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SUSTAINABILITY TAKES CENTRE STAGE IN PUBLIC PROCUREMENT

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This article delineates how a shift in the priorities of EU laws can change public procurement's current centre of gravity from its fixation on the lowest price to that of a more balanced consideration of different societal goals. There