products Regulation Proposal in its GPP dimension. It will be developed from other angles later in this report.

On 12 July 2023, the European Parliament adopted the proposal and referred it back to the committee responsible. On 11 April 2024, the aforementioned committee approved the text. On 23 April 2024, the European Parliament adopted the proposal as amended. The quotations hereafter are extracted from this text. The Council adopted the act on 27 May 2024 and the final act was signed on 13 June 2024. It is now awaiting publication in the EU Official Journal.<sup>113</sup>

Once again, the intention of the legislator to make GPP mandatory in this sector with the aim of transitioning to a circular economy is clearly set out in recitals 11, 22, 23, 100 and 101.

---

<sup>110</sup> Construction Products Regulation Proposal, art. 83 (we underline).

<sup>111</sup> Amendments adopted by the European Parliament on 11 July 2023 on the proposal for a regulation of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products, amending Regulation (EU) 2019/1020 and repealing Regulation (EU) 305/2011 (COM(2022)0144 – C9-0129/2022 – 2022/0094(COD)), art 84, § 1 (we underline).

<sup>112</sup> *Ibidem*.

<sup>113</sup> [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0095\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0095(COD)&l=en).

Mandatory GPP requirements are clearly mentioned in Article 1(1), *in fine* relating to the subject matter and scope of the Ecodesign for Sustainable Products Regulation Proposal. In addition, in order to be consistent with other EU law, for the preparation of the ecodesign requirements, European Commission, according to Article 5(10), (c), shall take into account the GPP criteria.

Article 65 of the Ecodesign for Sustainable Products Regulation Proposal deals specifically with GPP and provides that:

*“1. Contracting authorities and contracting entities **shall**, in compliance with Directives 2014/24/EU or 2014/25/EU, **award public contracts complying with the minimum requirements** set out pursuant to paragraph 2 of this Article for the purchase of products covered by delegated acts pursuant to Article 4, or for works or services where those products are used for activities constituting the subject matter of those contracts (*‘minimum requirements’*).*

*2. The minimum requirements shall be set where appropriate, in order to incentivise the supply and demand for environmentally sustainable products covered by delegated acts adopted pursuant to Article 4, taking into account the value and volume of public contracts awarded for the relevant product groups and the economic feasibility for contracting authorities and contracting entities to buy more environmentally sustainable products without entailing disproportionate costs.*

*3. The Commission is empowered to set, by means of implementing acts, the minimum requirements in the form of **technical specifications, award criteria, contract performance conditions or targets.***

*The minimum requirements shall be set in relation to the product aspects addressed in the delegated act adopted pursuant to Article 4 applicable to the product groups in question, as relevant for those product groups.*

*The minimum requirements shall be based on the two highest performance classes, the highest scores or, when not available, on the best possible performance levels as set out in the delegated act adopted pursuant to Article 4 applicable to the products in question.*

***Award criteria** shall, where appropriate, include a **minimum weight, between 15% and 30% in the awarding process which enables them to have a significant impact on the outcome of the tendering procedure and which favours the selection of the most environmentally sustainable products.***

***Targets** shall require, on annual or multiannual basis, a minimum percentage of 50% of procurement conducted at the level of contracting authorities or entities, or at an aggregated national level, of the most environmentally sustainable products as referred to in the fourth subparagraph.*

*Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 73(3).”<sup>114</sup>*

The removal of paragraph 1a from this Article is disappointing. As a reminder, the paragraph 1a was added by the Amendment 201 adopted by the European Parliament in the previous version. It was clear on the need to train staff in charge of GPP (*“to **upskill and reskill the staff in charge***

---

<sup>114</sup> Ecodesign for Sustainable Products Regulation Proposal, art. 65 (we underline).

of green public procurement”<sup>115</sup>). The idea is maybe still present, but less binding as it is only in recital 87 of the Ecodesign for Sustainable Products Regulation Proposal.

Article 74, sub 3, (b) provides that “Member States shall at least be able to impose the following penalties in the event of infringements of this Regulation: (...) (b) time-limited exclusion from public procurement procedures.”<sup>116</sup>

## 3.2 GPP in EU soft law

Although European Union law does not yet have many binding instruments relating to sustainable public procurement, for several years now, GPPs have been developed for specific sectors of public purchasing. These are set out in the European Commission’s working documents and therefore belong to the category of soft law<sup>117</sup>. No fewer than fourteen working documents are currently available online<sup>118</sup>. Each document is supported by a technical report explaining the reasons behind the drafting of the clauses, and some are also accompanied by guidelines<sup>119</sup>.

### 3.2.1 Overview of GPP-criteria

For the sake of completeness, old Commission working documents that the Commission considers to be out of date are also available online<sup>120</sup>. For this reason, they are mentioned for the record and will not be analysed below.

In order to provide a practical overview of the content of the documents containing the model clauses, we have drawn up the table below.

The sub-categories are either taken as they are from the working documents or are formulated in such a way as to give as practical a view as possible of the content of the working documents.

---

<sup>115</sup> Amendments adopted by the European Parliament on 12 July 2023 on the proposal for a regulation of the European Parliament and of the Council establishing a framework for setting eco-design requirements for sustainable products and repealing Directive 2009/125/EC (COM(2022)0142 – C9-0132/2022 – 2022/0095(COD)), art 58, § 1a (we underline).

<sup>116</sup> Ecodesign for Sustainable Products Regulation Proposal, art. 74, sub 3, (b).

<sup>117</sup> H. SCHEBESTA and M.J. PLANA CASADO, *op. cit.*, p. 131.

<sup>118</sup> [https://green-business.ec.europa.eu/green-public-procurement/gpp-criteria-and-requirements\\_en](https://green-business.ec.europa.eu/green-public-procurement/gpp-criteria-and-requirements_en) and [https://circabc.europa.eu/ui/group/44278090-3fae-4515-bcc2-44fd57c1d0d1/library/f69e60f9-9dc6-4345-aa18-b9a4b6dfdbf0?p=1&n=10&sort=name\\_ASC](https://circabc.europa.eu/ui/group/44278090-3fae-4515-bcc2-44fd57c1d0d1/library/f69e60f9-9dc6-4345-aa18-b9a4b6dfdbf0?p=1&n=10&sort=name_ASC).

<sup>119</sup> It is the case for the “Office building design, construction and management” GPP, the “Road lighting and traffic signals” GPP and the “Textile products and services” GPP. See [https://green-business.ec.europa.eu/green-public-procurement/gpp-criteria-and-requirements\\_en](https://green-business.ec.europa.eu/green-public-procurement/gpp-criteria-and-requirements_en) and [https://circabc.europa.eu/ui/group/44278090-3fae-4515-bcc2-44fd57c1d0d1/library/f69e60f9-9dc6-4345-aa18-b9a4b6dfdbf0?p=1&n=10&sort=name\\_ASC](https://circabc.europa.eu/ui/group/44278090-3fae-4515-bcc2-44fd57c1d0d1/library/f69e60f9-9dc6-4345-aa18-b9a4b6dfdbf0?p=1&n=10&sort=name_ASC).

<sup>120</sup> It concerns the “Copying and graphic paper” GPP, the “Electrical and Electronic Equipment used in the Health Care Sector” GPP, the “Road transport” GPP, the “Sanitary Tapware” GPP, the “Toilets and Urinals” GPP, the “Waste Water Infrastructure” GPP and the “Water-based Heaters” GPP. For more details, see [https://green-business.ec.europa.eu/green-public-procurement/gpp-criteria-and-requirements\\_en](https://green-business.ec.europa.eu/green-public-procurement/gpp-criteria-and-requirements_en) and [https://circabc.europa.eu/ui/group/44278090-3fae-4515-bcc2-44fd57c1d0d1/library/b672914b-22d5-45fe-8bdd-deb1e9db953c?p=1&n=10&sort=name\\_ASC](https://circabc.europa.eu/ui/group/44278090-3fae-4515-bcc2-44fd57c1d0d1/library/b672914b-22d5-45fe-8bdd-deb1e9db953c?p=1&n=10&sort=name_ASC).



Certain sub-categories sometimes seemed to be repetitions. In cases of persistent doubt, we chose to keep the sub-categories separate so as not to betray the information present in the working documents.

As regards the choice of whether or not to consider the fact that the clause is present in the working documents, although in most cases this was quite clear, we sometimes had to read more carefully to determine whether to put a “yes” or a “no” in the box. As this reading can sometimes lead to interpretation, another reader may not make exactly the same choices in borderline cases. The idea behind the choices was always to have the most practical and loyal representation possible of the content of the Commission’s working documents.

As a reminder, the abbreviations used have the following meanings: SM = subject-matter; SC = selection criteria; TS = technical specifications; AC = award criteria and CPC = contract performance clause.

*Table 1. Practical overview of the documents containing the model clauses*

	Category	Subcategory	SM	SC	TS	AC	CPC
1	Road transport	Purchase, lease or rental of cars, LCVs and L-category vehicles	Yes	No	Yes	Yes	No
		Procurement of mobility services	Yes	Yes	Yes	Yes	Yes
		Purchase or lease of heavy duty vehicles	Yes	No	Yes	Yes	No
		Outsourcing of public road transport services	Yes	Yes	Yes	Yes	Yes
		Procurement of post, courier and moving services	Yes	Yes	Yes	Yes	Yes
2	Road lighting and traffic signals	Preliminary assessment	No	No	No	No	Yes
		Design and/or installation team	No	Yes	No	No	Yes
		Energy efficient lighting equipment	No	No	Yes	Yes	Yes
		Low light pollution lighting equipment	No	No	Yes	Yes	Yes
		Good quality and durable lighting equipment	No	No	Yes	Yes	Yes
		Purchase of traffic signals	No	No	Yes	Yes	No
3	Road Design, Construction and Maintenance	Design	Yes	Yes	Yes	Yes	No
		Construction	Yes	Yes	No	No	Yes
		Use of the road	No	No	Yes	No	Yes
		Maintenance and operation	No	No	Yes	No	Yes
		End of life	No	No	Yes	No	No
4	Paints, varnishes and road marking	Paints and varnishes	Yes	No	Yes	Yes	Yes
		Painting works contracts	Yes	Yes	Yes	Yes	Yes
		Road markings	Yes	No	Yes	Yes	Yes
		Road marking works contracts	Yes	Yes	Yes	Yes	Yes
5	Public space maintenance	Purchase of cleaning products	Yes	No	Yes	Yes	No
		Purchase of cleaning services	Yes	Yes	Yes	No	Yes
		Purchase of gardening products	Yes	No	Yes	Yes	No
		Purchase of gardening services	Yes	Yes	Yes	No	Yes
		Machinery products	Yes	No	Yes	Yes	No
		Machinery services	Yes	Yes	Yes	Yes	Yes
		Vehicle fleets	Yes	No	Yes	Yes	No
		Purchase of fleet services	Yes	Yes	Yes	Yes	Yes
6	Office Building Design, Construction and Management	Design	Yes	Yes	Yes	Yes	No
		Construction	Yes	Yes	Yes	Yes	Yes
		Management	No	Yes	Yes	No	Yes

7	Imaging equipment, consumables and print services	Preliminary assessment of existing fleet and procurement needs	Yes	No	No	No	Yes
		Purchase of imaging equipment	Yes	Yes	Yes	Yes	Yes
		Purchase of consumables (cartridges and containers)	Yes	No	Yes	Yes	Yes
		Purchase of print services	Yes	No	Yes	Yes	Yes
8	Furniture	Procurement of furniture refurbishment services	No	No	Yes	Yes	No
		Procurement of new furniture	No	No	Yes	Yes	Yes
		Procurement of furniture End-of-Life services	No	No	Yes	Yes	No
9	Food, catering services and vending machines	Food procurement	No	No	Yes	Yes	Yes
		Catering services	No	Yes	Yes	Yes	Yes
		Vending machines	No	No	Yes	Yes	Yes
10	Electricity		Yes	No	Yes	Yes	Yes
11	Data centres, server rooms and cloud services	Purchase of IT virtualisation or consolidation services	No	Yes	No	Yes	No
		Purchase of enterprise data centre or server room operation and maintenance services	No	Yes	No	No	Yes
		Enterprise data centre/ server room operation and maintenance	No	No	No	Yes	No
		Purchase of operation and maintenance services for enterprise data centre and/or server rooms	No	No	No	Yes	Yes
		Purchase of IT equipment with reduced environmental impact	No	Yes	Yes	Yes	No
		Construction of a new data centre	No	Yes	Yes	Yes <sup>121</sup>	Yes
		Expansion of an existing facility with new data centre and server room infrastructure	No	Yes	Yes	No	No
		Expansion of existing building with a new data centre and/or server room(s) infrastructure	No	No	Yes	No	Yes
		Purchase of consolidation services for existing distributed server rooms in a new data centre	No	Yes	No	No	No
		Consolidation of existing server rooms and/or data centres into new or existing data centres	No	No	Yes	No	Yes
		Purchase of end-of-life services for servers, data storage and network equipment	No	No	Yes	Yes <sup>122</sup>	Yes
		Purchasing of co-location services	No	No	Yes	Yes	Yes
12	Computers, monitors, tablets and smartphones	Purchasing of hosting services	No	No	Yes	Yes	Yes
		Purchasing of cloud services	No	No	Yes	No	Yes
		Service agreement associated with the supply of ICT equipment	Yes	No	Yes	No	Yes
		Supply of ICT equipment	Yes	No	Yes	No	No
		Rechargeable battery life and endurance	No	No	Yes	Yes	No
		Mobile equipment durability testing	No	No	Yes	Yes	No
		Interoperability and reusability of components	No	No	Yes	Yes	No
		Energy consumption	Yes	No	Yes	Yes	No
		Hazardous substances	Yes	Yes	Yes	Yes	No
		Design for recycling	Yes	No	Yes	Yes	No
		Procurement of end-of-life management services for all ICT devices	Yes	No	Yes	No	Yes
		Supply of refurbished/remanufactured ICT equipment	Yes	Yes	Yes	Yes	No
		Service agreement associated with the supply of refurbished/remanufactured ICT equipment	Yes	No	Yes	No	Yes

<sup>121</sup> Also for retrofitting of an existing data centre.

<sup>122</sup> But only for servers.

1 3	Indoor cleaning services		Yes	Yes	Yes	Yes	Yes
1 4	Textiles products and services	Products	Yes	Yes	Yes	Yes	No
		Services	Yes	Yes	Yes	Yes	Yes

### 3.2.2 Observations from a legal point of view

These various model clauses exist, but in practice they are insufficiently used. We hope that the table above and the tables below will enable public authorities to find clauses that can be used in their specifications.

As mentioned above, it is currently quite possible to incorporate SC, AC, TC and CPC that make it possible to make the transition to a circular economy. The GPP working documents offer models for achieving this. To ensure that the clauses are always in line with the subject-matter of the contract, the GPP working documents also usually provide models of the purpose of the contract that can be used. Generally speaking, an example that works is to simply state that the public procurement is in line with a circular economy approach in the title and the subject-matter of the contract.

What is often missing from model clauses in the GPP working documents are sanction clauses. The documents often say that it is possible to add a sanction to the clause, but do not often provide a model. In this respect, we recommend in particular that special penalties be applied for non-compliance with the clauses. For example, we recommend:

- if a circular economy manager had been required as a selection criterion for assessing the candidate's technical and professional capacity, a clause could be included stating that if the manager is changed without the agreement of the contracting authority, or if there is no longer one, there will be a special penalty per day and per person;
- if the successful bidder had undertaken to have a certain percentage of materials from the circular economy and that this had been valorised *via* the award criteria, a penalty may be provided for based on the missing percentage and/or certain thresholds;
- if certain reports (waste management inventory, re-use balance sheet, etc.) had been required in the technical specifications, it is perfectly possible to provide for a penalty if these documents are missing or persistently incomplete; *etc.*

As part of a circular economy approach to public procurement, review clauses<sup>123</sup> are also a particularly useful tool. There is also a lack of examples of such clauses in the GPP working documents. An example of a review clause, which must comply with the conditions of Article 72, par. 1(a) of the Classic Directive<sup>124</sup>, would be to provide for the following possibility. If an opportunity arises to re-use materials other than those initially provided for in the technical specifications and/or the successful bidder's offer, one of the parties wishing to propose this to the other informs it in accordance with a pre-established procedure. If the quality is equivalent to new materials, it could be perfectly possible for the contracting authority to pay the price of new materials as set out in the initial offer, to the advantage of the contractor, in order to

<sup>123</sup> Classic Directive, art. 72; Utilities Directive, art. 89; Concession Directive, art. 43.

<sup>124</sup> Utilities Directive, art. 89, par. 1(a); Concession Directive, art. 43, par. 1(a).

encourage re-use and thus promote circular economy. If the materials are not of equivalent quality, a price fixing procedure can be included in the review clause.

In the same way, if the successful bidder goes well beyond the percentage of materials from the circular economy to which it had committed itself, the contracting authority could provide for the opposite of a penalty, *i.e.* a bonus. This could also be mentioned on the certificate of performance, mainly in the case of works public procurements. This type of clause is not included in the GPP working documents either.

### 3.2.3 Clauses implementing the circular economy

The tables below provide a quick overview of the model clauses that exist and can be used to create public procurement that are part of the circular economy. We have chosen to sort the model clauses that we consider relevant according to the 9Rs strategy set out above in the report. Once again, the choice to classify in one R rather than another does not exclude the clause from serving other R's of the strategy. We have classified the clauses in the category that seemed most relevant to us in order to provide the reader with a quick read.

Each clause has, in principle, a unique number in the GPP working document or at least by subcategory of the GPP working document. We have systematically referred to this unique number, which also indicates the type of clause (SM, SC, AC, TS or CPC). If relevant, we also have mentioned in which subcategory is the clause. This makes it easy to find the clause in the corresponding GPP working document. It should be noted that the GPP working documents are divided into two columns: one column for the basic clauses, which are simpler to implement and check, and another containing equivalent clauses for the ambitious contracting authorities who want to go a step further. In this case, the unique number refers to the two clauses, which are separated into two columns, but are all in the same row.

In some documents, the clauses are not as clearly identified. In this case, we have added a column identifying the type of clause so that the reader has the information they need to find the clause.

It should be noted that the clause number is valid regardless of the language of the document. The abbreviation of the clause type (SM, SC, AC, ST or CPC) simply needs to be translated into the desired language.

#### 3.2.3.1 Road transport

*Table 2. Overview of model clauses in road transport*

Circularity	Clause	Subcategory
R2: Reduce	TS5 Minimum warranty of the battery	Purchase, lease or rental of cars, LCVs and L-category vehicles
R2: Reduce	AC6 Extended warranty	Purchase, lease or rental of cars, LCVs and L-category vehicles

#### 3.2.3.2 Road lightning and traffic signals

Table 3. Overview of model clauses in road lightning and traffic signals

Circularity	Clause	Subcategory
R0: Refuse	CPC1. Preliminary assessment of existing lighting infrastructure and installation of dedicated metering	Preliminary assessment
R1: Rethink	TS13. Reparability	Good quality and durable lighting equipment
R2: Reduce	TS12. Product lifetime, spare parts and warranty	Good quality and durable lighting equipment
R2: Reduce	AC3. Extended Warranty	Good quality and durable lighting equipment
R2: Reduce	TS1. Life cycle cost (LCC)	Purchase of traffic signals
R2: Reduce	TS2. Product lifetime, spare parts and warranty	Purchase of traffic signals
R2: Reduce	AC1. Lowest life cycle cost	Purchase of traffic signals
R2: Reduce	AC2. Extended warranty	Purchase of traffic signals
R4: Repair	TS13. Reparability	Good quality and durable lighting equipment
R4: Repair	TS12. Product lifetime, spare parts and warranty	Good quality and durable lighting equipment
R6: Remanufacture	CPC7. Commitment to waste recovery and transport to suitable sites	Good quality and durable lighting equipment
R7: Reproduce	CPC7. Commitment to waste recovery and transport to suitable sites	Good quality and durable lighting equipment
R8: Recycle	TS11. Waste recovery	Good quality and durable lighting equipment
R8: Recycle	CPC7. Commitment to waste recovery and transport to suitable sites	Good quality and durable lighting equipment
R9: Recover	TS11. Waste recovery	Good quality and durable lighting equipment
R9: Recover	CPC7. Commitment to waste recovery and transport to suitable sites	Good quality and durable lighting equipment

### 3.2.3.3 Road design, construction and maintenance

Table 4. Overview of model clauses in road design, construction and maintenance

Circularity	Clause	Subcategory	Type
R1: Rethink	B14. LCA performance of the main road elements	Design	AC
R1: Rethink	C1. Commissioning of the road construction	Construction	CPC
R2: Reduce	B11. Performance requirements for durability of pavement	Design	TS
R3: Reuse	A1. Competencies of the project manager and design team	Design	SC
R3: Reuse	A2. Competencies of the main construction contractor	Design	SC
R3: Reuse	B2. Excavated Materials and Soil Management Plan	Design	TS
R3: Reuse	B14. LCA performance of the main road elements	Design	AC
R3: Reuse	B15. Incorporation of recycled content	Design	AC
R3: Reuse	C5. Commissioning of the Excavated Materials and Soil Management Plan	Construction	CPC
R3: Reuse	E2. Demolition Waste Audit and Management Plan	Maintenance and operation	TS
R3: Reuse	F1. Demolition waste audit and management plan	End of life	TS
R4: Repair	B11. Performance requirements for durability of pavement	Design	TS
R4: Repair	B12. Maintenance and Rehabilitation (M&R) Plan	Design	TS
R4: Repair	D3. Commissioning of the Maintenance and Rehabilitation (M&R) Plan	Use of the road	CPC
R4: Repair	E4. Commissioning of the road maintenance	Maintenance and operation	CPC
R8: Recycle	A1. Competencies of the project manager and design team	Design	SC
R8: Recycle	A2. Competencies of the main construction contractor	Design	SC
R8: Recycle	B2. Excavated Materials and Soil Management Plan	Design	TS
R8: Recycle	B14. LCA performance of the main road elements	Design	AC



R8: Recycle	B15. Incorporation of recycled content	Design	AC
R8: Recycle	C3. Incorporation of recycled content	Construction	CPC
R8: Recycle	C5. Commissioning of the Excavated Materials and Soil Management Plan	Construction	CPC
R8: Recycle	E2. Demolition Waste Audit and Management Plan	Maintenance and operation	TS
R8: Recycle	E5. Incorporation of recycled content	Maintenance and operation	CPC
R8: Recycle	F1. Demolition waste audit and management plan	End of life	TS

### 3.2.3.4 *Paints, varnishes and road marking*

Table 5. Overview of model clauses in paints, varnishes and road marking

<b>Circularity</b>	<b>Clause</b>	<b>Subcategory</b>	<b>Type</b>
R2: Reduce	2.1 Spreading rate	Paints and varnishes	TS
R2: Reduce	2.6 Packaging	Paints and varnishes	TS
R2: Reduce	1. Competencies of the tenderer	Painting works contracts	SC
R2: Reduce	2. Management of waste and unused paint	Painting works contracts	TS
R2: Reduce	2. Management of waste and unused road marking material	Road marking works contracts	TS
R2: Reduce	2.3 Weathering resistance (only outdoor paints)	Paints and varnishes	TS
R2: Reduce	2.4 Fungal and algal resistance of the film (only outdoor paints)	Paints and varnishes	TS
R2: Reduce	2.5 Abrasion resistance of floor paints	Paints and varnishes	TS
R2: Reduce	3. Quality and durability of road marking system	Road markings	TS
R3: Reuse	1. Competencies of the tenderer	Painting works contracts	SC
R3: Reuse	2. Reuse and/or recycling of waste and unused paint	Painting works contracts	AC
R3: Reuse	1. Management of paint handling	Painting works contracts	CPC
R3: Reuse	1. Competencies of the tenderer	Road marking works contracts	SC

R3: Reuse	1. Management of road marking usage and application	Road marking works contracts	CPC
R8: Recycle	1. Competencies of the tenderer	Painting works contracts	SC
R8: Recycle	2. Management of waste and unused paint	Painting works contracts	TS
R8: Recycle	2. Reuse and/or recycling of waste and unused paint	Painting works contracts	AC
R8: Recycle	1. Management of paint handling	Painting works contracts	CPC
R8: Recycle	2. Glass beads – Recycled glass content	Road markings	AC
R8: Recycle	1. Competencies of the tenderer	Road marking works contracts	SC
R8: Recycle	2. Management of waste and unused road marking material	Road marking works contracts	TS
R8: Recycle	1. Management of road marking usage and application	Road marking works contracts	CPC

### 3.2.3.5 Public space maintenance

Table 6. Overview of model clauses in public space maintenance

Circularity	Clause	Subcategory
R2: Reduce	TS5. Water recirculation systems	Vehicle fleets
R2: Reduce	SC1. Competences of the tenderer	Common criteria
R2: Reduce	TS1. Environmental management measures	Common criteria
R2: Reduce	CPC1. Staff training	Common criteria
R3: Reuse	TS2. Plant containers and packaging	Purchase of gardening products
R4: Repair	TS3. Vehicle tyres – rolling resistance	Vehicle fleets
R4: Repair	AC2. Vehicle tyres – retreaded tyres	Vehicle fleets
R4: Repair	CPC2. Vehicle tyres – rolling resistance	Purchase of vehicle fleets services
R8: Recycle	AC1. Compostable bin bags	Purchase of cleaning products
R8: Recycle	CPC2. Graffiti removal operation	Purchase of cleaning services
R8: Recycle	TS2. Plant containers and packaging	Purchase of gardening products
R8: Recycle	CPC1. Watering practices	Purchase of gardening services
R8: Recycle	CPC2. Waste management	Purchase of gardening services
R8: Recycle	AC4. Water recirculation systems	Vehicle fleets

R8: Recycle	AC4. Water recirculation	Purchase of vehicle fleets services
R8: Recycle	CPC1. Staff training	Common criteria

### 3.2.3.6 Office building design, construction and management

Table 7. Overview of model clauses in office building design, construction and management

Circularity	Clause	Subcategory	Type
R1: Rethink	A1. Competencies of the project manager	Design	SC
R1: Rethink	B10.1 Performance of the main building elements: Carrying out of a Life Cycle Assessment (LCA)	Design	AC
R3: Reuse	B10.2 Incorporation of recycled content in concrete and masonry	Design	AC
R3: Reuse	C1. Demolition waste audit and management plan	Construction	TS
R3: Reuse	D3. Site waste management	Construction	TS
R3: Reuse	D8. Site waste management	Construction	CPC
R3: Reuse	G3. Waste management system	Management	TS
R3: Reuse	G5. Waste management system	Management	CPC
R8: Recycle	A3. Competencies of the main construction contractor and specialist contractors.	Design	SC
R8: Recycle	B5. Recyclable waste storage	Design	TS
R8: Recycle	B10.2 Incorporation of recycled content in concrete and masonry	Design	AC
R8: Recycle	C1. Demolition waste audit and management plan	Construction	TS
R8: Recycle	D3. Site waste management	Construction	TS
R8: Recycle	D6. Incorporation of recycled content	Construction	CPC
R8: Recycle	D8. Site waste management	Construction	CPC
R8: Recycle	F7. Recyclable waste storage	Construction	CPC
R8: Recycle	G3. Waste management system	Management	TS
R8: Recycle	G5. Waste management system	Management	CPC

R9: Recover	C1. Demolition waste audit and management plan	Construction	TS
R9: Recover	D3. Site waste management	Construction	TS

### 3.2.3.7 Imaging equipment, consumables and print services

Table 8. Overview of model clauses in imaging equipment, consumables and print services

Circularity	Clause	Subcategory
R0: Refuse	Preliminary assessment of existing fleet and procurement needs	Preliminary assessment of existing fleet and procurement needs
R0: Refuse	CPC1 Preliminary assessment of existing fleet and procurement needs	Preliminary assessment of existing fleet and procurement needs
R1: Rethink	TS8 (b) Design for disassembly and repair	The purchase of imaging equipment
R1: Rethink	TS8 (c) Design for recycling	The purchase of imaging equipment
R2: Reduce	TS2 Duplex imaging capability	The purchase of imaging equipment
R2: Reduce	TS16 Cartridges/containers page-yield	The purchase of consumables (cartridges and containers)
R2: Reduce	TS17 Consumable mass resource efficiency	The purchase of consumables (cartridges and containers)
R2: Reduce	AC5 Electrophotographic consumables mass resource efficiency	The purchase of consumables (cartridges and containers)
R2: Reduce	TS26 User instructions for green performance management	Horizontal EU GPP criteria
R3: Reuse	TS4 Capability to use recycled paper	The purchase of imaging equipment
R3: Reuse	TS13 Firmware update control	The purchase of imaging equipment
R3: Reuse	AC3 End-of-life	The purchase of imaging equipment
R3: Reuse	CPC2 Reporting on reuse/recycle activities of imaging equipment	The purchase of imaging equipment
R3: Reuse	TS19 Design for reuse/remanufacturing	The purchase of consumables (cartridges and containers)
R3: Reuse	TS21 Take-back system for cartridges and containers and WEEE registration	The purchase of consumables (cartridges and containers)
R3: Reuse	AC6 Facilitating reusability/remanufacturability	The purchase of consumables (cartridges and containers)
R3: Reuse	AC7 End-of-life management of cartridges	The purchase of consumables (cartridges and containers)
R3: Reuse	CPC4 Reporting on reuse/recycle activities of consumables	The purchase of consumables (cartridges and containers)

R3: Reuse	TS22(a) Commitment to reuse of imaging equipment	The purchase of print services
R3: Reuse	AC8 Supply of reused/remanufactured cartridges and containers	The purchase of print services
R3: Reuse	CPC5 Reporting on supplied consumables	The purchase of print services
R3: Reuse	CPC7 Provision of environmental information during service contract	The purchase of print services
R3: Reuse	TS26 User instructions for green performance management	Horizontal EU GPP criteria
R4: Repair	TS8 (a) Spare parts availability	The purchase of imaging equipment
R4: Repair	TS8 (b) Design for disassembly and repair	The purchase of imaging equipment
R4: Repair	TS14 Warranty (TS14 Warranty and service agreements)	The purchase of imaging equipment
R4: Repair	AC2 Long warranties	The purchase of imaging equipment
R4: Repair	TS22(b) Commitment to repair of imaging equipment	The purchase of print services
R4: Repair	TS25(b) Guaranteed provision of spare parts during contract	Horizontal EU GPP criteria
R5: Refurbish	TS14 Warranty (TS14 Warranty and service agreements)	The purchase of imaging equipment
R6: Remanufacture	TS5 Capability to use remanufactured cartridges and containers	The purchase of imaging equipment
R6: Remanufacture	TS13 Firmware update control	The purchase of imaging equipment
R6: Remanufacture	TS14 Warranty (TS14 Warranty and service agreements)	The purchase of imaging equipment
R6: Remanufacture	AC4 Supply of remanufactured cartridges/containers	The purchase of imaging equipment
R6: Remanufacture	CPC3 Reporting on supplied consumables	The purchase of imaging equipment
R6: Remanufacture	TS19 Design for reuse/remanufacturing	The purchase of consumables (cartridges and containers)
R6: Remanufacture	AC6 Facilitating reusability/remanufacturability	The purchase of consumables (cartridges and containers)
R6: Remanufacture	CPC4 Reporting on reuse/recycle activities of consumables	The purchase of consumables (cartridges and containers)

R6: Remanufacture	AC8 Supply of reused/remanufactured cartridges and containers	The purchase of print services
R6: Remanufacture	CPC5 Reporting on supplied consumables	The purchase of print services
R6: Remanufacture	CPC6 Provision of consumable use information	The purchase of print services
R6: Remanufacture	CPC7 Provision of environmental information during service contract	The purchase of print services
R8: Recycle	TS4 Capability to use recycled paper	The purchase of imaging equipment
R8: Recycle	TS6 Reduced number of materials	The purchase of imaging equipment
R8: Recycle	TS7 Information on postconsumer recycled plastic used	The purchase of imaging equipment
R8: Recycle	TS8 (c) Design for recycling	The purchase of imaging equipment
R8: Recycle	AC3 End-of-life	The purchase of imaging equipment
R8: Recycle	CPC2 Reporting on reuse/recycle activities of imaging equipment	The purchase of imaging equipment
R8: Recycle	TS21 Take-back system for cartridges and containers and WEEE registration	The purchase of consumables (cartridges and containers)
R8: Recycle	AC7 End-of-life management of cartridges	The purchase of consumables (cartridges and containers)
R8: Recycle	CPC4 Reporting on reuse/recycle activities of consumables	The purchase of consumables (cartridges and containers)
R8: Recycle	CPC7 Provision of environmental information during service contract	The purchase of print services
R8: Recycle	TS26 User instructions for green performance management	Horizontal EU GPP criteria
R9: Recover	CPC7 Provision of environmental information during service contract	The purchase of print services

### 3.2.3.8 Furniture

Circularity	Clause	Subcategory
R3: Reduce	TS4: Refurbished furniture product warranty	Procurement of furniture refurbishment services
R3: Reduce	AC4: Extended warranty periods	Procurement of furniture refurbishment services
R3: Reuse	TS6 / 9: Design for disassembly and repair	Procurement of new furniture



R3: Reuse	TS1: Collection and reuse of existing furniture stock	Procurement of furniture End-of-Life services
R3: Reuse	AC1: Improvement in the re-use targets	Procurement of furniture End-of-Life services
R4: Repair	TS1: Refurbishment requirements	Procurement of furniture refurbishment services
R4: Repair	TS2: Durable upholstery coverings	Procurement of furniture refurbishment services
R4: Repair	TS6 / 9: Design for disassembly and repair	Procurement of new furniture
R4: Repair	TS7: Product warranty and spare parts	Procurement of new furniture
R4: Repair	AC3 / 5: Extended warranty periods	Procurement of new furniture
R5: Refurbish	TS1: Refurbishment requirements	Procurement of furniture refurbishment services
R5: Refurbish	TS4: Refurbished furniture product warranty	Procurement of furniture refurbishment services
R5: Refurbish	AC4: Extended warranty periods	Procurement of furniture refurbishment services
R8: Recycle	TS1: Collection and reuse of existing furniture stock	Procurement of furniture End-of-Life services

### 3.2.3.9 Food catering services and vending machines

Table 9. Overview of model clauses in food catering services and vending machines

Circularity	Clause	Subcategory
R1: Rethink	SC1. Competences of the tenderer	Catering services
R1: Rethink	TS3. Food and beverage waste prevention	Catering services
R1: Rethink	TS 4. Other waste: prevention, sorting and disposal	Catering services
R1: Rethink	CPC4. Staff training	Catering services
R2: Reduce	SC1. Competences of the tenderer	Catering services
R2: Reduce	TS3. Food and beverage waste prevention	Catering services
R2: Reduce	TS 4. Other waste: prevention, sorting and disposal	Catering services
R2: Reduce	TS 5.1 Disposable items	Catering services
R2: Reduce	TS8. Environmental management measures and practices	Catering services
R2: Reduce	CPC3. Environmental management measures and practices	Catering services
R2: Reduce	CPC4. Staff training	Catering services
R2: Reduce	TS 5.1 Chemical products and consumable goods	Catering services
R2: Reduce	TS4. Reusable cups	Vending machines
R3: Reuse	SC1. Competences of the tenderer	Catering services

R3: Reuse	TS3. Food and beverage waste prevention	Catering services
R3: Reuse	TS 5.1 Disposable items	Catering services
R3: Reuse	CPC4. Staff training	Catering services
R3: Reuse	CPC5. Food and beverage redistribution	Catering services
R3: Reuse	TS4. Reusable cups	Vending machines
R8: Recycle	SC1. Competences of the tenderer	Catering services
R8: Recycle	TS3. Food and beverage waste prevention	Catering services
R8: Recycle	TS 4. Other waste: prevention, sorting and disposal	Catering services
R8: Recycle	CPC4. Staff training	Catering services
R8: Recycle	TS 4.2. Waste sorting and disposal	Catering services

### **3.2.3.10 Electricity**

There was no relevant clause for the circular economy in that short working document.

### **3.2.3.11 Data centres, server rooms and cloud services**

*Table 10. Overview of model clauses for data centres, server rooms and cloud services*

<b>Circularity</b>	<b>Clause</b>
R3: Reuse	Purchase of end-of-life services for servers, data storage and network equipment
R3: Reuse	TS4 End-of-life management of servers, data storage and network equipment
R3: Reuse	Purchase of end-of-life services for servers
R3: Reuse	AC4 End-of-life management of servers
R3: Reuse	Purchase of end-of-life services for servers, data storage and network equipmen
R3: Reuse	CPC3 Reporting on the end-destination of servers, data storage and network equipment
R4: Repair	TS3 Design for the repair and upgrading of servers and data storage
R5: Refurbish	TS3 Design for the repair and upgrading of servers and data storage
R8: Recycle	Purchase of end-of-life services for servers, data storage and network equipment
R8: Recycle	TS4 End-of-life management of servers, data storage and network equipment
R8: Recycle	Purchase of end-of-life services for servers
R8: Recycle	AC4 End-of-life management of servers
R8: Recycle	Purchase of end-of-life services for servers, data storage and network equipmen
R8: Recycle	CPC3 Reporting on the end-destination of servers, data storage and network equipment

### 3.2.3.12 Computers, monitors, tablets and smartphones

Table 11. Overview of model clauses for computers, monitors, tablets and smartphones

Circularity	Clause	Subcategory
R1: Rethink	TS4 Design for reparability	Supply of ICT equipment
R2: Reduce	TS9 Battery protection software	Rechargeable battery life and endurance
R2: Reduce	TS10 Intelligent charging	Rechargeable battery life and endurance
R2: Reduce	AC1 Further rechargeable battery endurance	Rechargeable battery life and endurance
R2: Reduce	TS14 Standardised port	Interoperability and reusability of components
R2: Reduce	TS15 Standardised external power supply	Interoperability and reusability of components
R2: Reduce	AC4 ICT Equipment without accessories	Interoperability and reusability of components
R2: Reduce	TS23 Secure computer collection, sanitisation, re-use and recycling	Procurement of end-of-life management services for all ICT devices
R2: Reduce	TS1 Provision of an extended service agreement	Service agreement associated with the supply of ICT equipment
R2: Reduce	TS6 Rechargeable battery endurance	Rechargeable battery life and endurance
R3: Reuse	TS14 Standardised port	Interoperability and reusability of components
R3: Reuse	TS15 Standardised external power supply	Interoperability and reusability of components
R3: Reuse	TS17 Backward compatibility: adapters	Interoperability and reusability of components
R3: Reuse	AC4 ICT Equipment without accessories	Interoperability and reusability of components
R3: Reuse	CPC2 Reporting on the end destination of ICT equipment	Procurement of end-of-life management services for all ICT devices
R3: Reuse	TS26 Information on rechargeable battery endurance	Supply of refurbished/remanufactured ICT equipment
R3: Reuse	AC12 Standardised external power supply	Supply of refurbished/remanufactured ICT equipment
R3: Reuse	TS23 Secure computer collection, sanitisation, re-use and recycling	Procurement of end-of-life management services for all ICT devices
R3: Reuse	SC2 Quality of refurbishment/remanufacture process	Supply of refurbished/remanufactured ICT equipment
R3: Reuse	TS25 Rechargeable battery endurance	Supply of refurbished/remanufactured ICT equipment
R3: Reuse	AC11 Further rechargeable battery endurance	Supply of refurbished/remanufactured ICT equipment

R4: Repair	TS1 Provision of an extended service agreement	Service agreement associated with the supply of ICT equipment
R4: Repair	TS2 Continued availability of spare parts	Service agreement associated with the supply of ICT equipment
R4: Repair	CPC1 Service agreement	Service agreement associated with the supply of ICT equipment
R4: Repair	TS4 Design for reparability	Supply of ICT equipment
R4: Repair	TS23 Secure computer collection, sanitisation, re-use and recycling	Procurement of end-of-life management services for all ICT devices
R4: Repair	AC13 External power supply: detachable cables	Supply of refurbished/remanufactured ICT equipment
R4: Repair	TS28 Provision of an extended service agreement	Service agreement associated with the supply of refurbished/remanufactured ICT equipment
R4: Repair	CPC3 Service agreement	Service agreement associated with the supply of refurbished/remanufactured ICT equipment
R4: Repair	SC2 Quality of refurbishment/remanufacture process	Supply of refurbished/remanufactured ICT equipment
R5: Refurbish	TS1 Provision of an extended service agreement	Service agreement associated with the supply of ICT equipment
R5: Refurbish	SC2 Quality of refurbishment/remanufacture process	Supply of refurbished/remanufactured ICT equipment
R5: Refurbish	TS24 Refurbished/remanufactured product warranty	Supply of refurbished/remanufactured ICT equipment
R5: Refurbish	TS28 Provision of an extended service agreement	Service agreement associated with the supply of refurbished/remanufactured ICT equipment
R4: Refurbish	SC2 Quality of refurbishment/remanufacture process	Supply of refurbished/remanufactured ICT equipment
R6: Remanufacture	TS2 Continued availability of spare parts	Service agreement associated with the supply of ICT equipment
R6: Remanufacture	SC2 Quality of refurbishment/remanufacture process	Supply of refurbished/remanufactured ICT equipment
R6: Remanufacture	TS24 Refurbished/remanufactured product warranty	Supply of refurbished/remanufactured ICT equipment
R6: Remanufacture	TS28 Provision of an extended service agreement	Service agreement associated with the supply of refurbished/remanufactured ICT equipment

R6: Remanufacture	CPC3 Service agreement	Service agreement associated with the supply of refurbished/remanufactured ICT equipment
R8: Recycle	TS22 Marking of plastic casings, enclosures and bezels	Design for recycling
R8: Recycle	AC9 Recyclability of plastic casings, enclosures and bezels - separable inserts and fasteners	Design for recycling
R8: Recycle	AC10 Recyclability of plastic casings, enclosures and bezels - paints and coatings	Design for recycling
R8: Recycle	TS23 Secure computer collection, sanitisation, re-use and recycling	Procurement of end-of-life management services for all ICT devices
R8: Recycle	CPC2 Reporting on the end destination of ICT equipment	Procurement of end-of-life management services for all ICT devices

### 3.2.3.13 Indoor cleaning services

Table 12. Overview of model clauses for indoor cleaning services

Circularity	Clause
R2: Reduce	TS3 Environmental management measures and practices
R2: Reduce	CPC2 Staff training
R3: Reuse	CPC2 Staff training
R8: Recycle	TS3 Environmental management measures and practices
R8: Recycle	CPC2 Staff training

### 3.2.3.14 Textile products and services

Table 13. Overview of model clauses for textile products and services

Circularity	Clause	Subcategory
R2: Reduce	TS7. Durability standards	Textile products
R2: Reduce	SC1. Providers of textile services	Textile services
R2: Reduce	TS2. Maintenance of the textile assets	Textile services
R3: Reuse	AC3. Polyester recycling	Textile products
R3: Reuse	AC5. Design for reuse and recycling	Textile products
R3: Reuse	SC1. Providers of textile services	Textile services
R3: Reuse	TS3. Take-back system	Textile services
R3: Reuse	CPC2. Take-back system	Textile services
R4: Repair	TS8. Availability of parts and accessories	Textile products
R4: Repair	SC1. Providers of textile services	Textile services
R4: Repair	TS2. Maintenance of the textile assets	Textile services
R4: Repair	TS8. Availability of parts and accessories	Textile products
R8: Recycle	TS4. Polyester recycled content	Textile products
R8: Recycle	AC2. Polyester and polyamide (nylon) recycled content	Textile products

R8: Recycle	AC3. Polyester recycling	Textile products
R8: Recycle	AC5. Design for reuse and recycling	Textile products
R8: Recycle	SC1. Providers of textile services	Textile services
R8: Recycle	TS3. Take-back system	Textile services
R8: Recycle	CPC2. Take-back system	Textile services



# 4 Towards a more circular purchasing

The SPI has already been presented in the “*Research Report 1. 2022-23 – Lifespan extension of products. European & national initiatives*” written by C. Borucki in collaboration with D. Gruyaert, B. Keirsbilck and E. Terry, under the title “*5.4 Sustainable product initiatives (ecodesign)*”<sup>125</sup>. We therefore refer the reader to that report for a general presentation of the SPI and will limit ourselves in this report to highlighting the few points relevant to our reasoning.

The SPI initiative, “*which will revise and replace the Ecodesign Directive and propose additional legislative measures as appropriate, aims to make products placed on the EU market more sustainable.*”

*Consumers, the environment and the climate will benefit from products that are more durable, reusable, repairable, recyclable, and energy-efficient. The initiative will also address the presence of harmful chemicals in products such as:*

- *electronics & ICT equipment*
- *textiles*
- *furniture*
- *steel, cement & chemicals.*”<sup>126</sup>

This resulted in the new eco-design regulation proposed by the European Commission in March 2022 (Ecodesign for Sustainable Products Regulation (ESPR)).<sup>127</sup>

The scope of the Ecodesign Regulation is extended significantly compared to the Ecodesign Directive. Most products handled within the Union will therefore be subject to this regulation and the implementing regulations, delegated acts, that will be adopted. The regulation is intended to include the new requirements for eco-design of products to improve their durability, reusability, upgradability, recyclability and repairability, improve refurbishment and maintenance capabilities, address the presence of hazardous chemicals in products increasing their energy and resource efficiency, reducing the expected amount of waste generated and increasing the content of recycled materials in products, without compromising their performance and safety, enabling remanufacturing and high-quality recycling and reducing carbon and ecological footprints.<sup>128</sup> Quite a lot, in essence, this data should also be included in a digital product passport, so that products can be marked and identified and that it is possible

---

<sup>125</sup> C. BORUCKI, “Research Report 1. 2022-23 – Lifespan extension of products. European & national initiatives”, *CE center – Vlaanderen circulaire*, p. 15-68 (to be published).

<sup>126</sup> [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative_en).

<sup>127</sup> [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0095\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0095(COD)&l=en).

<sup>128</sup> Ecodesign for Sustainable Products Regulation Proposal, recital 6.

to retain the data relevant to their circularity and sustainability.<sup>129</sup> The strategy behind the digital product passport is that information on the environmental sustainability of products can be transferred to other companies operating in the product value chain so that they can help improve environmental performance, extend the life of products, and so on. It also provides for better information for consumers. A labelling obligation is provided for so that consumers can determine whether the choice for a certain product is indeed a sustainable choice. This will include information on carbon footprint and environmental footprint.<sup>130</sup> Through these regulations, it is mainly the company itself that is affected. It must ensure that the products it offers comply with these regulations.

This therefore offers certain possibilities and advantages in the field of public procurement and GPP in particular. The regulation itself also mentions them. One of the advantages is that, with the introduction of the product passport, it will become easier for the contracting authority to verify whether a specific bidder's bid complies with the requirements set out in the tender documents. We mentioned above that, in practice, it is now often necessary to rely on mere assertions by the tenderer and that it is not easy for the contracting authority to effectively determine whether or not a particular solution complies. Being able to make use of the opportunities contained in the Sustainable Product Initiative will therefore have to lead to more transparency in public procurement in general. Indeed, a contracting authority has more adequate, objectively verified information that can be used in justifying whether or not a tenderer's offer meets the predefined requirements in the specifications.

Moreover, whereas the current framework rather assumed that contracting authorities have the freedom to use or not use GPP criteria, the implementing regulations will also include mandatory criteria or targets that will have to be complied with by contracting authorities. These mandatory criteria will be adopted by the European Commission in the implementing regulations, the delegated acts, cited above. The mandatory criteria may take the form of mandatory technical specifications, selection criteria, award criteria, contract performance clauses, or targets, as appropriate.

Such mandatory criteria or targets will ensure that the leverage of public spending to boost demand for better performing products is maximised in all Member States. The recitals further clarify that the criteria or targets set by delegated acts for specific product groups should be complied with not only when directly procuring those products in public supply contracts but also in public works or public services contracts where those products will be used for activities constituting the subject matter of those contracts.

While mandatory criteria are imposed, there is also room for member states (and even contracting authorities themselves) to impose additional obligations, as long as they are, however, in line with the generally applicable principles and principles of public procurement law.

Currently, this regulation is pending before the European Parliament and the Council also has yet to give its approval.

---

<sup>129</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Making sustainable products the norm", COM(2022) 140.

<sup>130</sup> Ecodesign for Sustainable Products Regulation Proposal, art. 7.

In a way, it is regrettable that although in the aforementioned initiatives and regulations we have examined in a chapter *supra* there is always the link to public procurement, there is no general framework bringing this together. A public procurement codex, so to speak. Whereas in the regulations discussed here the link is often made to GPP and in certain cases effective obligations are also imposed, it is already advisable to include this in a renewed version of the procurement directives. In that revised version, a more complete framework can then be sought, where what can be procured is also integrated into the framework of how it should be procured.

In that way, even if the CSDDD has less impact on the public procurement law itself and has therefore been only mentioned above, a part of its recital 92 is worth noting:

*“To ensure consistency of Union legislation and support implementation, the Commission should consider whether it is relevant to update any of those directives, in particular with regards to the requirements and measures Member States are to adopt to ensure compliance with the sustainability and due diligence obligations throughout procurement and concession processes.”<sup>131</sup>*

Recently, the Council of the EU requested *“from the Commission to undertake, without delay, an in-depth analysis of the existing legislative framework on public procurement (including Directives 2014/23/EU, 2014/24/EU, and 2014/25/EU) to assess whether a revision is necessary during the 2024-2029 term in light of the major commitments that the EU made in order to achieve its sustainable development objectives by 2030; (...) consider[ed] that a thorough examination is needed in this analysis on the interplay between the Directives and the multiplicity of specific sectoral legal acts containing procurement provisions; request[ed] from the Commission to examine in its in-depth analysis the need for streamlining and alignment of these initiatives in the interest of finding a balance among the different objectives, greater legal certainty, overall coherence, and, where appropriate, the reduction of regulatory burden and costs,”<sup>132</sup>.*

So it seems that a reform of the European procurement directives is indeed being considered, which is to be welcomed. Hopefully, the recommendation to also link back more with the other regulations and even integrate them into the new procurement directives will also be taken into account at that point.

---

<sup>131</sup> Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, final act signed on 13 June 2024 (awaiting publication in the EU Official Journal), recital 92 (we underline).

<sup>132</sup> Council Conclusions on the European Court of Auditors’ Special Report Nr 28/2023: Public Procurement in the EU: Less Competition for Contracts Awarded for Works, Goods, and Services in the 10 Years up to 2021, 24 May 2024, p. 5.

# 5 Regulation and good practices in some EU Member States

## 5.1 At the Belgian level

In Belgium, green public procurement law is developed at the level of the Federal State and the Regions. It should be noted that under Article 6, § 1, VI, sub. 4, 1° of the Special act on institutional reforms<sup>133</sup>, the Federal State is responsible for general rules on public procurement.

Under strict conditions, the Regions have powers implicit in their attributed competence (like environment) on the basis of Article 10 of the Special act on institutional reforms<sup>134</sup>. According to the Council of State the conditions are the following:

*“This requires that the regulation is necessary for the exercise of a community or regional power, that the impact of the regulation on the federal matter is only marginal and that the matter lends itself to differentiated regulation.”<sup>135</sup>*

However, this has not prevented the Regions from developing a whole series of good practices.

### 5.1.1 At the federal level

#### 5.1.1.1 Hard and soft law

##### 5.1.1.1.1 How to establish effective circular public procurement practices in the current state of the Act of 17 June 2016?

The European procurement directives were transposed in Belgium by the acts of 17 June 2016 on public procurement and on concession contracts<sup>136</sup>, respectively. They reflect the general framework as elaborated for public procurement at the European level, and thus also the general provision that was embedded in Article 18(2) of the Classics Directive. This was transposed in Article 7 of the Act of 17 June 2016, where this provision reads as follows:

*“Economic operators shall be obliged to comply with and enforce all applicable obligations in the field of environmental, social and labor law under European Union law, national law or collective labor agreements or under the provisions of international environmental, social and labor law listed in Annex II, by any person acting as a*

---

<sup>133</sup> Special act of 8 August 1980 on institutional reforms, *BJ*, 15 August 1980.

<sup>134</sup> *Ibidem*.

<sup>135</sup> CoS, 15 February 2023, advice 72.576/AV, p. 6.

<sup>136</sup> *BJ*, 14 July 2016.

*subcontractor at any stage, and by any person who employs personnel for the performance of the contract.*

*Without prejudice to the application of penalties referred to in other legal, regulatory or conventional provisions, violations of the obligations referred to in the first paragraph shall be determined by the contracting authority and, if necessary, the contracting authority shall take measures for violations of the provisions of the contract."*

Several things can be inferred from this provision which has the potential to be a "valuable legal provision"<sup>137</sup>.

First of all, it reminds the entrepreneur that - in any capacity during the awarding and execution of the contract - he must comply with the obligations of environmental social and labor law. This obligation in itself is nothing special, in the sense that these provisions apply to entrepreneurs in any case, regardless of whether or not there is a public contract. What is innovative, however, is that the entrepreneur - again in any capacity during the awarding and execution of the contract - is obliged to also enforce these regulations on any person acting as a subcontractor and by any person who employs staff for the execution of the contract. It is a specific responsibility imposed on the economic operator, acting either as tenderer or as contractor, to verify that the subcontractor it uses also complies with the applicable environmental, social and labor regulations. However, this is not a result obligation, but a means obligation, in the sense that it does not introduce automatic liability for the entrepreneur for the shortcomings of subcontractors. This does not alter the fact that the entrepreneur does have to check to some extent whether the subcontractor he uses complies with environmental, social and labor regulations. In addition, a task for the contracting authority can also be found in Article 7 of the Act of 17 June 2016. Indeed, the contracting authority will have to monitor compliance by the entrepreneur and his appointees and, if necessary, take appropriate measures. At first glance, this provision appears to go beyond what was imposed in Article 18(2) of the Directive. It includes an actual obligation for economic operators to comply with environmental regulations and, in this sense, also indirectly an obligation for the contracting authority to verify compliance.

It should also be noted that certain EU law provisions are also further incorporated into the national law. For example, this applies to the Energy Efficiency Directive, as well as the Directive on the promotion of clean and energy-efficient road vehicles<sup>138</sup>. The latter directive, relating to energy-efficient road vehicles, was transposed with the act of 18 May 2022, integrating it into the framework of public procurement and concessions.<sup>139</sup>

This approach is essentially different from the European approach. Whereas at the Belgian level there is an attempt to co-integrate the directives into an overall framework, notably the acts of 17 June 2016, at the European level the approach is different and it is the case that in other regulations, rather than integrating provisions into an existing framework (in the directives on public procurement and concessions), reference is made to the existing directives on public procurement and concessions, at least for some regulations.

---

<sup>137</sup> M. ANDHOV, *op. cit.*, p. 137.

<sup>138</sup> See Article 1 of the Act of 17 June 2016.

<sup>139</sup> Act of 18 May 2022 amending the Act of 17 June 2016 on public procurement and the Act of 17 June 2016 on concession contract, *BJ*, 30 May 2022.

Other provisions provided for there in the procurement directives are transposed almost *verbatim*. Therefore, in the public procurement law, there is no real added value in the transition to a circular economy compared to the existing public procurement directives, except for Article 7 of the public procurement law. Therefore, in order to proceed with an effective circular strategy in public procurement now, the technical specifications, provisions regarding the execution of the contract as well as selection and award criteria, among others, can be used, as also outlined above.

Towards the provisions regarding the provisions regarding the execution of the contract, reference may still be made to Article 87 of the Act of 17 June 2016, which provision reads as follows:

*"The contracting authority may attach special conditions to the performance of the contract, provided that they relate to the subject matter of the contract within the meaning of Article 81 §3 and are stated in the contract notice or in the contract documents. These conditions may relate to economic, innovation or environmental or social or labor-related considerations."*

Thus, based on this provision, there are possibilities to include performance conditions in the contract documents to the extent that they are related to the subject matter of the contract. Reference can be made to research by Hasselt University where it was explained that: *"(...) already at the outset (i.e. in the contract documents) agreements (should/can) be made regarding the high-quality reuse of materials at the end of the initial use phase and accountability for this (which can lead to a different allocation of risks and erasure). In contrast to classical public procurement, circular procurement/purchasing (e.g.) does not exclude that the supplier (...) possibly becomes the director of the further cycle (...)."* This therefore implies that agreements can be made/provisions can be imposed on how to ensure value retention of materials as much as possible. Retaining value obviously reduces the impact on the circular economy since no new products need to be produced, transported, etc.

#### 5.1.1.1.2 Other relevant regulations

From a policy point of view at the federal level, and in particular with regard to energy-efficient vehicles, reference should be made to Circular 307septies.<sup>140</sup> This circular further clarifies the federal government's ambitions for its own vehicle fleet. These stem, among other things, from the Clean Vehicle Directive, but also go further. The following is therefore included in the circular:

*"The Federal Government's ambitions for its own vehicle fleet are more stringent than the objectives formulated in the Coalition Agreement and those from the Clean Vehicle Directive. In this way, the Federal Government wants to set a "good example" by accelerating the transition to a sustainable fleet of vehicles."*

To set that good example, this circular is mandatorily applicable to purchases made by federal state departments. For other services, it applies as a recommendation, the circular says.

---

<sup>140</sup> Circular 307septies of 12 April 2023 – Acquisition (purchase, hire-purchase, rental and lease) of clean (emission-free) vehicles registered in Belgium, BJ, 12 April 2023.



Interestingly, the circular also prescribes award criteria. For example, it provides that the award criteria used should include, at a minimum, a calculation of life-cycle costs and an environmental score. These are also further specified in the circular itself. For example, to determine the environmental score, energy efficiency, greenhouse gas emissions (CO<sub>2</sub> emissions), RDE emissions of air pollutants, tire class, battery warranty and recycling and the vehicle's ecoscore should be taken into account. The "ecoscore" refers to the score given to it in the database of environmentally friendly vehicles. It can be consulted at <http://www.ecoscore.be>.

Another initiative worth mentioning at the federal level is the circular of May 16, 2014<sup>141</sup> regarding the integration of sustainable development, including social clauses and measures in favor of small and medium-sized enterprises, in the context of public contracts awarded by federal contracting authorities. In doing so, the federal government hopes to provide further incentives to engage in sustainable procurement. In this circular, possibilities are provided to include sustainable criteria and provisions in contract documents. These criteria were partly based on the criteria and directives of the European Commission, even those that were being drafted at the time.

#### **5.1.1.2 Other useful information**

At federal level, there is also the website: <https://guidedesachatsdurables.be/nl> where interesting information can be found. The site allows you to search by sectors (transport, clothes and textile, food and catering, office, construction and energy, waste and recycling, household equipment, decoration and finishing, park and garden, financial products, cleaning, care and hygiene). Within these sectors, there are sub-sectors for which there are links to various useful documents and/or sites.

## **5.1.2 At the regional level**

### **5.1.2.1 Introduction**

Sometimes there are also cross-regional initiatives, such as GRO as a tool to measure and lighten sustainability in building projects or TOTEM, or the "Tool to Optimize the Total Environmental impact of Materials," for example. GRO was developed by the "The Facilities Management Company" (*het Facilitair Bedrijf*), which assesses all aspects of a major construction project in terms of sustainability and is also further developed in partnership with Brussels Environment and the *Service Public de Wallonie*. TOTEM was developed by OVAM, Brussels Environment and the *Service Public de Wallonie*. It is a tool that bets on life-cycle analysis and does so based on standardized ISO standards.<sup>142</sup> As to how TOTEM can be further applied in public procurement, we would like to refer to an earlier report, prepared on behalf of OVAM.<sup>143</sup>

---

<sup>141</sup> Circular of 16 May 2014 – Integration of sustainable development, including social clauses and measures in favour of small and medium-sized enterprises, in the context of public contracts awarded by federal contracting authorities, *BJ*, 21 May 2014.

<sup>142</sup> <https://www.totem-building.be/>.

<sup>143</sup> <https://publicaties.vlaanderen.be/view-file/44218>.

### 5.1.2.2 Flanders

At the Flemish level, the first point to note is the public procurement policy conducted by the Flemish Government, called: the Flemish Public Procurement Plan (2016-2020). As one of the six primary objectives of the plan, sustainable and innovative public procurement is the focus there. It is the wish of the Flemish Government to set an example in procurement policy by resolutely opting for solutions that have the least impact on the environment and are socially and ethically responsible. Under point 2.5 of the plan, it includes the following:

«

- *We set an example by going for innovative public procurement in our procurement policy and resolutely opting for solutions that have the least impact on the environment throughout their life cycle and are also socially and ethically responsible.*
- *We are strongly committed to pilot projects, good practices and communicating to the market our needs that generate significant sustainability gains if fulfilled in an innovative-sustainable way.*
- *We engage in effective controls on human rights violations in the execution of contracts in a number of sensitive sectors and counteract social dumping.*
- *We ensure that through informed choices, concrete steps are taken towards the circular economy, so that products are reused or recycled at the end of their use phase.*
- *We anchor sustainable and innovation-oriented procurement in the strategic policy of all government organisations. For sustainable procurement, the Flemish government decided in its communication of 5 September 2008 to use the following definition with regard to all entities of the Flemish government: "Sustainable public procurement is the approach whereby public authorities integrate environmental, social and economic criteria in all phases of their procurement process of supplies, works and services, thus promoting the dissemination of environmentally-saving technologies, social innovation and the development of environmentally, socio- and ethically sound products and services, by looking for solutions that have the least impact on the environment during their entire life cycle and are socially and ethically responsible".*

For a number of product groups, the Flemish government has defined so-called "essential sustainability criteria" that can be included in contract documents. Those are not mandatory. It covers the following product groups: paper products, F-gases, electricity, building refurbishment materials, furniture, PCs, laptops and monitors, reproduction equipment, cleaning products and services, textiles and clothing, websites and vehicles.<sup>144</sup> Specific circulars were also adopted for that purpose. For example, reference can be made to circular KB/BZ 2020/4 on the acquisition and disposal use and management of service vehicles.

---

<sup>144</sup> <https://www.vlaanderen.be/het-facilitair-bedrijf-overheidsopdrachten-en-raamcontracten/duurzame-en-innovatieve-overheidsopdrachten/monitoring-duurzame-overheidsopdrachten/essentiele-duurzaamheidscriteria>.

One of the other ways in which this has taken effect is through the drafting of some standard clauses by the Facilitair Bedrijf of the Flemish Government<sup>145</sup> that can be included in the contract documents of contracting authorities. However, the number of clauses is very limited, especially compared to other initiatives at the Flemish level. Given that the policies had been drafted in 2016, it should be noted that some are dated. Among other things, toward the limited clauses that were included, it should be noted that they could be improved. However, we also understand from the research that the Flemish government is working to expand the example criteria it makes available, which, among other things, are in the context of cooperation with the Netherlands regarding the MVI-tool (voy. *infra*).

In Flanders, other initiatives can also be found to promote and support sustainable public procurement. In these initiatives, circular procurement often takes a prominent place. In the context of the circular economy and public procurement, one can point to initiatives such as the OVAM ambition map, the GRO as a tool to measure and heighten sustainability in building projects, initiatives taken by the Team Vlaamse Bouwmeester, Vlaanderen Circulair....

These are rather initiatives that are widely taken, often not very structured, but occasionally brought together in a report.<sup>146</sup> In our opinion, there is currently a lack of a structured approach, in which there is one partner who is further committed to the transition to circular economy from public procurement regulations. However, the lack of a structural approach crosses the boundaries of circularity. Buyers are asking not to split up into circular purchasing, biobased purchasing, ethical purchasing, social purchasing... but to approach this story in one overarching whole. In Belgium, however, it is also necessary to take into account the division of competences, whereby the powers relating to public procurement on the one hand and the powers relating to the environment and related matters on the other hand are split between the federal and regional levels (see also *infra*).

### 5.1.2.3 Brussels

At the Brussels level, one should first point out a specific ordinance, specifically this one of May 8, 2014 concerning the inclusion of environmental and ethical clauses in public contracts.<sup>147</sup> This ordinance outlines a framework within which it is possible for contracting authorities to invoke environmental clauses, among other things, in the journey towards a circular economy. In addition, the ordinance also provides for regional coordination and evaluation, with the task of providing model documents and clauses for further roll-out also being put forward.<sup>148</sup>

Another important regulation is that which obliges public authorities to ban all single-use packaging and to give preference to tap water from 2023, with certain exceptions<sup>149</sup>.

---

<sup>145</sup> <https://www.vlaanderen.be/het-facilitair-bedrijf-overheidsopdrachten-en-raamcontracten/duurzame-en-innovatieve-overheidsopdrachten/standaardclausules-duurzame-overheidsopdrachten>.

<sup>146</sup> For example: [https://www.circubuild.be/nl/aanbesteden/cabrio/e-book\\_circulair\\_aanbesteden.pdf](https://www.circubuild.be/nl/aanbesteden/cabrio/e-book_circulair_aanbesteden.pdf).

<sup>147</sup> BJ, 6 June 2014.

<sup>148</sup> See art. 18 of the Ordinance of 8 May 2014 concerning the inclusion of environmental and ethical clauses in public contracts, BJ, 6 June 2014.

<sup>149</sup> Government of the Brussels-Capital Region order of 1 December 2016 on waste management, BJ, 13 January 2017, art. 4.6.3. See also <https://leefmilieu.brussels/pro/wetgeving/verplichtingen-en-vergunningen/brudalex-regels-inzake-afvalbeheer-voor-de-overgang-naar-een-circulaire-economie>.

There is also a Ministerial order of 3 May 2019 on thresholds and values for circular economy projects<sup>150</sup> which proposes a method for assessing the circularity of a project from a quantitative point of view.

The good practices developed in Brussels include the public procurement price observatory<sup>151</sup>, a free help desk on *i.a.* green and circular public procurement in partnership with CODUCO<sup>152</sup>, explanations of the EMAS label<sup>153</sup> and the creation of the eco-dynamic company label<sup>154</sup>.

There are also standard specifications, clauses and useful documents for sustainable public procurement, classified by sector (Food, office, waste – resources, eco-construction, circular economy, energy, green spaces, mobility, cleaning, textiles and ICT & digital)<sup>155</sup>.

#### 5.1.2.4 Wallonia

In Wallonia, there is a decree of 2 May 2019 amending various decrees with a view to including environmental, social and ethical clauses in public contracts subsidised by the Walloon Region<sup>156</sup>. This decree amended several text to make the award of a special subsidy for certain works public procurements subject to the inclusion of social, environmental and/or ethical clauses. Its scope is therefore fairly limited.<sup>157</sup>

From a soft law point of view, there is the circular of 28 November 2013 on the implementation of a sustainable procurement policy for Walloon regional contracting authorities<sup>158</sup>. This circular sets out the constituent elements of a sustainable public purchasing policy in very concrete terms (*e.g.* the importance of the definition and analyse of the need, the designation of a responsible person, monitoring, annual assessment)<sup>159</sup> and gives tools (*e.g.* helpdesk<sup>160</sup>,

---

<sup>150</sup> BJ, 7 May 2019.

<sup>151</sup> <https://www.brupartners.brussels/fr/observatoire-des-prix-de-reference-dans-les-marches-publics>.

<sup>152</sup> <https://leefmilieu.brussels/pro/diensten-en-aanvragen/advies-en-begeleiding/gratis-helpdesk-voor-duurzame-overheidsopdrachten>.

<sup>153</sup> <https://leefmilieu.brussels/pro/milieubeheer/duurzamer-worden/bevestig-de-inzet-van-uw-bedrijf-in-zake-leefmilieu-op-europees-niveau-met-emas?highlight=circulaire%20clause%20environnementale>.

<sup>154</sup> <https://leefmilieu.brussels/pro/milieubeheer/duurzamer-worden/het-label-ecodynamische-onderneming-laait-uw-acties-voor-het-leefmilieu-renderen>.

<sup>155</sup> <https://leefmilieu.brussels/pro/diensten-en-aanvragen/advies-en-begeleiding/modelbestekken-clausules-en-nuttige-documenten-voor-duurzame-overheidsopdrachten>.

<sup>156</sup> BJ, 27 August 2019.

<sup>157</sup> See also on this topic, Belgium, *Second control report on public procurement and concessions*, 2021, p. 90, available on [https://bosa.belgium.be/sites/default/files/documents/monitoringreportbelgium2021\\_fr\\_0.pdf](https://bosa.belgium.be/sites/default/files/documents/monitoringreportbelgium2021_fr_0.pdf).

<sup>158</sup> BJ, 17 December 2013.

<sup>159</sup> *Ibidem*, point 3.

<sup>160</sup> <https://marchespublics.wallonie.be/pouvoirs-adjudicateurs/outils/achats-publics-responsables/outils-transversaux/helpdesk.html>.

practical guides<sup>161</sup>, trainings, newsletters, sectoral tools, networking)<sup>162</sup>. There is also lots of documents (including model clauses) by sector<sup>163</sup>.

In addition, Wallonia has commissioned a study on circular public purchasing. The study was delivered on 15 April 2022 and covers six case studies in depth.<sup>164</sup> This study mentions TOTEM amongst the useful tools<sup>165</sup>. Among the challenges and points for attention were the problem of knowledge, financial and time constraints, monitoring difficulties, *etc.*<sup>166</sup> The recommendations were numerous: training in circularity, setting up a project team, prior consultation of the market, co-construction, division of the market, feedback, circular selection and award criteria, circular levels of performance and requirements, ecolabelling, *etc.*<sup>167</sup>

With regard to circular public procurement, we should also mention the call for applications “Towards circular public procurement”, which is open until 19 November 2024 to Walloon contracting authorities wishing to receive operational support in adopting supply or services (works are excluded) public procurement that promotes the circular economy.<sup>168</sup>

---

<sup>161</sup> <https://ediwall.wallonie.be/marches-publics-responsables-note-de-cadrage-et-de-conseils-juridiques-juin-2019-numerique-084532#:~:text=Cette%20note%20de%20cadrage%20juridique,juristes%20charg%C3%A9s%20de%20les%20valider.>

<sup>162</sup> *Ibidem*, points 4 to 7.

<sup>163</sup> <https://marchespublics.wallonie.be/pouvoirs-adjudicateurs/outils/achats-publics-responsables/clauses-environnementales.html>. On circular economy, see <https://economiecirculaire.wallonie.be/fr/economie-circulaire-pouvoirs-publics>.

<sup>164</sup> IDEA, *Étude sur l’achat public circulaire*, 15 April 2022, available on <https://ediwall.wallonie.be/etude-sur-lachat-public-circulaire-rapport-du-15-avril-2022-numerique-104091>.

<sup>165</sup> *Ibidem*, p. 53-54.

<sup>166</sup> *Ibidem*, p. 57-64.

<sup>167</sup> *Ibidem*, p. 65-70.

<sup>168</sup> <https://economiecirculaire.wallonie.be/fr/economie-circulaire-pouvoirs-publics>.

## 5.2 In other EU Member States

### 5.2.1 Italy

First of all, it should be pointed out that Italy has a new Public Procurement Code which applies since 1 July 2023<sup>169</sup>. As the sources on which this report is based were written prior to the new code, we advise readers who want to read them to take a concordance table with them<sup>170</sup>.

When it comes to green public procurement, Italy is often presented as a forerunner, having taken this issue head on. In fact, it was the first Member State to make substantial (as opposed to procedural) minimum environmental criteria mandatory. In Italian, these are known as “Criteri Ambientali Minimi” or “CAM”.<sup>171</sup>

Firstly, we will describe the situation before CAMs became mandatory (9.2.1.1). Secondly, we will look at what has happened since they became mandatory (9.2.1.2). Finally, we will present the case law on mandatory CAMs (9.2.1.3).

#### 5.2.1.1 *Before the criteria were mandatory*

In a favorable legislative framework that went further than simply transposing the directives of the time<sup>172</sup>, under the proactive impetus of certain public authorities and with the adoption of the National Action Plan on Green Public Procurement in 2008, CAMs began to be adopted from 2011, initially for eleven categories of public procurement inspired by the European GPPs.<sup>173</sup>

In this context, it is interesting to note that a study has been carried out on public procurement published in government and regional databases concerning the building and construction sector. This study analysed the green nature of works contracts (construction, maintenance or renovation of buildings) in this sector, given their significant environmental impact. A sample of 164 contracts across Italy was analysed. In temporal terms, the starting date was that of public procurements for which the tender had to be submitted by 1 April 2011 at the latest, and the end date was that of public procurements published up to 6 June 2013.<sup>174</sup> The authors state that this sample covers at least one year, providing “a clear picture of the diffusion of green criteria at that moment”<sup>175</sup>.

According to this study, 32% of public procurements did not include any green criteria. This implies that nearly 70% of public works contracts were already more or less green, even though

---

<sup>169</sup> Article 229, § 2 of the Italian Public Procurement Code.

<sup>170</sup> As there is no official concordance table, it is advisable to refer to private concordance tables which can easily be found on the internet. For example: <https://biblus.acca.it/confronto-vecchio-e-nuovo-codice-appalti-la-tabella-di-raffronto-articolo-per-articolo/>.

<sup>171</sup> G. BOTTA, *op. cit.*, p. 189-190, 195 and 203-204; A. IURASCU, *op. cit.*, p. 9.

<sup>172</sup> See articles 2, § 2, 68, § 1 and 83, § 1 of the Italian Code of public contracts for works, services and supplies implementing Directives 2004/17/EC and 2004/18/EC of 12 April 2006, as amended; G. BOTTA, *op. cit.*, p. 193.

<sup>173</sup> G. BOTTA, *op. cit.*, p. 190, 193 and 203; A. IURASCU, *op. cit.*, p. 6 and 9.

<sup>174</sup> F. TESTA *et al.*, *op. cit.*, p. 202-203.

<sup>175</sup> *Ibidem*, p. 203.



CAMs were not yet mandatory. It should be noted that this study counted as green public contracts those public contracts that simply complied with the environmental regulations in force. As a result, there was not always any particular effort on the part of the contracting authority.<sup>176</sup>

In terms of methodology, the authors classified contracts into four categories:

- those with no green clause (32%),
- those including at least one green clause similar to the least demanding of the GPP toolkit's core criteria (32%),
- those including at least one green clause similar to the most demanding of the GPP toolkit's core criteria (22%),
- those including at least one green clause similar to the GPP toolkit's comprehensive criteria (13%).<sup>177</sup>

It is specified that: *“Considering all the green criteria included in the GPP toolkit, it has been recognized that most of them were never, or rarely, used in the analyzed sample.”*<sup>178</sup>

The same study found that green clauses were most often found in the technical specifications (setting minimum requirements) and in the award criteria (assessing what goes beyond the minimum requirements). However, only two public procurements contained a green selection criterion<sup>179</sup>. This leads the authors to conclude that contracting authorities are more concerned with the green nature of the final product, as determined by the requirements of the technical specifications and evaluated *via* the award criteria, than with the green nature of the process, which would be more influenced by the selection criteria and the contract performance conditions.<sup>180</sup>

In addition, it appeared that public procurements based on the MEAT, those whose execution phase is preceded by a project phase, those of a higher value, those concerning the construction of a new building and those referring to the LCA or functional criteria were more likely to include green clauses.<sup>181</sup>

In a context where CAMs were optional, this study gives an idea of the context in which Italy found itself shortly before deciding to make them compulsory, which may inspire other Member States wishing to do the same. It may also contribute to discussions at European Union level.

### **5.2.1.2 Since the criteria became mandatory**

---

<sup>176</sup> *Ibidem*, p. 203-204.

<sup>177</sup> *Ibidem*, p. 202-204. We are aware that the sum of the percentages gives a result of 99%. We assume that this margin of error is due to figures after the decimal point that have not been reported in the article.

<sup>178</sup> *Ibidem*, p. 205.

<sup>179</sup> One of these was open to criticism because it required ISO 14001 certification without providing for the possibility of providing proof of an equivalent approach. *Ibidem*, p. 204.

<sup>180</sup> F. TESTA *et al.*, *op. cit.*, p. 211.

<sup>181</sup> *Ibidem*, p. 204-205 and 209-210.

Firstly, we will examine the legal framework and the CAMs in force (9.2.1.2.1) and, secondly, the reports published by the *Osservatorio appalti verdi*<sup>182</sup> (9.2.1.2.2).

#### 5.2.1.2.1 Legal framework and CAMs in force

Since 2015, CAMs, as regards their technical specifications and performance clauses, have become mandatory for certain categories of public procurement<sup>183</sup>. This obligation was extended to all categories for which CAMs existed in 2017<sup>184</sup>. This obligation is currently set out in Article 57, § 2 of the Italian Public Procurement Code, which states that, for the categories of public procurements where they exist, the technical specifications and contract performance clauses set out in the CAMs must be used. This article also refers to the use of award criteria set out in the CAMs. Although it is no longer explicitly<sup>185</sup> mentioned, this obligation does apply to public procurements above and below the European thresholds<sup>186</sup>.

No fewer than twenty categories of public procurement are currently concerned, namely:

- Interior furnishings
- Street furniture
- Incontinence Assistive Products
- Leather work footwear and accessories
- Paper
- Cartridges
- Building
- Cultural events
- Public lighting (supply and design)
- Public lighting (service)
- Industrial washing and rental of textiles and mattresses
- Cleaning and sanitisation
- Municipal waste and street sweeping
- Catering
- Refreshments and vending machines
- Energy Services for Buildings
- Printers
- Textile
- Vehicles
- Public green spaces<sup>187</sup>

---

<sup>182</sup> <https://www.appaltiverdi.net/category/monitoraggio/>.

<sup>183</sup> See art. 68-bis of the Italian Code of public contracts for works, services and supplies implementing Directives 2004/17/EC and 2004/18/EC of 12 April 2006, as amended; G. BOTTA, *op. cit.*, p. 194; F. LICHÈRE and O. SULPICE, *op. cit.*, p. 236; A. IURASCU, *op. cit.*, p. 10.

<sup>184</sup> Art. 34 of the Italian Public contract code of 18 April 2016, as amended; G. BOTTA, *op. cit.*, p. 190 and 194; F. LICHÈRE and O. SULPICE, *op. cit.*, p. 236-237; A. IURASCU, *op. cit.*, p. 10-11.

<sup>185</sup> See art. 68-bis of the Italian Code of public contracts for works, services and supplies implementing Directives 2004/17/EC and 2004/18/EC of 12 April 2006, as amended; art. 34, § 3 of the Italian Public contract code of 18 April 2016, as amended; G. BOTTA, *op. cit.*, p. 194-195.

<sup>186</sup> L. SALVEMINI, “Il nuovo codice degli appalti: CAM e contratti sottosoglia”, slides available on [https://gpp.mite.gov.it/sites/default/files/2023-05/L-Salvemini\\_Appalti-Cam\\_180523.pdf](https://gpp.mite.gov.it/sites/default/files/2023-05/L-Salvemini_Appalti-Cam_180523.pdf).

<sup>187</sup> <https://gpp.mite.gov.it/CAM-vigenti>.

This list has grown over the years and is regularly updated<sup>188</sup>, the planning being set out in a directorial decree<sup>189</sup>.

These criteria are established by “[s]pecific working groups [that] are appointed for each category, composed of technical experts, public administrators, and representatives from research centres, universities, trade unions, and business associations to conduct technical and scientific evaluations and develop the criteria after technical consultation with qualified experts. The final package of technical criteria, integrated with methodological and operational instructions on purchasing procedures and environmental targets, is shared with the GPP Management Committee and the Standing Panel for evaluation and review”<sup>190</sup>. They are finally enshrined in a ministerial decree.<sup>191</sup>

Each CAM is structured in two parts. The first contains the legal references and advice on how to proceed, including the importance of clearly defining one’s needs and prospecting the market. The second part contains the clauses themselves (SM, SC, TS, AC and CPC).<sup>192</sup>

It should also be noted that, under the Italian public contract Code of 2016, contracting authorities wishing to award a public contract of more than EUR 150,000 for works or more than EUR 40,000 for supplies or services had to obtain a specific qualification or go through a qualified central purchasing body.<sup>193</sup> These thresholds were raised in the Italian Public Procurement Code to EUR 500,000 for works and EUR 140,000 for supplies and services.<sup>194</sup> It would be interesting for further research to examine whether this increase in thresholds has an impact on the implementation of CAMs.

#### 5.2.1.2.2 Assessment of their implementation

The existence of substantial minimum environmental criteria does not, however, eliminate the challenges posed by their application in the day-to-day life of contracting authorities. Since 2018, the Italian GPP Observatory has produced an annual report on the implementation of CAMs. The 2018 version is quite concise (5 pages). From 2019 to 2022, as part of these reports, it has been questioning certain categories of contracting authorities on *i.a.* three main obstacles (lack of training, difficulty in drafting tender documents and lack of economic operators) to the application of the CAMs. To date, the last report was published in 2023. This report however does not contain data over the main obstacles.<sup>195</sup>

---

<sup>188</sup> G. BOTTA, *op. cit.*, p. 190 and 195-196; A. IURASCU, *op. cit.*, p. 11.

<sup>189</sup> For example, see [https://gpp.mite.gov.it/sites/default/files/2023-04/DD\\_CAM\\_protocollato\\_MASE\\_EC\\_REGISTRO\\_DECRETI%28R%29\\_0000015.31-03-2023.pdf](https://gpp.mite.gov.it/sites/default/files/2023-04/DD_CAM_protocollato_MASE_EC_REGISTRO_DECRETI%28R%29_0000015.31-03-2023.pdf).

<sup>190</sup> G. BOTTA, *op. cit.*, p. 195.

<sup>191</sup> G. BOTTA, *op. cit.*, p. 195; A. IURASCU, *op. cit.*, p. 9.

<sup>192</sup> G. BOTTA, *op. cit.*, p. 196.

<sup>193</sup> Art. 37, § 1 of the Italian Public contract code of 18 April 2016, as amended; G. BOTTA, *op. cit.*, p. 192.

<sup>194</sup> Art. 62, § 1 *juncto* 50, § 1, (b) of the Italian Public Procurement Code.

<sup>195</sup> G. BOTTA, *op. cit.*, p. 197-198. The reports are available on <https://www.appaltiverdi.net/category/monitoraggio/>.

Although these reports do exist and provide an overview of the state of CAMs for the contracting authorities surveyed that year, it has to be said that it is not always the same (categories of) contracting authorities that answer, nor the same number per category.<sup>196</sup> Furthermore, the literature warns against analyses based on questionnaires, in that they “*could be subjected to several method-related biases*”<sup>197</sup>. This should be borne in mind when reading what follows.

In these reports (2019 to 2022), the only category of contracting authority that answers systematically and with a fairly stable and representative amount of data is that of the *comuni capoluogo* (i.e. cities of a certain importance). The table<sup>198</sup> below shows the sample.

Table 14. Overview of reports on the implementation of CAMs

Year of the report	Number of <i>comuni capoluogo</i>	Number of answers	Number of complete answers
2019	106	88	82
2020	106 <sup>199</sup>	88	Not specified
2021	111	98	89
2022	111	89	89

In the graph<sup>200</sup> below we have grouped together the main obstacles to the application of CAMs.

<sup>196</sup> S. FALOCCHIO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2022*, Osservatorio appalti verdi, 14 October 2022, p. 8; S. FALOCCHIO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2021*, Osservatorio appalti verdi, 7 October 2021, p. 11; S. FALOCCHIO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2020*, Osservatorio appalti verdi, 9 October 2020, p. 7; S. FALOCCHIO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2019*, Osservatorio appalti verdi, 18 October 2019, p. 4; X., *I Comuni alla prova del Green public procurement*, Osservatorio appalti verdi, 2018, p. 2. For more detailed data, see the different reports available on: <https://www.appaltiverdi.net/category/monitoraggio/>. For the 2023 report, we found the most complete version on this website: <https://www.forumcompraverde.it/wp-content/uploads/2023/08/I-numeri-del-Green-Public-Procurement-Rapporto-OAV-2023-2.pdf>.

<sup>197</sup> F. TESTA *et al.*, *op. cit.*, p. 200.

<sup>198</sup> The data in the table comes from: S. FALOCCHIO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2021*, Osservatorio appalti verdi, 7 October 2021, p. 12; S. FALOCCHIO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2020*, Osservatorio appalti verdi, 9 October 2020, p. 7-8; S. FALOCCHIO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2019*, Osservatorio appalti verdi, 18 October 2019, p. 4 and 21.

<sup>199</sup> However, the report shows that 22 *comuni capoluogo* did not answer. The sum of 88 and 22 gives a result of 110. There are two possible explanations for this. First hypothesis: given that the number of complete answers is not specified, of the 88 that did respond, 4 returned questionnaires that were so incomplete that the authors considered that there was no answer. Second hypothesis: there is a typo in the report and there were 110 *comuni capoluogo* in 2020 and not 106. ; S. FALOCCHIO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2020*, Osservatorio appalti verdi, 9 October 2020, p. 8.

<sup>200</sup> The data in the graph comes from: S. FALOCCHIO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2021*, Osservatorio appalti verdi, 7 October 2021, p. 14; S. FALOCCHIO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2020*, Osservatorio appalti verdi, 9 October 2020, p. 9-10; S. FALOCCHIO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2019*, Osservatorio appalti verdi, 18 October 2019, p. 23.

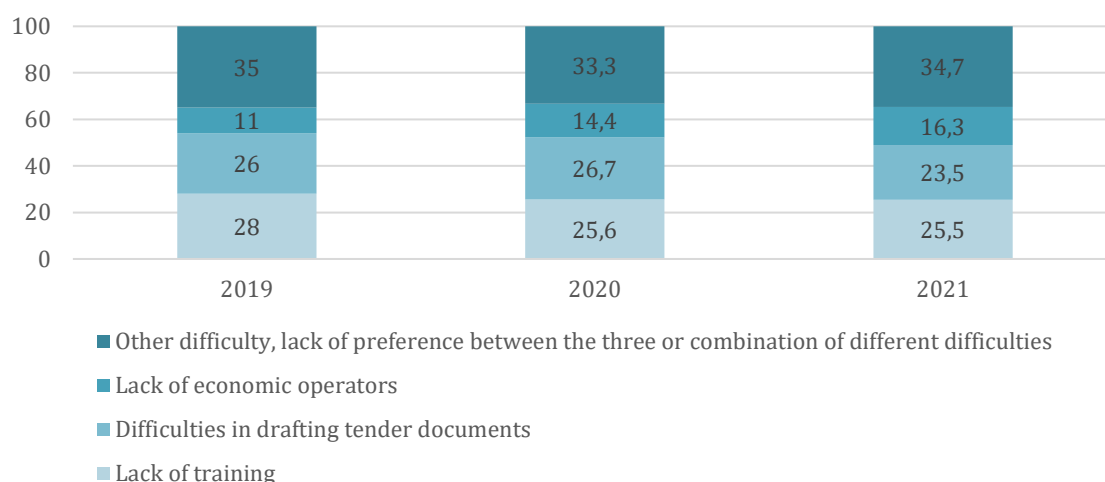


Figure 3. Main obstacles in the application of CAMs

Unfortunately, for the *comuni capoluogo*, the 2022 report does not contain data on the three main difficulties identified<sup>201</sup>.

These data are interesting to cross-reference with data on staff training and the existence of a monitoring system. We have grouped these two types of data together in the two distinct graphs<sup>202</sup> that follow. It should be noted that, once again, these data are not available for the *comuni capoluogo* in the 2022 report.

With regard to staff training, the question was whether the *comuni capoluogo* had trained its employees over the last three years (*i.e.* the years 2016-2019 for the 2019 report<sup>203</sup>, the years 2017-2020 for the 2020 report<sup>204</sup> and the years 2018-2021 for the 2021 report).

<sup>201</sup> S. FALOCCHO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2022*, Osservatorio appalti verdi, 14 October 2022, p. 9-16.

<sup>202</sup> The data in the graphs comes from: S. FALOCCHO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2021*, Osservatorio appalti verdi, 7 October 2021, p. 14-16; S. FALOCCHO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2020*, Osservatorio appalti verdi, 9 October 2020, p. 10-12; S. FALOCCHO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2019*, Osservatorio appalti verdi, 18 October 2019, p. 22 (training) and 24 (monitoring).

<sup>203</sup> S. FALOCCHO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2019*, Osservatorio appalti verdi, 18 October 2019, p. 22.

<sup>204</sup> S. FALOCCHO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2020*, Osservatorio appalti verdi, 9 October 2020, p. 10.

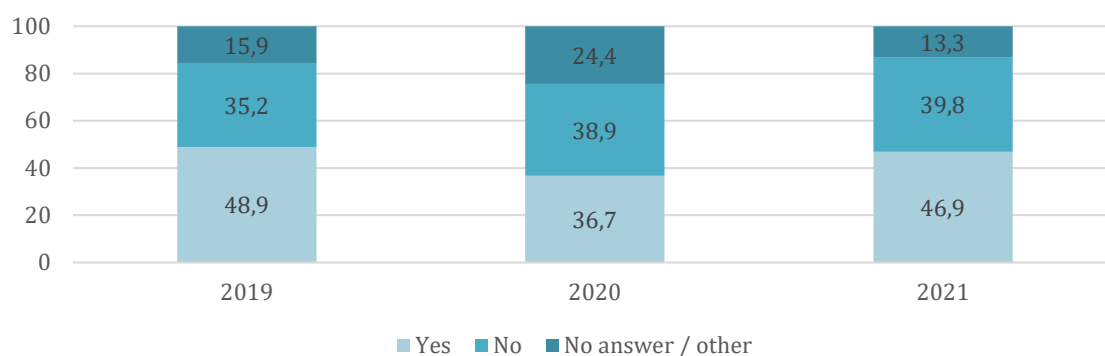


Figure 4. Staff training

For example, while almost half of the *comuni capoluogo* stated that they had trained their staff in the last three years in 2019, this is the main obstacle presented in the same report. In the 2020 report, only a third of the *comuni capoluogo* stated that they had trained their staff in the last three years, while the problem of a lack of training has decreased and ranks second. This problem remained stable in the 2021 report, but returns to the top of the list, while once again almost half of the *comuni capoluogo* stated that they had trained their staff. It is therefore difficult to draw conclusions from this data to establish an action plan to remedy the problem.

However, the 2022 report shows that 62.2% of the *comuni capoluogo* consider training to be a factor facilitating the implementation of CAMs<sup>205</sup>.

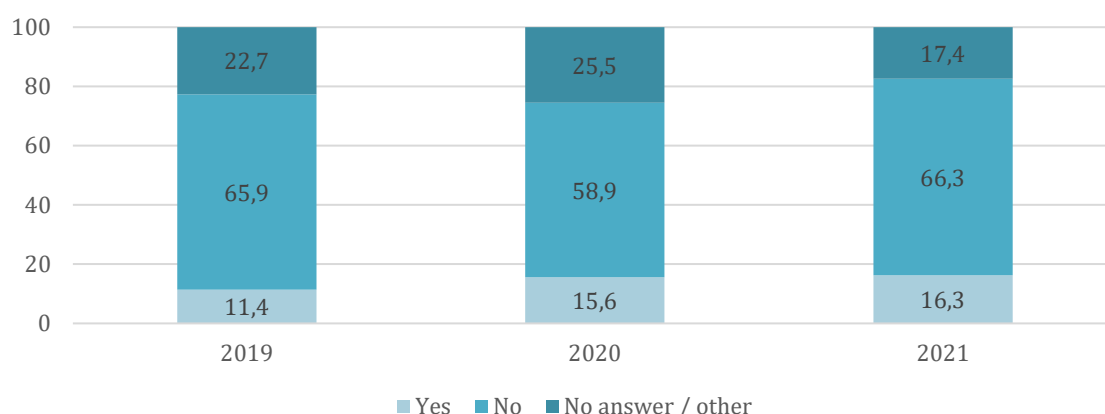


Figure 5. Monitoring

The 2020 and 2021 reports stress that there is a “chronic lack of monitoring systems”<sup>206</sup> and that “monitoring is a fundamental aspect not only to verify concrete compliance with article 34 of the Public Contracts Code [i.e. that of 2016], but also to investigate difficulties, critical points,

<sup>205</sup> S. FALOCCHIO et al., *I numeri del Green Public Procurement in Italia - Rapporto 2022*, Osservatorio appalti verdi, 14 October 2022, p. 15.

<sup>206</sup> S. FALOCCHIO et al., *I numeri del Green Public Procurement in Italia - Rapporto 2021*, Osservatorio appalti verdi, 7 October 2021, p. 15; S. FALOCCHIO et al., *I numeri del Green Public Procurement in Italia - Rapporto 2020*, Osservatorio appalti verdi, 9 October 2020, p. 11.



*and breaking variables*”<sup>207</sup>. The authors of the report therefore consider this absence to be problematic.<sup>208</sup>

In the 2022 report, only 16.2% of *comuni capoluogo* considered that a monitoring system was a factor facilitating the implementation of CAMs<sup>209</sup>. This may well be where the problem lies as far as the *comuni capoluogo* are concerned. As long as there is no collective awareness of the importance of establishing systems for monitoring CAMs, the difficulties encountered are likely to persist despite the training provided.

In this sense, the exercise carried out by these reports is essential in that it allows Italy to have available data and to ask the relevant questions in order to draw up an action plan to improve the situation.

Please note that these reports also assess the percentages of adoption of CAMs by product category for which CAMs exist<sup>210</sup>. A detailed analysis of this data is however beyond the scope of this report, and it is not certain that any relevant conclusions can be drawn from it in view of what has already been concluded above.

Other barriers identified in the doctrine are the limited resources and organisational capacity dedicated to this type of procurement and the burden, time and money involved in monitoring and verifying the CAMs, which can lead to a lack of implementation of such clauses.<sup>211</sup> This is in line with the conclusions we drew regarding the lack of a monitoring system.

The legal doctrine concludes that:

*“Despite the present barriers and challenges, a shift from voluntary to mandatory is gradually happening thanks to CAMs, encouraging contracting authorities to lead by example and to purchase by example and this could inspire other Member States or relevant EU proposals. Nonetheless, to ensure a truly transformational process, further legal interpretation, continual updates and expansion to new sectors and mandatory social considerations will be necessary, taking into constant account obstacles encountered by contracting authorities.”*<sup>212</sup>

---

<sup>207</sup> S. FALOCCHIO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2020*, Osservatorio appalti verdi, 9 October 2020, p. 11. In the same way, see S. FALOCCHIO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2021*, Osservatorio appalti verdi, 7 October 2021, p. 15.

<sup>208</sup> S. FALOCCHIO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2021*, Osservatorio appalti verdi, 7 October 2021, p. 15; S. FALOCCHIO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2020*, Osservatorio appalti verdi, 9 October 2020, p. 11.

<sup>209</sup> S. FALOCCHIO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2022*, Osservatorio appalti verdi, 14 October 2022, p. 15.

<sup>210</sup> S. FALOCCHIO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2022*, Osservatorio appalti verdi, 14 October 2022, p. 16, 27, 32 and 39; S. FALOCCHIO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2021*, Osservatorio appalti verdi, 7 October 2021, p. 19-30; 41-48; 55-64 and 70-77; S. FALOCCHIO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2020*, Osservatorio appalti verdi, 9 October 2020, p. 15-29, 42-50 and 57-68; S. FALOCCHIO *et al.*, *I numeri del Green Public Procurement in Italia - Rapporto 2019*, Osservatorio appalti verdi, 18 October 2019, p. 9-19, 26-35 and 46-52; X., *I Comuni alla prova del Green public procurement*, Osservatorio appalti verdi, 2018, p. 2-5.

<sup>211</sup> G. BOTTA, *op. cit.*, p. 198.

<sup>212</sup> *Ibidem*, p. 204.

### 5.2.1.3 Case law

Since 2017, the number of administrative case law cases mentioning CAMs has gradually increased, without being excessive in relation to the total number of cases concerning public procurement, which leads one author to say that the implementation of CAMs seems to be going relatively smoothly<sup>213</sup>. Another author, on the other hand, sees in the very existence of this case law the existence of difficulties in putting them into practice<sup>214</sup>.

Case law has confirmed the mandatory nature of CAMs for the categories of purchases concerned by them. For other categories of purchases, contracting authorities may draw inspiration from the CAMs, while ensuring that they comply with all the rules relating to public procurements, in particular the main principles.<sup>215</sup>

According to the Italian Council of State:

*"The case law of this Council of State is well-established in finding the rationale of the mandatory nature of minimum environmental criteria in the need to ensure "that the national policy on green public procurement is incisive not only in the objective of reducing environmental impacts, but in the objective of promoting more sustainable, "circular" production and consumption models and in spreading "green" employment" (thus, most recently, decision 6934/2022).*

*The provision in question, and the institution regulated by it, thus contribute to connote the evolution of the public procurement contract from a mere instrument for the acquisition of goods and services to an instrument of economic policy: in particular, as stated in doctrine, the so-called green public procurements are characterised by being a "segment of the circular economy"."*<sup>216</sup>

As to what precisely is mandatory in the CAMs, case law has confirmed that at least the use of technical specifications and performance clauses is mandatory. This means that failure to mention them in the contract documents or, if they are mentioned, failure to apply them during the award procedure renders the award decision subject to annulment and the resulting contract, if concluded, subject to a declaration of ineffectiveness. In the same vein, an offer that does not meet the technical specifications of the CAMs must be declared irregular insofar as

---

<sup>213</sup> *Ibidem*, p. 199.

<sup>214</sup> A. IURASCU, *op. cit.*, p. 15.

<sup>215</sup> G. BOTTA, *op. cit.*, p. 200; F. LICHÈRE and O. SULPICE, *op. cit.*, p. 240-241; A. IURASCU, *op. cit.*, p. 11.

<sup>216</sup> Free translation of: *"La giurisprudenza di questo Consiglio di Stato è pacifica nel rinvenire la ratio dell'obbligatorietà dei criteri ambientali minimi nell'esigenza di garantire «che la politica nazionale in materia di appalti pubblici verdi sia incisiva non solo nell'obiettivo di ridurre gli impatti ambientali, ma nell'obiettivo di promuovere modelli di produzione e consumo più sostenibili, "circolari" e nel diffondere l'occupazione "verde"» (così, da ultimo, la sentenza n. 6934/2022).*

*La previsione in parola, e l'istituto da essa disciplinato, contribuiscono dunque a connotare l'evoluzione del contratto d'appalto pubblico da mero strumento di acquisizione di beni e servizi a strumento di politica economica: in particolare, come affermato in dottrina, i cc.dd. green public procurements si connotano per essere un "segmento dell'economia circolare".*" Italian Council of State, 14 September 2022, case 8773, par. 8.

these are minimum requirements. Other decisions have clarified that the selection and award criteria proposed in the CAMs are not mandatory.<sup>217</sup>

With regard to the declaration of ineffectiveness, the doctrine points out that “[t]he Italian administrative procedural code (‘CPA’) provided for ineffectiveness as a general remedy going well beyond the cases provided by Article 2d of the Remedies Directive”<sup>218</sup> which “has proven successful to ensure the enforcement of MECs [i.e. CAMs]”<sup>219</sup>. Even if the successful bidder had been performing the contract for several months “[t]he protection of the public interest prevailed over both the contractual interests of the parties and the risk that, by complying with the MECs, Ladisa [i.e. the successful bidder in this case] may have been awarded the contract anyway, so that a substitution was not foreseeable on the facts of the case.”<sup>220</sup> The most remarkable thing about this case is that the disappointed bidder who initiated the action was ranked fourth<sup>221</sup>. “Remarkably, the ruling sheds light on the real possibility of economic operators participating in a tender to stand up and require compliance with environmental and social requirements.”<sup>222</sup>

Finally, regarding the discretionary margin left to Italian contracting authorities, in a landmark case, the Italian Council of State states that:

*“(…) the contracting authority (…) had to and must proceed in accordance with the **minimum environmental criteria** established by the above-mentioned ministerial decree of 7 March 2012: the two alternative cases outlined therein (A or B) do not in fact represent only two ideal models of how to pursue the objectives, but also the **only two concrete models that contracting authorities had to and must use.**”*

*The aforementioned quantitative and qualitative differences of the aforementioned models **radically exclude the possibility that the contracting authority could proceed to the formulation of a lex specialis for the award of contracts containing elements (criteria) of the one and elements (criteria) of the other:** such contamination, in itself already logically inadmissible, would also be in blatant **conflict with the principle of legality of administrative action.***

*Nor, as the appellant also claims, can the discretion of the **administration** reasonably oppose this: the latter can (and indeed must) certainly identify its own needs, by means of a correct and in-depth preliminary investigation, but it **can neither decide autonomously whether to pursue the objectives of environmental compatibility, nor the methods by which to pursue it, this having been established directly by the ministerial decree cited several times** (…).”<sup>223</sup> (we underline)*

---

<sup>217</sup> G. BOTTA, *op. cit.*, p. 200-203; F. LICHÈRE and O. SULPICE, *op. cit.*, p. 245 and 251; A. IURASCU, *op. cit.*, p. 7 and 12-15.

<sup>218</sup> A. IURASCU, *op. cit.*, p. 14.

<sup>219</sup> *Ibidem*, p. 16.

<sup>220</sup> *Ibidem*, p. 14. See also, Italian Council of State, 14 September 2022, case 8773, par. 11.

<sup>221</sup> A. IURASCU, *op. cit.*, p. 15. See also Italian Council of State, 14 September 2022, case 8773, par. 2, 4 and 5.

<sup>222</sup> *Ibidem*, p. 15.

<sup>223</sup> Free translation of and extracted from: “Sulla base del delineato e articolato substrato normativo, a confutazione delle tesi prospettate dall’appellante, deve ritenersi che la stazione appaltante non solo era ed è obbligata in linea generale a perseguire gli obiettivi di sostenibilità ambientale, ma che a tanto doveva e deve

It can therefore be deduced that as regards technical specifications and performance conditions provided for in the CAMs, the margin of discretion of Italian contracting authorities as to 'what to buy' seems to be very limited.<sup>224</sup>

## 5.2.2 The Netherlands

### 5.2.2.1 Hard law

In the Netherlands, the procurement directives have been transposed into the so-called Aanbestedingswet 2012 and contain some interesting provisions that can be seen as starting points in the transition to a circular economy.

Namely, the idea included in the Dutch Procurement Act is that awards are always made on the basis of the best price-quality ratio, and if awards would be made purely on the basis of price or even the life-cycle cost, this should also be justified in the contract documents (comply or explain).<sup>225</sup> This should lead to more sustainable procurement<sup>226</sup> and has been introduced from the idea of complying with the specific obligation that applies in the Netherlands of contracting authorities to maximise social value for public funds.<sup>227</sup> The aim is to challenge the market to innovation and sustainability as much as possible. A contracting authority will be allowed to opt for application of the criterion of lowest price in deviation from this main rule, provided proper justification is given.

However, questions can be raised about the efficiency and effectiveness of this provision.<sup>228</sup> For instance, it requires justification as to why a contract cannot be awarded purely on the basis of price or (lifecycle) cost. It should be noted that even there, a contracting authority has some discretionary power. This therefore leads to the conclusion that if it is argued that the use of criteria relating to quality are not appropriate according to the contracting authority, there is

---

*procedere secondo le modalità ed i criteri ambientali minimi stabiliti dal più volte citato decreto ministeriale 7 marzo 2012: le due fattispecie alternative ivi delineate (A o B) non rappresentano infatti soltanto due modelli ideali di modalità di perseguimento degli obiettivi, ma anche i due soli modelli concreti che le amministrazioni appaltante dovevano e devono utilizzare.*

*Le accennate diversità quantitative e qualitative dei predetti modelli esclude in radice la possibilità che l'amministrazione appaltante possa procedere alla formulazione di una lex specialis per l'affidamento contenente elementi (criteri) dell'una e elementi (criteri) dell'altra: tale contaminazione, di per sé già logicamente inammissibile, sarebbe anche in palese contrasto con il principio di legalità dell'azione amministrativa.*

*Né a tanto, come pure prospetta l'appellante, può ragionevolmente opporsi la discrezionalità dell'amministrazione: quest'ultima può (e anzi deve) sicuramente individuare le proprie necessità, attraverso una corretta e approfondita istruttoria, ma non può né decidere autonomamente se perseguire gli obiettivi di compatibilità ambientale, né le modalità attraverso cui perseguirla, ciò essendo stato stabilito direttamente proprio dal decreto ministeriale più volte citato (rientrando invece nella discrezionalità dell'ente l'individuazione della durata del contratto, durata la cui previsione (non inferiore ad un triennio) deve essere in ogni caso coerente con le esigenze individuate e con i criteri ambientali minimi concretamente applicabili." Italian Council of State, 3 February 2021, case 972, par. 7.4.4.*

<sup>224</sup> See also, G. BOTTA, *op. cit.*, p. 200; F. LICHÈRE and O. SULPICE, *op. cit.*, p. 241; A. IURASCU, *op. cit.*, p. 15.

<sup>225</sup> See art. 2.114(4) of the Dutch Procurement Act 2012.

<sup>226</sup> See <https://zoek.officielebekendmakingen.nl/kst-32440-25.html>.

<sup>227</sup> See art. 1.4(2) of the Dutch Procurement Act 2012.

<sup>228</sup> See also J. VOORTER, Circulariteit bij de gunning van overheidsopdrachten voor bouwwerken: LCK all the way?", MCP-OOO 2023, afl. 2, (169) – 171.

little that can be done against this. This is also evident from case law in the Netherlands, where any criticism of the motives is often dismissed as being unfounded.<sup>229</sup>

### 5.2.2.2 Good practices

In the Netherlands, policies emphasise so-called "socially responsible purchasing" ("maatschappelijk verantwoord inkopen"). This means that government agencies look not only at the price of products, but also at their effects on the environment: to what extent they are sustainably produced, can be reused (circular) and are based on plant-based raw materials (bio-based). It also looks at social effects, such as human rights, and whether they encourage innovations.<sup>230</sup> Originally, the policy referred only to socially responsible procurement, at least when it was introduced in 2016. In 2022, a manifesto prepared for socially responsible procurement also included the term "commissioning". The idea behind this is that the principal precedes the procurement and should therefore be referred to as "socially responsible commissioning and procurement".<sup>231</sup> The manifesto drawn up under it also provides a framework for contracting authorities, who can opt to sign it. In doing so, the framework consists, on the one hand, of some "substantive agreements" to which the contracting authority signing the manifesto must in principle adhere. Among other things, it presupposes that the contracting authority draws up an "Action Plan for Socially Responsible Commissioning and Purchasing (SRCP)".<sup>232</sup> In the Action Plan, the contracting authority defines for its own organisation the levels of ambition to be pursued for each of the societal goals, the actions to be carried out to this end and the time and budget allocated for this purpose. It can set its own level of ambition, from one to five, from awareness to leadership.<sup>233</sup>

---

<sup>229</sup> <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBMNE:2018:1963>; <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBMNE:2021:4356>.

<sup>230</sup> See also L. KOK and M.C. ZIJP, "Tools voor maatschappelijk verantwoord inkopen", *RIVM Briefrapport 2016-0204*, Amsterdam, Rijkswaterstaat, 2016, 3. (<https://rivm.openrepository.com/bitstream/handle/10029/620831/2016-0204.pdf?sequence=1&isAllowed=y>).

<sup>231</sup> RIJKSOVERHEID, *Manifest Maatschappelijk Verantwoord Opdrachtgeven en Inkopen*, Amsterdam, Rijksoverheid, 2022 (<https://www.pianoo.nl/sites/default/files/media/documents/2023-06/Manifest%20Maatschappelijk%20Verantwoord%20Opdrachtgeven%20en%20Inkopen%202022-2025-V2.pdf>).

<sup>232</sup> *Ibidem*, p. 24.

<sup>233</sup> *Ibidem*, p. 26.



Figure 6. Ambition level of the manifest

As it were, it offers contracting authorities the opportunity to choose for themselves to what extent they wish to focus on Socially Responsible Commissioning and Purchasing (SRCP). In addition, the manifesto also provides for support that will be provided by the government. Indeed, the government undertakes to support the contracting authorities that sign the manifesto in all kinds of ways. For example, by providing guidance, but also to further streamline monitoring. The intention is for the contracting authority itself to monitor the progress of its action plan, through process monitoring and/or impact monitoring. A self-assessment tool has been developed from the government for this purpose, which can be used by the contracting authority and should help ensure uniform reporting by the various contracting authorities committed to signing the manifesto.

In terms of guidance, the website "pianoo.nl", among others, provides various criteria that can be used by contracting authorities with a view to more socially responsible commissioning and procurement. In particular, reference can be made to the SRP-criteria tool<sup>234</sup>, in which there are several criteria and also subdivided according to the ambition level of the contracting authority. They are criteria aimed at including minimum requirements in the contract documents or providing specific selection or award criteria. Clusters of criteria are used, covering the following areas (1) automation and telecommunications, (2) office facilities and services, (3) civil engineering, (4) office buildings, (5) energy, (6) transportation and transport. A useful feature of the tool is that a search can be made using a specific keyword or a CPV code, and the tool then indicates which criteria could possibly be considered for the assignment in question. In our opinion, this offers some added value.

In addition, the Netherlands also pioneered the CO<sub>2</sub> performance ladder. The CO<sub>2</sub> Performance Ladder is a CO<sub>2</sub> management system consisting of 5 levels. Up to level 3, an organization works on the emissions of its own organization (and all projects). From level 4 and 5 onwards, work is

<sup>234</sup> See: <https://www.mvicriteria.nl/>.



also done on CO<sub>2</sub> emissions in the chain and sector. A certified organization meets the requirements of the CO<sub>2</sub> Performance Ladder at a certain level (and all underlying levels). These requirements stem from four perspectives:

- A- Insight: Determining energy flows and the CO<sub>2</sub> footprint.
- B- Reduction: Developing ambitious targets for CO<sub>2</sub> reduction.
- C- Transparency: Structural communication about the CO<sub>2</sub> policy.
- D- Participation: Participation in industry initiatives on CO<sub>2</sub> reduction<sup>235</sup>

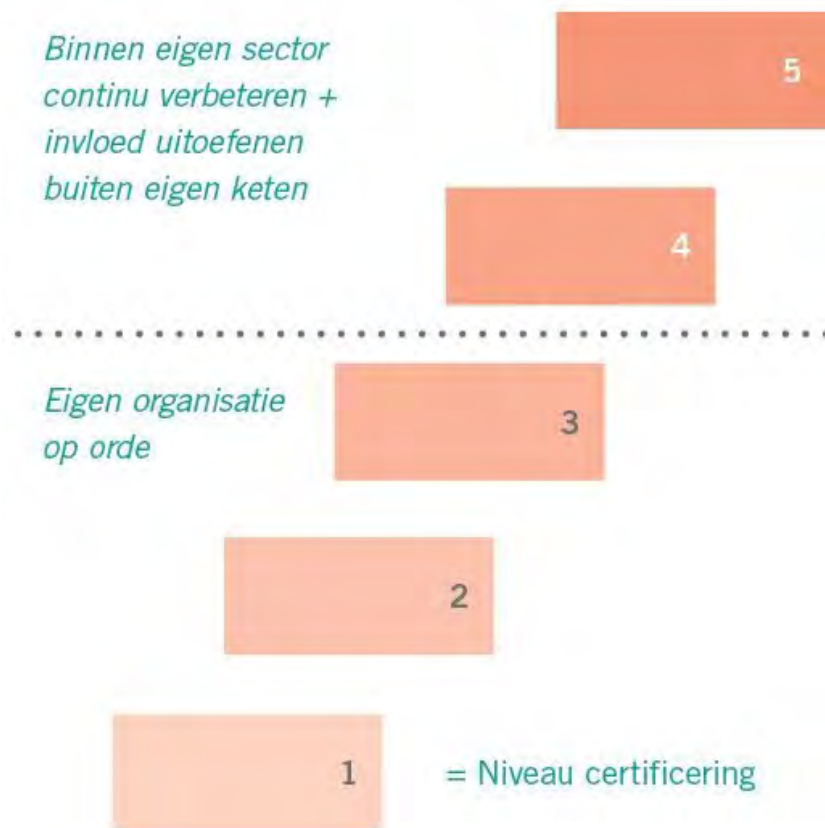


Figure 7. CO<sub>2</sub> performance level<sup>236</sup>

Certified companies receive discounts on tender prices. Companies on the Ladder are rewarded with a concrete award advantage in the procurement process. The higher the step, the higher the discount. The contracting authority or client determines the award advantage for each level of the Ladder.<sup>237</sup> This would lead to more circular procurement. This was evidenced in part by a report made in the Netherlands, which judged that public contracts that used the carbon performance ladder had a positive effect on the circular economy.<sup>238</sup> This CO<sub>2</sub> performance ladder is now being rolled out in other countries, including Belgium, among others.

<sup>235</sup> <https://www.co2-prestatieladder.nl/nl/news-item/Circulair-inkopen-heeft-effect-ook-met-de-CO2-Prestatieladder>.

<sup>236</sup> <https://www.co2-prestatieladder.be/nl/wat-is-de-ladder>.

<sup>237</sup> <https://www.co2-prestatieladder.be/nl/wat-is-de-ladder>.

<sup>238</sup> <https://www.rivm.nl/bibliotheek/rapporten/2020-0002.pdf>.



A variant of this is the environmental cost indicator (EQI, *milieukostenindicator (MKI)*).<sup>239,240</sup> The EQI is a tool used to determine which material has the lowest environmental impact, taking into account the life cycle of the material being used. All impacts are taken into account and are expressed in a monetary unit, namely the EQI, the environmental cost indicator. It aggregates all relevant environmental impacts of a product into a single environmental cost score that demonstrates the environmental shadow price/shadow cost of the product or project.<sup>241</sup> This financial value represents the expected social costs if the occurring environmental impacts have to be undone with costs known for this purpose.<sup>242</sup> All costs can be taken into account, such as the manufacture of the product, transport with a diesel truck or with an electric truck, or a transport of 5 km compared to a transport of 5,000 km and so on. This therefore requires - toward comparability - that an analysis of the entire life cycle also be done in order to also measurably identify those costs and make them comparable to other solutions offered.

## 5.2.3 Spain

### 5.2.3.1 Introduction

At various levels (state and regional), Spain has introduced a series of regulations to green its public procurement markets, particularly under the influence of the Green Deal.<sup>243</sup>

Public procurement law in Spain is particularly dispersed due to the structure of the State and the powers granted to the Autonomous Communities. At State level, there is one main act: the Public Sector Contracts Act, but there are also a number of other surrounding acts that deal with the issue of (green) public procurement<sup>244</sup>. At the level of the Autonomous Communities, there are also many scattered laws<sup>245</sup>.

<sup>239</sup> J. TÖBBEN en R. OPDENAKKER, "Developing a Framework to Integrate Circularity into Construction Projects", *Sustainability* 2022, afl. 14, 5136, (1) 11; L. HILLEGE, "Milieukostenindicator (MKI) – Overzicht", on [ecochain.com](https://ecochain.com) (see: <https://ecochain.com/nl/knowledge-nl/milieukosten-indicator-mki/>).

<sup>240</sup> See also motions and questions in Dutch Parliament: Motie van het lid Van Eijs over de MKI-waarde zwaarder meewegen bij aanbestedingen van Rijkswaterstaat ingediend in de Nederlandse Tweede Kamer op 30 juni 2020, met nummer 32852-126 see: <https://www.tweedekamer.nl/kamerstukken/moties/detail?id=2020D27386&did=2020D27386>; Inbreng verslag van een schriftelijk overleg over de Nationale Grondstoffenstrategie (Kamerstuk 32852-224), Inbreng in de Nederlandse Tweede Kamer op 20 januari 2023 met volgnummer 2023D01697 see <https://www.tweedekamer.nl/kamerstukken/detail?id=2023D01697&did=2023D01697>.

<sup>241</sup> L. HILLEGE, "Milieukostenindicator (MKI) – Overzicht", op [ecochain.com](https://ecochain.com) see <https://ecochain.com/nl/knowledge-nl/milieukosten-indicator-mki/>.

<sup>242</sup> PIANO, *Stappenplan: inkopen met de milieukostenindicator*, 2020, see [https://www.piano.nl/sites/default/files/media/documents/2020-12/inkopen\\_met\\_de\\_milieukostenindicator-augustus2020.pdf](https://www.piano.nl/sites/default/files/media/documents/2020-12/inkopen_met_de_milieukostenindicator-augustus2020.pdf).

<sup>243</sup> X. LAZO VITORIA, *op. cit.*, p. 219.

<sup>244</sup> In addition to those mentioned in the following lines, see Royal Decree-Act 36/2020 of 30 December 2020, approving urgent measures for the modernisation of the Public Administration and for the implementation of the Recovery, Transformation and Resilience Plan, art. 54.

<sup>245</sup> In addition to those mentioned in the following lines, see Catalonia Decree-Act 5/2021 of 2 February 2021, approving urgent measures for the implementation and management of funds from the Recovery and Resilience Mechanism and the REACT-EU fund for the Administration of the Government of Catalonia and its public sector, art. 13 and 16; Andalusia Decree-Act 3/2021 of 16 February 2021, adopting measures to streamline administration and rationalise resources to promote recovery and resilience in the Autonomous Community of Andalusia, art. 25 and 26; Canary Island Decree-Act 4/2021 of 31 March 2021 on urgent measures for administrative streamlining

It is interesting to study Spanish public procurement law for several reasons. Firstly, because there are several texts that make a direct link between public procurement and the circular economy. Secondly, because a number of regulations are ambitious yet pragmatic. Finally, as there is also a division of competences in Spain<sup>246</sup>, this may inspire the Flemish Region in the exercise of its competences.

On a less positive note, it gives an idea of the problem of not having coordinated/codified legislation. When we look at the way in which green / circular public procurement law is being developed in many different texts at the EU level, we realise that we are in danger of moving towards something that will become as difficult to read as Spanish public procurement law, and that it may well be time to recast everything in a single directive.

### 5.2.3.2 The Spanish Public Sector Contracts Act

The tone is set by Article 1 of the Spanish Public Sector Contracts Act, paragraph 3 of which states that:

*“Social and environmental criteria **shall** be incorporated in **all** public procurement in a **cross-cutting and mandatory manner** whenever they are related to the subject matter of the contract, in the conviction that their inclusion provides better value for money in the provision of the contract, as well as greater and better efficiency in the use of public funds. (...)”<sup>247</sup> (we underline)*

It is worth noted that as regards the subject-matter of the contract, there is an obligation to define it taking account of environmental considerations<sup>248</sup>. As a result, the link with the SM of the contract might no longer have seemed as an obstacle to including GPP clauses. However, the legal doctrine reports that the courts still have restrictive case law<sup>249</sup>.

The preamble to the Spanish Public Sector Contracts Act also speaks for itself:

---

and the planning, management and control of the funds from the European Recovery Instrument known as “Next Generation EU”, in the Autonomous Community of the Canary Islands and establishing tax measures in the Canary Islands General Indirect Tax to combat COVID-19, art. 36, 37 and 41; Extremadura act 12/2018 of 26 December 2018 on socially responsible public procurement in Extremadura, art. 1, sub. 1, art. 3, § 3, sub. 1, art. 5, § 2 and 4, 10, § 1, c), 16, § 1, c), 25 and 27; Aragon Act 11/2023 of 30 March 2023 on the strategic use of public procurement in the Autonomous Community of Aragon, art. 3, § 2, 5, 8, 10, 22, 24, 26, 58, § 1, 64, § 1, e), 107, § 1, 114 *sq.*, 10<sup>th</sup> additional provision, § 2 and 3. Both the Extramadura and Aragon Acts can inspire other legislators to encourage the introduction of GPP in line with the circular economy. They are putting in place a whole range of practical tools to achieve this.

<sup>246</sup> See for example, “In the field of public contracts, Navarre has exclusive competence in accordance with the provisions of article 49.1 of Organic Law 13/1982, of 10 August, on the Reintegration and Improvement of the Provincial Regime of Navarre.” (free translation) Preamble of the Navarre Climate Act, point V, paragraph 13, *in fine*.

<sup>247</sup> Art. 1, § 3 of the Spanish Public Sector Contracts Act (free translation). See also, X. LAZO VITORIA, *op. cit.*, p. 220-221.

<sup>248</sup> Spanish Public Sector Contracts Act, art. 35, § 1, c).

<sup>249</sup> X. LAZO VITORIA, *op. cit.*, p. 230-229.

*« public procurement plays a key role, as it is one of the instruments based on the internal market that must be used to achieve smart, sustainable and inclusive growth, while ensuring a more economically rational use of public funds”*.<sup>250</sup>

In addition to this central legislation<sup>251</sup>, sectoral legislation, legislation on climate change and legislation approved under the EU Next Generation Funds<sup>252</sup> also play an important role in greening public procurement. There are also a number of soft law instruments, “*some of these instruments include SPP mandatory requirements as a target*”<sup>253</sup>.

In the Spanish Public Sector Contracts Act, in addition to the obligation to incorporate environmental criteria in accordance with Article 1, § 3, the greening of public procurement takes concrete form at various levels.

In the administrative clauses of the contract, “*environmental considerations which are set out in the selection criteria, award criteria or contract performance clauses*”<sup>254</sup> must be included. There is a provision that goes more or less in the same direction for technical specifications<sup>255</sup>. Environmental considerations are therefore clearly given prominence, although they are not explicitly imposed as SC, AC or TS. With regard to CPCs, another provision should be taken into account.

In the context of CPCs, the legislator goes indeed further:

*“In any case, it will be mandatory to establish in the specifications of particular administrative clauses at least one of the contract performance clauses listed in the following section. (...)*

*2. These contract performance clauses may relate in particular to economic, innovation-related, environmental or social considerations.”*<sup>256</sup> (we underline)

Although the legislator does not establish a preference between the different types of clauses it proposes, it should be emphasised that environmental considerations are clearly among the suggestions for mandatory clauses. In addition, the Spanish Public Sector Contracts Act expressly provides that the contract documents may attach a certain number of mechanisms to ensure compliance (penalties, classification as an essential obligation, grounds for dissolution of the contract or serious breach<sup>257</sup>). Academic writers emphasise that: “*This is the first time*

---

<sup>250</sup> Preamble, I, § 3 of the Spanish Public Sector Contracts Act (free translation). See also, X. LAZO VITORIA, *op. cit.* p. 221.

<sup>251</sup> Accompanied, for public procurement in special sectors by the Royal Decree-Law 3/2020 of 4 February 2020 on urgent measures transposing into Spanish law various European Union directives in the field of public procurement in certain sectors, private insurance, pension plans and funds, taxation and tax litigation. See, X. LAZO VITORIA, *op. cit.*, p. 220-221.

<sup>252</sup> X. LAZO VITORIA, *op. cit.*, p. 221.

<sup>253</sup> *Ibidem*, p. 221.

<sup>254</sup> Spanish Public Sector Contracts Act, art. 122, § 2 (free translation).

<sup>255</sup> Spanish Public Sector Contracts Act, art. 124.

<sup>256</sup> Spanish Public Sector Contracts Act, art. 202 § 1, sub. 2 and § 2, sub. 1 (free translation).

<sup>257</sup> Spanish Public Sector Contracts Act, art. 202, § 3.

*that Spanish legislation has made this compulsory and, moreover, applied it across the board, that is, whatever the type of contract or its economic threshold.”*<sup>258</sup>

With regard to the award criteria, a number of provisions should be noted which indirectly promote the greening of public procurement and the transition to a circular economy:

- “Contracts **shall** be awarded using a **plurality** of award criteria on the basis of the best value for money.”<sup>259</sup> (we underline) An award based solely on price or cost must be justified<sup>260</sup>.
- In a number of service contracts and, in any case, “in contracts relating to services of an intellectual nature, the criteria relating to quality must represent at least 51 per cent of the score assignable in the evaluation of tenders, without prejudice to the provisions of Article 146(2)(a)”<sup>261</sup><sup>262</sup> (we underline).
- “Contracting authorities **shall** calculate the costs referred to in the first and second paragraphs of Article 145 on the basis of life-cycle cost.”<sup>263</sup> (we underline) This provision encourages the transition to a circular economy.

The very broad scope of the various articles has been criticised by legal writers, who recognise that “the legislator appears to have opted for real ‘shock therapy’ here to accelerate the sustainability of tenders in Spain”<sup>264</sup>.

In addition to this Spanish Public Sector Contracts Act, the Spanish Council of Ministers adopted a Green public procurement plan on 7 December 2018. The annex to this plan contains an overview of the European GPPs as they were established at the time, with direct links to the documents in Spanish on the European Commission website.<sup>265</sup>

---

<sup>258</sup> X. LAZO VITORIA, *op. cit.*, p. 222-223.

<sup>259</sup> Spanish Public Sector Contracts Act, art. 145, § 1, sub. 1 (free translation).

<sup>260</sup> Spanish Public Sector Contracts Act, art. 145, § 1, sub. 2.

<sup>261</sup> This provision specifies that: “2. Where a plurality of award criteria are used, in their determination, whenever possible, preponderance shall be given to those which refer to characteristics of the subject-matter of the contract which can be assessed by means of figures or percentages obtained through the mere application of the formulas laid down in the tender documents.

*The application of the award criteria will be carried out by the following bodies:*

*(a) In open or restricted award procedures carried out by public administration bodies, the assessment of criteria whose quantification depends on a value judgement shall, where appropriate because they have been given a greater weight than that corresponding to the criteria that can be evaluated automatically, be carried out by a committee made up of experts with appropriate qualifications; that it has a minimum of three members, who may belong to the services dependent on the contracting authority, but in no case may they be attached to the body proposing the contract, which will be responsible for evaluating the tenders; or entrust it to a specialized technical body, duly identified in the specifications.”* (free translation)

<sup>262</sup> Spanish Public Sector Contracts Act, art. 145, § 4, sub. 2.

<sup>263</sup> Spanish Public Sector Contracts Act, art. 148, § 4.

<sup>264</sup> X. LAZO VITORIA, *op. cit.*, p. 223.

<sup>265</sup> Order PCI/86/2019 of 31 January 2019 publishing the Agreement of the Council of Ministers of 7 December 2018, approving the Green Public Procurement Plan for the General State Administration, its autonomous bodies and the managing entities of the Social Security (2018-2025) (free translation), available on: [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2019-1394](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2019-1394).

In April 2021, the Spanish Government published a three-year report (2018 to 2020) on public procurement in Spain<sup>266</sup>. The figures gathered by the Spanish Government are encouraging. To illustrate the data contained in the Spanish Government's report<sup>267</sup>, we have drawn up the following graph. This graph shows the number of GPP in Spain over the reporting period.

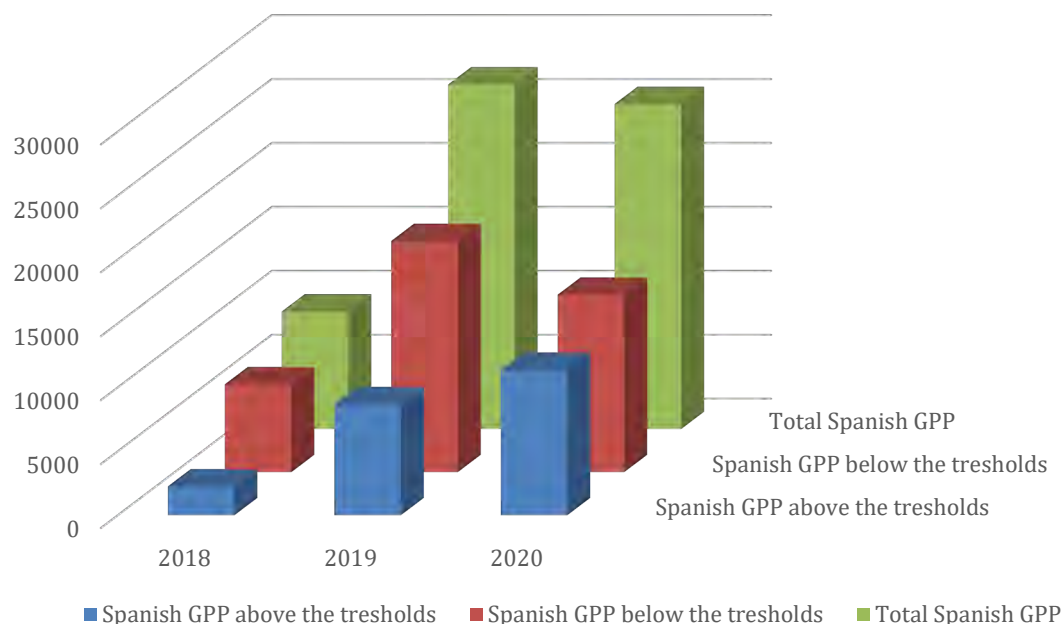


Figure 8. Spanish GPP

These figures should be seen in relation to the figures for the total number of public contracts awarded in Spain. Based on the figures provided in the Spanish Government's report<sup>268</sup>, we have drawn up the following graph to illustrate the situation. The following graphs show therefore the percentage of GPP in relation to the total number of public procurement for the year in question.

By comparing the first graph below with the graph above, we can see that, although the total number of GPP fell in 2020, the proportion of the total number of GPP in relation to the total number of public procurement nevertheless increased. We can therefore deduce that fewer public procurement were awarded in 2020 overall, but that the proportion of GPP was higher.

<sup>266</sup> Spanish Government, *Triennial report on public procurement in Spain in 2018, 2019 and 2020*, April 2021, available on: <https://www.hacienda.gob.es/DGPatrimonio/junta%20consultiva/trienal2021.pdf>.

<sup>267</sup> Spanish Government, *Triennial report on public procurement in Spain in 2018, 2019 and 2020*, April 2021, p. 16 and 72-74.

<sup>268</sup> Spanish Government, *Triennial report on public procurement in Spain in 2018, 2019 and 2020*, April 2021, p. 69-71.



Figure 9. Evolution of the proportion of Spanish GPP: all public procurements

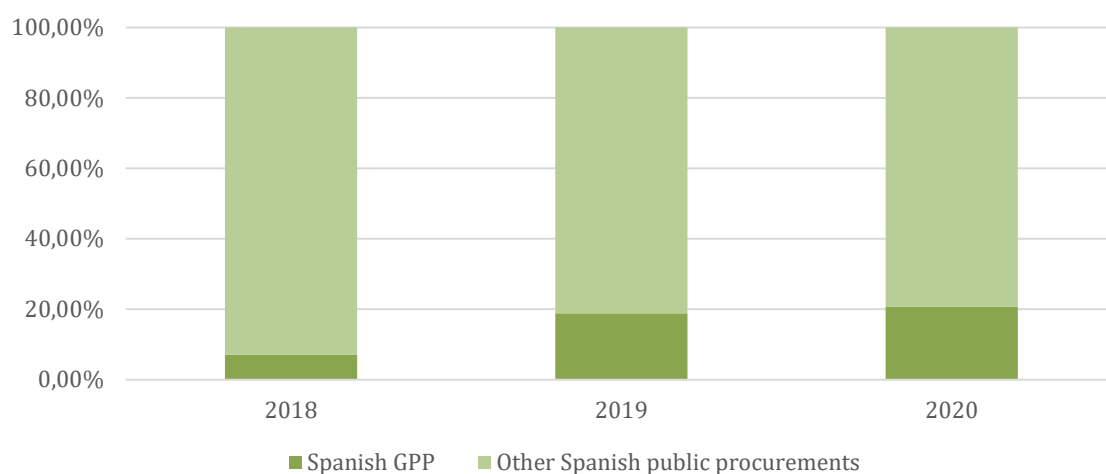


Figure 10. Evolution of the proportion of Spanish GPP: above the thresholds

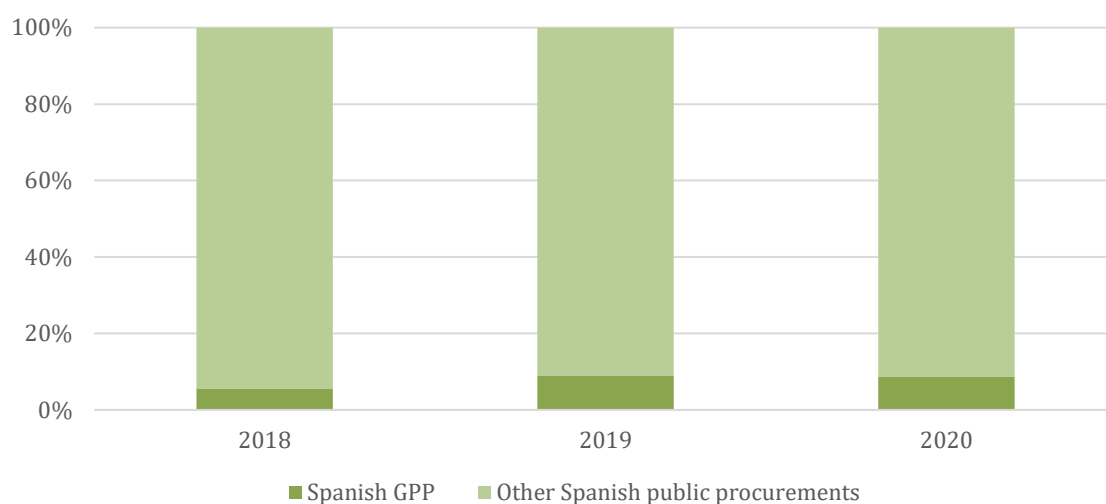


Figure 11. Evolution of the proportion of Spanish GPP: below the thresholds

However, the results are mixed since “[i]t is common to see merely formal compliance with the law, the introduction of generic clauses and non-specific obligations or, to give another example, that a clause is limited to reiterating a requirement already included in a previous regulation”<sup>269</sup>.

The government's report also identifies a whole series of problems in the implementation of green public procurement. Thus, there are problems relating to (i) the regulation (normative dispersion and complexity and lack of common criteria), (ii) the drafting of specification (difficulties regarding the link between the AC / CPC and the SM, increase in the budget and price of the contract, difficulties in the definition of the condition, difficulties of valuating green criteria), (iii) the compliance by the bidders (limitation of the competition, prejudice for SMEs, compliance control by the contracting authorities), (iv) insufficiency of means and (v) lack of training<sup>270</sup>. Following on from this, the Spanish Government proposes a whole series of measures to deal with them, *i.e.* (i) internal regulation and instructions (procurement plans, strategies, standards and instructions), (ii) informative guidelines and recommendation, (iii) training plans (courses and seminars), (iv) creation of bodies to coordinate the promotion of GPP and (v) impact monitoring<sup>271</sup>.

### **5.2.3.3 State and Autonomous Communities law related to GPP and the circular economy**

#### **5.2.3.3.1 Climate law**

At the State level, it is interesting to point out Article 31, § 2 of the Spanish Climate Act because de minimisation of waste generation is provided as an example of AC<sup>272</sup>.

A number of Autonomous Communities have adopted their own climate change regulations<sup>273</sup>.

With that respect, it is interesting noting the Annex II of the Catalonia Climate Act provides that, in the annual report to be drawn up pursuant to Article 29, § 1, e), the minimum information includes both information directly promoting the circular economy (*e.g.* “*c) Measures to reduce waste generation and improve waste management.*”) and very clearly the GPP (“*h) Actions in the field of greening of public procurement, with special emphasis on the groups of products*”).

---

<sup>269</sup> X. LAZO VITORIA, *op. cit.*, p. 131.

<sup>270</sup> Spanish Government, *Triennial report on public procurement in Spain in 2018, 2019 and 2020*, April 2021, p. 130-132.

<sup>271</sup> Spanish Government, *Triennial report on public procurement in Spain in 2018, 2019 and 2020*, April 2021, p. 132-135.

<sup>272</sup> Spanish Climate Act, art. 31, § 2 (free translation). For an analyse of this act, see X. LAZO VITORIA, *op. cit.*, p. 225-226. On waste reduction, see also Balearic Islands Climate Act, art. 71, § 1, d).

<sup>273</sup> X. LAZO VITORIA, *op. cit.*, p. 224-225. This author points out that : “*Catalonia was the first region to legislate on climate change in 2017. It was followed by Andalusia (2018), the Balearic Islands (2019) and the Autonomous Region of Navarre (2022). Other Autonomous Regions are also in the process of approving similar regulations (Canary Islands, Autonomous Region of Valencia, Aragon and the Basque Country), so each autonomous territory is likely to have its own climate legislation in the near future.*” Since then, with the exception of Aragon, for which we found nothing similar, all the Autonomous Communities mentioned in the quotation have indeed adopted regulations on climate change. See in particular, the Navarre Climate Act, 11<sup>th</sup> additional provision and 2<sup>d</sup> final provision; Catalonia Climate Act, art. 35 and 29; Balearic Islands Climate Act, art. 68, 71 and 73; Andalusia Climate Act, art. 30; Canary Islands Climate Act, art. 24, 25, 27 and 28; Valencia Act 6/2022 of 5 December 2022 on Climate Change and Ecological Transition of the Valencian Community, art. 90, 93 and 95; Basque Country Act 1/2024 of 8 February 2024 on Energy Transition and Climate Change, art. 55 and 57.



defined as priorities by the European Union and those established by the Generalitat's greening guidelines.”)<sup>274</sup>. Article 29, § 1, d) provides for the obligation to “include in all procurement procedures where appropriate to their purpose **specific technical specifications and award criteria relating to the efficient use of resources**”<sup>275</sup>, which contributes to the transition towards a circular economy.

In the Andalusia Climate Act, the reference to GPP is explicit. Article 30 is clearly entitled as such<sup>276</sup>. In terms of the circular economy, it specifically promotes “[t]he establishment of **award criteria that give preference to the processes of reduction, reuse and recycling of products, and the reduction of greenhouse gas emissions in the processes of production, marketing and distribution of the same.**”<sup>277</sup> (we underline)

With regard to the circular economy, Article 25 of the Canary Islands Climate Act requires in paragraph 1, b), while using the “comply or explain” mechanism that, “[i]n contracts for the execution of works:

1. **The use of construction and demolition waste, as well as other waste that may be used in the execution of the works, whenever possible and the nature of the work so permits, in which case its non-use must be justified. In this case, economic criteria may not be invoked as justification.**

2. **Waste management plans must justifiably maximise the reuse of waste.**”<sup>278</sup> (we underline)

Provisions on waste management are also included for the organisation of events, public events and hospitality services in Article 28<sup>279</sup>.

#### 5.2.3.3.2 Environmental law

It is worth giving a few more examples from the regulations on the circular economy in which public procurement plays an important role.

Annex V of Spanish Act 7/2022 of 8 April 2022 on waste and contaminated soils for a circular economy gives the following as “[e]xamples of economic instruments and other measures to incentivise the implementation of the waste hierarchy [:] Sustainable public procurement to incentivise better waste management and the use of products and materials, reused, prepared for reuse and recycled, as well as the repair of products”<sup>280</sup>.

---

<sup>274</sup> Catalonia Climate Act, annex II, c) and h).

<sup>275</sup> Catalonia Climate Act, art. 29, § 1, d).

<sup>276</sup> Andalusia Climate Act, art. 30.

<sup>277</sup> Andalusia Climate Act, art. 30, c).

<sup>278</sup> Canary Islands Climate Act, art. 25, § 1, b) (free translation).

<sup>279</sup> Canary Islands Climate Act, art. 28.

<sup>280</sup> Spanish Act 7/2022 of 8 April 2022 on waste and contaminated soils for a circular economy, Annex V (free translation). See also, X. LAZO VITORIA, *op. cit.*, p. 229.

In the Basque Country, Article 84, § 3 of Act 10/2021, of 9 December 2021, on Environmental Administration in the Basque Country, on GPP probably inspired Article 20, paragraph 3 of the Asturias Environment Act<sup>281</sup>, because it contains the same idea:

*“In the drafting of the specifications of administrative clauses and specific technical prescriptions for the execution of **works** contracts, the percentages of **by-products, secondary raw materials, recycled materials** or materials from preparation processes for **reuse** to be used for each of them shall be indicated. The **minimum percentage of use of such materials shall be 40 %**, unless for justified technical reasons this percentage must be reduced.”*<sup>282</sup> (we underline)

However, the scope of application is more restricted in that this is only required for public works contracts, while Article 20, paragraph 3 of the Asturias Environment Act applies to work and supplies. Both Autonomous Communities are therefore clearly showing a firm commitment to the circular economy in its GPP, while being pragmatic and using the “comply or explain” mechanism.

Additionally, Article 19 of the Asturias Environment Act establishes a direct link between the circular economy and public procurement, setting out the following principles *“the use of **by-products, secondary raw materials and materials recycled or from preparation processes for reuse**”*<sup>283</sup> (we underline) a preferential criterion in public procurement.

In Valencia, the Act 5/2022, of 29 November 2022, on waste and contaminated soils for the promotion of the circular economy in the Valencian Community states that a whole series of criteria for public procurement must be developed to promote the circular economy from different angles, e.g.:

- *“Prioritization of the acquisition of reusable, reused, repaired, biodegradable, recyclable and recycled products and materials.”*<sup>284</sup>
- For public works procurement: *“inclusion of bioclimatic design criteria, self-consumption from renewable energies, supply of energy from renewable energy sources, nature-based solutions and quantitative targets regarding the use of reusable, biodegradable, recyclable and recycled materials, of high durability, proximity or low environmental impact according to the life cycle analysis”*<sup>285</sup>.
- *“Prioritisation of the procurement and use of ecodesign products”*<sup>286</sup>.

---

<sup>281</sup> Asturias Environment Act, art. 20, § 3. Other interesting articles about GPP are art. 16, § 2, c), 17, § 2, d), 18, § 2, c) and 20, § 2.

<sup>282</sup> Basque Country Act 10/2021 of 9 December on Environmental Administration in the Basque Country, art. 84, § 3 (free translation). See also, X. LAZO VITORIA, *op. cit.*, p. 229.

<sup>283</sup> Asturias Environment Act, art. 19, § 1.

<sup>284</sup> Valencia act 5/2022 of 29 November 2022 on waste and contaminated soils for the promotion of the circular economy in the Valencian Community, art. 34, § 1, b) (free translation).

<sup>285</sup> Valencia act 5/2022 of 29 November 2022 on waste and contaminated soils for the promotion of the circular economy in the Valencian Community, art. 34, § 1, c) (free translation).

<sup>286</sup> Valencia act 5/2022 of 29 November 2022 on waste and contaminated soils for the promotion of the circular economy in the Valencian Community, art. 34, § 1, d) (free translation).

- *“Prioritization of the acquisition of products and services registered in systems with environmental product declarations (EPDs), in accordance with the international standard ISO 14025, based on life cycle analysis.”<sup>287</sup>*

Finally, in Andalusia, Article 3, e) of the Act 3/2023, of 30 March 2023, on the Circular Economy of Andalusia defines green public procurement using terms similar<sup>288</sup> to those of the European definition<sup>289</sup>.

Article 11 of this Andalusia Act is entitled *“Circularity measures in green public procurement”*<sup>290</sup> and set out that:

*“1. The contracting bodies of the public sector entities included in the scope of application of this Act (...) shall ensure the reduction of the environmental impact of **works, supplies or services** and shall encourage the application of the waste hierarchy, **promoting green public procurement as an essential instrument to favour the transition towards a circular economy model** (...).*

*2. The mandatory minimum criteria and objectives for green public procurement shall be included in the sectoral regulations, which, in any case, shall ensure the inclusion of the principles set out in article 9 of Law 20/2013, of 9 December, on guaranteeing market unity. The deadlines for its implementation shall be determined by regulation, in accordance with European Union law and basic state regulations.”<sup>291</sup> (we underline)*

Paragraph 3 of the same Article provides for example of environmental clauses such as the application of the LCA for products or services<sup>292</sup>, the use of the Ecolabel<sup>293</sup>, the EMAS registration<sup>294</sup>, the *“procurement of products from secondary raw material markets or made from recycled materials”*<sup>295</sup>, the *“products, works and services to be acquired comply with durability and reparability criteria”*<sup>296</sup>, etc.

Article 12 sets out rules for the public procurement of key products (food, renewable energies, building, textile, etc.) in the context of circular economy<sup>297</sup>.

#### 5.2.3.4 Conclusion

Our research, as reflected in the preceding lines, shows that Spanish public procurement law is particularly difficult to read. Both at State level and at the level of the Autonomous

<sup>287</sup> Valencia act 5/2022 of 29 November 2022 on waste and contaminated soils for the promotion of the circular economy in the Valencian Community, art. 34, § 1, f) (free translation).

<sup>288</sup> Andalusia act 3/2023 of 30 March 2023 on the Circular Economy of Andalusia, art. 3, e).

<sup>289</sup> Cf. *supra*.

<sup>290</sup> Andalusia act 3/2023 of 30 March 2023 on the Circular Economy of Andalusia, art. 11 (free translation).

<sup>291</sup> Andalusia act 3/2023 of 30 March 2023 on the Circular Economy of Andalusia, art. 11, § 1-2 (free translation).

<sup>292</sup> Andalusia act 3/2023 of 30 March 2023 on the Circular Economy of Andalusia, art. 11, § 3, a).

<sup>293</sup> Andalusia act 3/2023 of 30 March 2023 on the Circular Economy of Andalusia, art. 11, § 3, b).

<sup>294</sup> Andalusia act 3/2023 of 30 March 2023 on the Circular Economy of Andalusia, art. 11, § 3, c).

<sup>295</sup> Andalusia act 3/2023 of 30 March 2023 on the Circular Economy of Andalusia, art. 11, § 3, g) (free translation),

<sup>296</sup> Andalusia act 3/2023 of 30 March 2023 on the Circular Economy of Andalusia, art. 11, § 3, h) (free translation).

<sup>297</sup> Andalusia act 3/2023 of 30 March 2023 on the Circular Economy of Andalusia, art. 12.

communities, the provisions relating to public contracts are to be found in some of the most scattered texts. This complexity and lack of clarity has been raised by both academics<sup>298</sup> and the government's report<sup>299</sup>. Neither European public procurement law nor Belgian law should fall into such a situation.

Among the positive points of Spanish law, it should be noted that several provisions are both ambitious and pragmatic. In fact, they are directive in terms of what needs to be done, but use the “comply or explain” mechanism, which allows the necessary margin of appreciation to be applied in each individual case.

It is particularly interesting to note the important role played by the Autonomous Communities in greening public procurement law and strengthening its links with the circular economy. While respecting the distribution of competences in Belgium, the Spanish model can clearly provide inspiration and concrete examples of what can be done to foster green public procurement and the circular economy in the legislation.

## 5.3 Main obstacles to achieving a circular economy in public procurement with the use of GPP

Among the obstacles to the adoption of GPPs, including their circular economy components, in the day-to-day practice of public purchasers, studies have already pointed out “*financial barriers (...), lack of managerial support (...), lack of information, knowledge and competences*”<sup>300</sup>.

The lack of training for those who have to apply public procurement law is often pointed out as one of the first problems to be tackled to enable more circular economy in public procurement law<sup>301</sup>. With this in mind, it is all the more disappointing that the amendments aimed at upskill and reskill staff who have to apply GPP have recently been withdrawn from the texts currently in the process of being adopted by the European Union<sup>302</sup>.

In addition, staff dealing with public procurement often have other tasks to perform, and sometimes already have to follow fairly cumbersome internal approval rules for simple public contracts. This does not help to integrate more innovative clauses such as GPP clauses.

As far as financial problems are concerned, the literature points out that it is often a question of a lack of long-term vision on the part of management, which is characterised by a tendency

---

<sup>298</sup> X. LAZO VITORIA, *op. cit.*, p. 230.

<sup>299</sup> Spanish Government, *Triennial report on public procurement in Spain in 2018, 2019 and 2020*, April 2021, p. 130.

<sup>300</sup> F. TESTA *et al.*, *op. cit.*, p. 198. In the same way, IDEA, *op. cit.*, p. 57-64.

<sup>301</sup> *Cf. supra* regarding Italy; X. LAZO VITORIA, *op. cit.*, p. 230.

<sup>302</sup> *Cf. supra*.

to buy cheaper without necessarily taking into account the fact that the life of the product could, in this case, be shorter. To overcome this, training public purchasers and their management to calculate the total cost of ownership / operations (TCO) would enable them to better understand the real cost of what a product represents for the contracting authority<sup>303</sup>. The cheapest product at a given time is not necessarily the cheapest in the long term. To take environmental externalities into account, it is worth referring to tools like life cycle costing (LCC)<sup>304</sup> or life cycle assessment (LCA).<sup>305</sup> The European Union already provides tools for certain product categories<sup>306</sup>, and the SPI should make it possible to increase the tools available<sup>307</sup>.

In the same vein, in Belgium, it appears from practice that sometimes the Inspectorate of Finance seems not very open to admitting that the price criterion may be worth less than the quality criterion for public contracts with large budgets. In any case, awarding as many points for quality as for price (50 % price – 50% quality), or even awarding more points for quality (e.g. 30% price – 70 % quality), requires solid justification. The circular economy seems to contribute to such a justification. The budget's annuity rule does not help either.

Still from a financial point of view, there may indeed be a budgetary problem where the contracting authority simply does not have the means to be able to buy better products in the short term<sup>308</sup>. In this respect, it is worth remembering that when it comes to the circular economy, sometimes it is better not to buy than to buy something the contracting authorities do not really need.

With regard to “*lack of information, knowledge and competences*”<sup>309</sup>, the literature notes that a number of toolkits and initiatives already exist, but they need to be better known by public purchasers if they are to be used more. In particular, it is noted that the smaller the contracting authority, the more likely it is that internal skills for including environmental clauses and ensuring that they are implemented will diminish, but that this is not necessarily correlated.<sup>310</sup> We have seen that a number of documents are already available in Belgium at both federal and regional level, but it is not always easy for contracting authorities to find their way through the mass of documents.

In Spain<sup>311</sup>, Italy<sup>312</sup> and Wallonia<sup>313</sup> the lack of monitoring and/or control of the performance of GPP clauses was identified as a problem. In Wallonia, difficulties had also been encountered in assessing circular AC<sup>314</sup>.

---

<sup>303</sup> On this subject, see <https://aankopen.vlaanderen-circulair.be/nl/aan-de-slag/webinars-circulair-aankopen/webinar-start-met-total-cost-of-ownership>.

<sup>304</sup> Classic Directive, art. 68; Utilities Directive, art. 83

<sup>305</sup> F. TESTA *et al.*, *op. cit.*, p. 199. See also <https://aankopen.vlaanderen-circulair.be/nl/aan-de-slag/financiering>; ISO 20400:2017 Sustainable procurement — Guidance.

<sup>306</sup> *Cf. supra* 6.1.2.3.

<sup>307</sup> *Cf. supra*.

<sup>308</sup> IDEA, *op. cit.*, p. 61.

<sup>309</sup> F. TESTA *et al.*, *op. cit.*, p. 198.

<sup>310</sup> *Ibidem*, p. 199-200 and 210-211.

<sup>311</sup> X. LAZO VITORIA, *op. cit.*, p. 231.

<sup>312</sup> *Cf. supra*.

<sup>313</sup> IDEA, *op. cit.*, p. 63.

<sup>314</sup> IDEA, *op. cit.*, p. 58-59.

Another problem is that there are potentially not enough private players on the market to offer such green works, supplies and/or services. This is also something that was encountered in Italy when CAMs became compulsory. This undermines a major principle of public procurement law, namely the principle of competition.

In some public procurement, too much innovation in the re-use of materials can lead to legal problems (insurance, IP, *etc.*) that contracting authorities need to be able to deal with. For example, carrying out works using raw soil bricks makes it possible to reuse excavated soil not far from where it was dug up, but this means being able to argue to insurance companies that the building can still be insured against common risks (fire, flood, *etc.*) even though it includes an innovative material that the insurance market is not used to. This can discourage many public purchasers.

A problem that is already very present in Spain and that is emerging at European level is the dispersal of rules relating to public procurement in texts that are not specific to public procurement. This dispersion means that it is less easy to be aware of their existence and therefore to apply them. This is an obstacle to the inclusion of GPP clauses promoting the circular economy.

Faced with these difficulties, we will suggest a whole series of possible solutions in our conclusion.

# 6 Conclusion: GPP and SPI: how can they best be combined to create an ever more circular economy? Policy recommendations

In the section on “*Mobilising industry for a clean and circular economy*” in its communication on the European Green Deal, the European Commission clearly identifies public procurement as a tool for achieving this objective, as well as a sustainable product policy<sup>315</sup>.

It is important to underline that Green Public Procurement and the circular economy can go hand in hand. Indeed, the definition of GPP remains focused on the “process” by which procuring authorities seek to procure goods, services and works with a reduced environmental impact during their life cycle. Reduced environmental impact during the life cycle is one of the essential characteristics of the circular economy. It should be noted that introducing specific provisions on choosing “*what*” a contracting authority should procure does not imply that it cannot do better. Indeed, the “*what*” provides a minimum basis in which the available framework can also indicate “*how*” to do better procurement and “*how*” these procedures can be further used to procure even better products, services and works in order to move towards a circular economy.

Further greening of products, services and works, should thus be considered as an opportunity for government procurement. Indeed, it becomes easier to establish technical and implementing provisions, as well as selection and award criteria, because - through the specific regulations related to the greening of products, services and works - there is now precisely a framework that can be fitted into the procedures provided for public procurement. It is precisely in these procedures that the added value of good provisions and criteria will also show its added value in making further distinctions between the products, works and services proposed by bidders. The **complementarity** of restrictions on “*what*” can be procured on the

---

<sup>315</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European economic and social Committee and the Committee of the regions, *The European Green Deal*, COM(2019) 640 final, p. 7-8, available on <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2019:640:FIN>. See also, C. BACKES and M. BOEVE, “Regulating the Producer Instead of the Procurer – The EU Sustainable Products Initiative and Extended Producer Responsibility as Ways to Foster the Transition to a Circular Economy”, *Mandatory sustainability requirements in EU public procurement law*, W. Janssens and R. Caranta (ed.), Bloomsbury Collections, Oxford, Hart Publishing, 2023, p. 95.



one hand and the manner of “*how*” procurement is carried out on the other should therefore be embraced.

The complementarity outlined also translates into a certain **coherence and uniformity**. Indeed, it provides a uniform framework for all contracting authorities on what can be procured. The discretionary freedom being diminished also has the effect of creating a more coherent and uniform framework, within which entrepreneurs also have more visibility into what the government can procure in the future. In our view, this also has a positive impact on market forces and competition. Whereas today public contracts are often issued, where it is clear that only limited competition is available, this should change in the future, given a certain **predictability** of “*what*” will be tendered.

Therefore, the key words quoted here seem to be the framework to be watched over, especially by policy makers at the European level. They should help to provide a complementary, coherent and uniform framework on the basis of which it is possible to maintain some predictability for market participants. Only in this way can it also be ensured that circularity is pursued together. This requires, among other things, that the market is also adequately guided and incentivized to commit to a circular approach, which will enable them to successfully participate in a public procurement procedure. The requirement for uniformity does not imply that sectoral rules and specific product-related rules cannot be imposed. Indeed, it may be interesting to have more stringent rules for certain sectors or regarding specific products. However, the basic principle remains that these must be clearly known in advance, so that it is also foreseeable to the market what will be tendered.

Nevertheless, there is also a role for the federal and Flemish regulators responsible for the implementation of European regulations. They too can ensure that things are further streamlined, in particular that the public procurement framework on how and what can be procured is aligned as much as possible.

Another important concern is this one of **support**. Indeed, the research shows that there is a need for this. Indeed, contracting authorities need to be supported in their further procurement and how to use GPP to contribute to a circular economy.

Our possible solutions to further foster the circular economy through GPP are as follows:

- Provide a complete framework. Ensure that procedural guidelines are maximally aligned with what can be procured. This includes, for example, linking to the evidence that may be required as part of selection as well as in the award of public contracts themselves. For example, there could be an obligation to produce product passports and the like more so that a contracting authority also has a better understanding of what it is purchasing.
- Given the importance of training in this area, it is essential to organise as many training courses and workshops as possible for public purchasers so that the existing tools are better known. To make this happen, it is important to provide the necessary financial support.

- Regarding training, in addition to the previous point, it could also be useful to train operational staff on certain points of attention (for example, whether an abnormal price can be linked to violations of environmental law<sup>316</sup>). In this way, they can better inform the public purchasers.
- More generally, it would be useful to encourage interaction between public purchasers with basic skills and experts to complement the latter. On this subject, we also refer to the digital solution that could be put in place and which is set out in the last point of this list.
- As regards the organization of knowledge sharing, it can be useful to have a point of contact that directs the public purchaser to the appropriate resources for their matter.
- Workshops and meetings with economic operators can also be useful, so that private players are aware of these clauses and can also give their views on what can be done. This could also help public authorities to better determine their needs and draw up their specifications. This also helps to avoid problems of lack of competition.
- Sometimes the cost benefits do not materialise until the whole picture is considered – including multiple contracts and the implications for people/resources across the whole operation. It is therefore necessary to take a longer-term view, not just of the contract, but of the product group or operation as a whole. To do this, it is useful to look beyond the public purchaser and management and involve all the relevant stakeholders in the operation to develop a solid policy around a product group.
- If it is not possible to establish an award criterion other than the price, or if the price criterion counts for a majority of points, it is worth considering setting verifiable minimum requirements which, if not met, will result in (i) irregularity of the offer during the award phase and (ii) special penalties during the performance of the contract.
- As we have seen in Italy, making certain clauses compulsory (“what to build”) does generate the necessary awareness and enables the contracting authorities to move in the right direction. In this respect, the mandatory clauses being introduced at European level are a good start. Flanders could choose to go further, depending on the reality on the ground, while respecting the rules on the division of competences. In this respect, it could draw inspiration from what the Spanish Autonomous Communities are doing by, for example, imposing a percentage of materials from the circular economy in public procurement contracts while using the “comply or explain” mechanism. If this type of regulation is developed, it is important that it remains centralised and is not scattered across different texts to ensure that it is easy to understand.
- Systematically mentioning in the subject of the contract that it is a public contract that is part of a circular economy approach not only sends a strong signal to economic operators, but also ensures that the clauses promoting this circular economy are in line with the SM of the contract.

---

<sup>316</sup> See *supra*, 6.1.1.3.

- Continuing to develop – even non-compulsory – standard clauses promoting the circular economy so that they can be easily implemented by contracting authorities in their specifications is certainly an effort to be pursued at all levels. In this respect, the arrival of the MVOO-criteria-tool <sup>317</sup> is excellent news. The MVIcriteria-tool in the Netherlands<sup>318</sup> and the green clause<sup>319</sup> in France remain a source of inspiration.
- Flanders could, as a first step, raise the issue of LCC – and even LCA – tools at EU level to understand why their implementation remains very limited. Secondly, given the cost in time and money of developing such tools, it might be a good idea to push for their development and updating at EU level, ensuring that national particularities are taken into account if they are relevant.
- The importance of contract performance clauses should certainly not be underestimated. Developing model special penalty clauses, bonus clauses and review clauses for public procurements that promote the circular economy would have a definite added value compared to the GPP model clauses that already exist at EU level.

Regarding the MVOOcriteria-tool, it might be a good idea to ask for feedback from users to find out which criteria are most used, which are most effective and which are experiencing difficulties and need to be improved. To this end, the MVOOcriteria-tool website could redirect to another website where an account would have to be created (to prevent anyone writing anything at all). On this website, people using the criteria could ask their questions. Others could describe how they have adapted one or another clause in a specific case. This website could also be fed by the helpdesk (especially at the beginning), which could post the most frequently asked questions and the answers given. There could also be a system for voting on posts to assess their relevance. A successful example of this type of system in a completely different field is Stack Overflow<sup>320</sup>. As this tool is open source, it could be redeployed with a few adaptations.

---

<sup>317</sup> <https://www.mvoocriteria.be/nl>.

<sup>318</sup> <https://www.mvicriteria.nl/en>.

<sup>319</sup> <https://laclauseverte.fr/>.

<sup>320</sup> <https://stackoverflow.com/>.

# 7 Bibliography

## 7.1 Legislation

### 7.1.1 EU law

- 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), *OJ*, 20 September 2023.
- 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, *OJ*, 28 July 2023.
- 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) N° 995/2010, *OJ*, 9 June 2023.
- 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, *OJ*, 12 July 2019.
- 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, *OJ*, 28 March 2014.
- 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, *OJ*, 28 March 2014.
- Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, *OJ*, 28 March 2014.
- Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, *OJ*, 14 November 2012.

### 7.1.2 Belgian law

- Circular 307septies of 12 April 2023 – Acquisition (purchase, hire-purchase, rental and lease) of clean (emission-free) vehicles registered in Belgium, *BJ*, 12 April 2023.
- Act of 18 May 2022 amending the Act of 17 June 2016 on public procurement and the Act of 17 June 2016 on concession contract, *BJ*, 30 May 2022.
- Walloon Decree of 2 May 2019 amending various decrees with a view to including environmental, social and ethical clauses in public contracts subsidised by the Walloon Region, *BJ*, 27 August 2019.
- Brussels ministerial order of 3 May 2019 on thresholds and values for circular economy projects, *BJ*, 7 May 2019.
- Government of the Brussels-Capital Region order of 1 December 2016 on waste management, *BJ*, 13 January 2017.
- Act of 17 June 2016 on public procurement, *BJ*, 14 July 2016.
- Act of 17 June 2016 on concession contracts, *BJ*, 14 July 2016.

- Circular of 16 May 2014 – Integration of sustainable development, including social clauses and measures in favour of small and medium-sized enterprises, in the context of public contracts awarded by federal contracting authorities, *BJ*, 21 May 2014.
- Ordinance of 8 May 2014 concerning the inclusion of environmental and ethical clauses in public contracts, *BJ*, 6 June 2014.
- Circular of 28 November 2013 on the implementation of a sustainable procurement policy for Walloon regional contracting authorities, *BJ*, 17 December 2013.
- Special act of 8 August 1980 on institutional reforms, *BJ*, 15 August 1980.

### 7.1.3 Italian law

- Legislative Decree n° 36 of 31 March 2023 – Public Contracts Code in implementation of Article 1 of Act n° 78 of 21 June 2022, delegating the Government in the field of public contracts, *GU*, 31 March 2023.
- Legislative Decree n° 50 of 18 April 2016 – Public Contracts Code, *GU*, 19 April 2016.
- Legislative Decree n° 163 of 12 April 2006 – Code of public contracts for works, services and supplies implementing Directives 2004/17/EC and 2004/18/EC, *GU*, 2 May 2006.

### 7.1.4 Dutch law

- Act of 1 November 2012, containing new rules on procurement (Procurement Act 2012), *NJ*, 08 November 2012.

### 7.1.5 Spanish law

- Basque Country Act 1/2024 of 8 February 2024 on Energy Transition and Climate Change, *BOE*, 19 February 2024.
- Aragon Act 11/2023 of 30 March 2023 on the strategic use of public procurement in the Autonomous Community of Aragon, *BOE*, 6 May 2023.
- Andalusia Act 3/2023 of 30 March 2023 on the Circular Economy of Andalusia, *BOE*, 25 April 2023.
- Asturias Act 1/2023 of 15 March 2023 on Environmental Quality, *BOE*, 29 April 2023.
- Canary Islands act 6/2022 of 27 December 2022, on climate change and energy transition in the Canary Islands, *BOE*, 4 February 2023.
- Valencia Act 6/2022 of 5 December 2022 on Climate Change and Ecological Transition of the Valencian Community, *BOE*, 20 February 2023.
- Valencia Act 5/2022 of 29 November 2022 on waste and contaminated soils for the promotion of the circular, *BOE*, 9 February 2023.
- Spanish Act 7/2022 of 8 April 2022 on waste and contaminated soils for a circular economy, *BOE*, 9 April 2022.
- Navarre Act 4/2022 of 22 March 2022 on Climate Change and Energy Transition, *BOE*, 1 April 2022.
- Basque Country Act 10/2021 of 9 December 2021 on Environmental Administration in the Basque Country, *BOE*, 31 December 2021.
- Spanish Act 7/2021 of 20 May 2021 on climate change and energy transition, *BOE*, 21 May 2021.
- Canary Island Decree-Act 4/2021 of 31 March 2021 on urgent measures for administrative streamlining and the planning, management and control of the funds from the European Recovery Instrument known as “Next Generation EU”, in the

Autonomous Community of the Canary Islands and establishing tax measures in the Canary Islands General Indirect Tax to combat COVID-19, *BOE*, 5 June 2021.

- Andalusia Decree-Act 3/2021 of 16 February 2021 adopting measures to streamline administration and rationalize resources to promote recovery and resilience in the Autonomous Community of Andalusia, *BOE*, 22 February 2021.
- Catalonia Decree-Act 5/2021 of 2 February 2021 approving urgent measures for the implementation and management of funds from the Recovery and Resilience Mechanism and the REACT-EU fund for the Administration of the Government of Catalonia and its public sector, *BOE*, 18 March 2021.
- Royal Decree-Act 36/2020 of 30 December 2020, approving urgent measures for the modernisation of the Public Administration and for the implementation of the Recovery, Transformation and Resilience Plan, *BOE*, 31 December 2020.
- Spanish Royal Decree-Act 3/2020 of 4 February 2020 on urgent measures transposing into Spanish law various European Union directives in the field of public procurement in certain sectors, private insurance, pension plans and funds, taxation and tax litigation, *BOE*, 5 February 2020.
- Balearic Islands Act 10/2019 of 22 February 2019 on Climate Change and Energy Transition, *BOE*, 13 April 2019.
- Spanish Order PCI/86/2019 of 31 January 2019 publishing the Agreement of the Council of Ministers of 7 December 2018, approving the Green Public Procurement Plan for the General State Administration, its autonomous bodies and the managing entities of the Social Security (2018-2025), *BOE*, 4 February 2019.
- Extremadura Act 12/2018 of 26 December 2018 on socially responsible public procurement in Extremadura, *BOE*, 9 February 2019.
- Andalusia Act 8/2018 of 8 October 2018 on measures against climate change and for the transition to a new energy model in Andalusia, *BOE*, 7 November 2018.
- Spanish Act 9/2017 of 8 November 2017 on Public Sector Contracts, transposing into Spanish law European Parliament and Council Directives 2014/23/EU and 2014/24/EU of 26 February 2014, *BOE*, 9 November 2017.
- Catalonia Act 16/2017 of 1 August 2017 on climate change, *BOE*, 3 August 2017.

## 7.2 Case law

- ECJ, 30 janvier 2020, C-395/18, *Tim SpA – Direzione e coordinamento Vivendi SA v. Consip SpA, Ministero dell'Economia e delle Finanze*.
- ECJ, 10 May 2012, C-368/10, *European Commission v. Kingdom of the Netherlands*.
- ECJ, 4 December 2003, C-448/01, *EVN AG and Wienstrom GmbH v. Republik Österreich, Stadtwerke Klagenfurt AG*.
- CoS, 22 February 2023, case 255.878.
- CoS, 15 February 2023, advice 72.576/AV.
- Italian Council of State, 14 September 2022, case 8773.
- Italian Council of State, 3 February 2021, case 972.

## 7.3 Legal doctrine

- ARROWSMITH (S.), *The law of public and utilities procurement. Regulation in the EU and UK*, vol. 2, 3d ed., London, Sweet & Maxwell, 2018.

- ANDHOV (M.), CARANTA (R.), JANSSEN (W.A.) and MARTIN-ORTEGA (O.), *Shaping sustainable public procurement laws in the European Union – An analysis of the legislative development from ‘how to buy’ to ‘what to buy’ in current and future EU legislative initiatives*, November 2022, The Greens/EFA in the European Parliament.
- ANDHOV (M.), “Contracting Authorities and Strategic Goals of Public Procurement – A Relationship Defined by Discretion?”, *Discretion in EU Procurement Law*, S. Bogojevic, X. Groussot and J. Hettne (eds.), Oxford, Hart Publishing, 2019, p. 117-137.
- BORUCKI (C.), “Research Report 1. 2022-23 – Lifespan extension of products. European & national initiatives”, *CE center – Vlaanderen circulaire* (to be published).
- CARANTA (R.), “Towards mandatory SPP for buildings/works”, *European Journal of Public Procurement Markets*, 2022, 4, 9-22.
- DESCAMPS (B.), “Duurzame overheidsopdrachten in de EU: de blijvende zoektocht naar een evenwicht tussen de primaire en de secundaire aanbestedingsdoelstellingen van de rechtspraak van het Hof van Justitie”, *MER*, 2022, p. 3-15.
- FRITON (P.) and ZÖLL (J.), “Article 57 Exclusion Grounds”, *European Public Procurement Commentary on Directive 2014/24/EU*, R. Caranta and A. Sanchez-Graells (eds.), Cheltenham, Edward Elgar, 2021, p. 588-635.
- IDEA, *Étude sur l’achat public circulaire*, 15 April 2022, available on <https://ediwall.wallonie.be/etude-sur-lachat-public-circulaire-rapport-du-15-avril-2022-numerique-104091>.
- IURASCU (A.), “How Will the Adoption of Mandatory GPP Criteria Change the Game? Lessons from the Italian Experience”, *EPPPL*, 2023, p. 6-16.
- IURASCU (A.), VAN GARSSE (S.) and VOORTER (J.), “The concept “circular economy”: towards a more universal definition”, *Ius publicum*, 2021/2, p. 1-28.
- JANSSENS (W.) and CARANTA (R.) (ed.), *Mandatory sustainability requirements in EU public procurement, law*, Bloomsbury Collections, Oxford, Hart Publishing, 2023.
- KOK (L.) and ZIJP (M.C.), *Tools voor maatschappelijk verantwoord inkopen. RIVM Briefrapport 2016-0204*, Amsterdam, Rijkswaterstaat, 2016.
- LASMOTHEY (K. B. P.), *Analyse environnementaliste du droit de la commande publique*, Phd thesis publicly defended on 16 December 2022 (unpublished).
- LOTZ (M.T.), BARKHAUSEN (R.), HERBST (A.), PFAFF (M.), DURAND (A.) and REHFELDT (M.), “Potentials and Prerequisites on the Way to a Circular Economy: A Value Chain Perspective on Batteries and Buildings”, *Sustainability*, 2022, p. 956-978.
- MARIQUE (Y.) and MUNUNGU LUNGUNGU (K.), “Les marchés publics : un levier efficace dans la mise en œuvre des obligations sociales et environnementales ?”, *Actualités des marchés publics*, D. Batselé et al. (dir.), Bruxelles, Larcier, 2018, p. 57-142.
- MORAS (S.), OOMS (J.), ZEGERS (E.) and UYTTERHOEVEN (K.), “De openbare en niet-openbare plaatsingsprocedures: de voornaamste wolfijzers en schietgeweren in de nieuwe regelgeving”, *TBO*, 2018, p. 85-109.
- POTTING (J.), HEKKERT (M.), WORRELL (E.) and HANEMAAIJER (A.), *Circular economy: measuring innovation in the product chain. Policy report*, January 2017.
- SALVEMINI (L.), “Il nuovo codice degli appalti: CAM e contratti sottosoglia”, slides available on [https://gpp.mite.gov.it/sites/default/files/2023-05/L-Salvemini\\_Appalti-Cam\\_180523.pdf](https://gpp.mite.gov.it/sites/default/files/2023-05/L-Salvemini_Appalti-Cam_180523.pdf).
- TESTA (F.), GRAPPIO (P.), GUSMEROTTI (N.M.), IRALDO (F.) and FREY (M.), “Examining green public procurement using content analysis: existing difficulties for procurers and useful recommendations”, *Eviron. Dev. Sustain.*, 2016, p. 197-219.



- TREPTE (P.), “The Contracting Authority as Purchaser and Regulator: Should the Procurement Rules Regulate what we Buy?” in G. SKOVGAARD ØLYKKE, C. RISVIG HANSEN, CH. D. TVARNØ, *EU Public Procurement Modernisation, Growth and Innovation: Discussions on the 2011 Proposals for Procurement Directives*, Copenhagen, DJØF Publishing, 2012, 85-102.
- VANHEUSDEN (B.), VAN GARSSE (S.) and VOORTER (J.), *Draaiboek circulaire aanbesteden. Juridische FAQ*, available on: [https://bouwen.vlaanderen-circulair.be/src/Frontend/Files/userfiles/files/20221215\\_Draaiboek%20Circulair%20Aanbesteden\\_Q%26A\\_FINCLEANV2\\_interactive\(2\).pdf](https://bouwen.vlaanderen-circulair.be/src/Frontend/Files/userfiles/files/20221215_Draaiboek%20Circulair%20Aanbesteden_Q%26A_FINCLEANV2_interactive(2).pdf).
- VERSCHAVE (A.), *Selectie- en gunningscriteria*, Brussels, Politeia, 2021, 96p.
- VOORTER (J.), Circulariteit bij de gunning van overheidsopdrachten voor bouwwerken: LCK all the way?”, *MCP-OOO* 2023, afl. 2, 169 – 176.

## 7.4 EU documentation

- Council Conclusions on the European Court of Auditors’ Special Report Nr 28/2023: Public Procurement in the EU: Less Competition for Contracts Awarded for Works, Goods, and Services in the 10 Years up to 2021, 24 May 2024.
- European Parliament legislative resolution of 10 April 2024 on the proposal for a regulation of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products, amending Regulation (EU) 2019/1020 and repealing Regulation (EU) 305/2011 (COM(2022)0144 – C9-0129/2022 – 2022/0094(COD)).
- European Parliament legislative resolution of 24 April 2024 on the proposal for a regulation of the European Parliament and of the Council on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC (COM(2022)0677 – C9-0400/2022 – 2022/0396(COD)).
- Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, final act signed on 13 June 2024 (awaiting publication in the EU Official Journal).
- Regulation of the European Parliament and of the Council establishing a framework for setting ecodesign requirements for sustainable products, amending Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC (COM(2022)0142 – C9-0132/2022 – 2022/0095(COD)), final act signed on 13 June 2024 (awaiting publication in the EU Official Journal).
- Amendments adopted by the European Parliament on 12 July 2023 on the proposal for a regulation of the European Parliament and of the Council establishing a framework for setting eco-design requirements for sustainable products and repealing Directive 2009/125/EC (COM(2022)0142 – C9-0132/2022 – 2022/0095(COD)).
- Amendments adopted by the European Parliament on 11 July 2023 on the proposal for a regulation of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products, amending Regulation (EU) 2019/1020 and repealing Regulation (EU) 305/2011 (COM(2022)0144 – C9-0129/2022 – 2022/0094(COD)).
- Proposal for a regulation of the European Parliament and of the Council on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU)

2019/904, and repealing Directive 94/62/EC, COM(2022) 677 final, 2022/0396 (COD), 30 November 2022.

- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system*, COM(2020) 381 final, 20 May 2020.
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, *A new Circular Economy Action Plan For a cleaner and more competitive Europe*, COM/2020/98 final, 11 March 2020.
- Communication from the Commission to the European Parliament, the European Council, the Council, the European economic and social Committee and the Committee of the regions, *The European Green Deal*, COM(2019) 640 final, 11 December 2019.
- Commission staff working document on the evaluation of the Directive 2006/66/EC on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC, SWD(2019) 1300 final, 9 April 2019.
- European Commission, *Green paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market*, COM(2011) 15 final, 27 January 2011.
- Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the regions, *Public procurement for a better environment*, COM(2008) 400 final, 16 July 2008.

## 7.5 Member States reports

- FALOCCO (S.), LE DONNE (G.) and MANCINI (M.), *I numeri del Green Public Procurement in Italia - Rapporto 2023*, Osservatorio appalti verdi, 16 May 2023.
- RIJKSOVERHEID, *Manifest Maatschappelijk Verantwoord Opdrachtgeven en Inkopen*, Amsterdam, Rijksoverheid, 2022.
- FALOCCO (S.), LE DONNE (G.), MINUTOLO (A.) and MANCINI (M.), *I numeri del Green Public Procurement in Italia - Rapporto 2022*, Osservatorio appalti verdi, 14 October 2022.
- FALOCCO (S.), FONTANA (E.), LE DONNE (G.) and MANCINI (M.), *I numeri del Green Public Procurement in Italia - Rapporto 2021*, Osservatorio appalti verdi, 7 October 2021.
- Spanish Government, *Triennial report on public procurement in Spain in 2018, 2019 and 2020*, April 2021, available on: <https://www.hacienda.gob.es/DGPatrimonio/junta%20consultiva/trienal2021.pdf>.
- Belgium, *Second control report on public procurement and concessions*, 2021, available on [https://bosa.belgium.be/sites/default/files/documents/monitoringreportbelgium2021\\_fr\\_0.pdf](https://bosa.belgium.be/sites/default/files/documents/monitoringreportbelgium2021_fr_0.pdf).
- FALOCCO (S.), FONTANA (E.), LE DONNE (G.) and MANCINI (M.), *I numeri del Green Public Procurement in Italia - Rapporto 2020*, Osservatorio appalti verdi, 9 October 2020.
- FALOCCO (S.) et al., *I numeri del Green Public Procurement in Italia - Rapporto 2019*, Osservatorio appalti verdi, 18 October 2019.
- X., *I Comuni alla prova del Green public procurement*, Osservatorio appalti verdi, 2018.

## 7.6 Website

- <https://aankopen.vlaanderen-circulair.be/nl/aande-slag/de-ambitiekaart>.
- <https://aankopen.vlaanderen-circulair.be/nl/aan-de-slag/financiering>.
- <https://aankopen.vlaanderen-circulair.be/nl/aan-de-slag/webinars-circulair-aankopen/webinar-start-met-total-cost-of-ownership>.
- <https://www.appaltiverdi.net/category/monitoraggio/>.
- <https://biblus.acca.it/confronto-vecchio-e-nuovo-codice-appalti-la-tabella-di-raffronto-articolo-per-articolo/>.
- <https://leefmilieu.brussels/pro/wetgeving/verplichtingen-en-vergunningen/brudalex-regels-inzake-afvalbeheer-voor-de-overgang-naar-een-circulaire-economie>.
- <https://www.brupartners.brussels/nl/observatorium-van-de-referentieprijzen-voor-de-overheidsopdrachten>.
- [https://circabc.europa.eu/ui/group/44278090-3fae-4515-bcc2-44fd57c1d0d1/library/1fac691f-005a-4396-b275-0c234ff55c4f?p=1&n=10&sort=modified\\_DESC](https://circabc.europa.eu/ui/group/44278090-3fae-4515-bcc2-44fd57c1d0d1/library/1fac691f-005a-4396-b275-0c234ff55c4f?p=1&n=10&sort=modified_DESC).
- [https://circabc.europa.eu/ui/group/44278090-3fae-4515-bcc2-44fd57c1d0d1/library/f69e60f9-9dc6-4345-aa18-b9a4b6dfdbf0?p=1&n=10&sort=name\\_ASC](https://circabc.europa.eu/ui/group/44278090-3fae-4515-bcc2-44fd57c1d0d1/library/f69e60f9-9dc6-4345-aa18-b9a4b6dfdbf0?p=1&n=10&sort=name_ASC).
- <https://www.circubuild.be/nl/aanbesteden/cabrio/e-book-circulair-aanbesteden.pdf>.
- <https://www.co2-prestatieladder.be/nl/wat-is-de-ladder>.
- <https://www.co2-prestatieladder.nl/nl/news-item/Circulair-inkopen-heeft-effect-ook-met-de-CO2-Prestatieladder>.
- [https://commission.europa.eu/news/commission-publishes-evaluation-eu-batteries-directive-2019-04-09\\_en#:~:text=The%20evaluation%20concludes%20that%20the,for%20batteries%20and%20recycled%20materials](https://commission.europa.eu/news/commission-publishes-evaluation-eu-batteries-directive-2019-04-09_en#:~:text=The%20evaluation%20concludes%20that%20the,for%20batteries%20and%20recycled%20materials).
- [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_7155](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7155).
- [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_2013](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2013).
- [https://ec.europa.eu/environment/gpp/versus\\_en.htm](https://ec.europa.eu/environment/gpp/versus_en.htm).
- [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative_en).
- <https://ec.europa.eu/tools/ecertis/#/search>.
- <https://economiecirculaire.wallonie.be/fr/economie-circulaire-pouvoirs-publics>.
- <https://ediwall.wallonie.be/marches-publics-responsables-note-de-cadrage-et-de-conseils-juridiques-juin-2019-numerique-084532#:~:text=Cette%20note%20de%20cadrage%20juridique,juristes%20charg%C3%A9s%20de%20les%20valider>.
- [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:JOL\\_2023\\_231\\_R\\_0001](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:JOL_2023_231_R_0001).
- [https://www.forumcompraverde.it/wp-content/uploads/2023/08/I-numeri-del-Green-Public-Procurement\\_Rapporto-OAV-2023-2.pdf](https://www.forumcompraverde.it/wp-content/uploads/2023/08/I-numeri-del-Green-Public-Procurement_Rapporto-OAV-2023-2.pdf).
- <https://gpp.mite.gov.it/CAM-vigenti>.
- [https://gpp.mite.gov.it/sites/default/files/2023-04/DD\\_CAM\\_protocollato\\_MASE\\_EC\\_REGISTRO\\_DECRETI%28R%29\\_0000015.31-03-2023.pdf](https://gpp.mite.gov.it/sites/default/files/2023-04/DD_CAM_protocollato_MASE_EC_REGISTRO_DECRETI%28R%29_0000015.31-03-2023.pdf).
- [https://green-business.ec.europa.eu/green-public-procurement\\_en](https://green-business.ec.europa.eu/green-public-procurement_en).

- [https://green-business.ec.europa.eu/green-public-procurement/gpp-criteria-and-requirements\\_en](https://green-business.ec.europa.eu/green-public-procurement/gpp-criteria-and-requirements_en).
- <https://laclauseverte.fr/>.
- <https://leefmilieu.brussels/pro/diensten-en-aanvragen/advies-en-begeleiding/gratis-helpdesk-voor-duurzame-overheidsopdrachten>.
- <https://leefmilieu.brussels/pro/diensten-en-aanvragen/advies-en-begeleiding/modelbestekken-clausules-en-nuttige-documenten-voor-duurzame-overheidsopdrachten>.
- <https://leefmilieu.brussels/pro/milieubeheer/duurzamer-worden/bevestig-de-inzet-van-uw-bedrijf-inzake-leefmilieu-op-europees-niveau-met-emas?highlight=circulaire%20clause%20environnementale>.
- <https://leefmilieu.brussels/pro/milieubeheer/duurzamer-worden/het-label-ecodynamische-onderneming-laat-uw-acties-voor-het-leefmilieu-renderen>.
- <https://marchespublics.wallonie.be/pouvoirs-adjudicateurs/outils/achats-publics-responsables/outils-transversaux/helpdesk.html>.
- <https://www.mvicriteria.nl/>.
- <https://www.mvoocriteria.be/nl>.
- <https://www.oecd.org/publication/government-at-a-glance/2023/country-notes/italy-bbc309cd#chapter-d1e22>.
- [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0396\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0396(COD)&l=en).
- [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0095\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0095(COD)&l=en).
- [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0094\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0094(COD)&l=en).
- <https://publicaties.vlaanderen.be/view-file/44218>.
- <https://www.rivm.nl/bibliotheek/rapporten/2020-0002.pdf>.
- <https://stackoverflow.com/>.
- <https://www.totem-building.be/>.
- <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBMNE:2018:1963>.
- <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBMNE:2021:4356>.
- <https://www.vlaanderen.be/het-facilitair-bedrijf-overheidsopdrachten-en-raamcontracten/duurzame-en-innovatieve-overheidsopdrachten/monitoring-duurzame-overheidsopdrachten/essentiele-duurzaamheidscriteria>.
- <https://zoek.officielebekendmakingen.nl/kst-32440-25.html>.

# CE CENTER

CIRCULAR ECONOMY  
POLICY RESEARCH CENTER

**Disclaimer:**

This publication reflects the views only of the authors, and the Flemish Government cannot be held responsible for any use which may be made of the information contained therein.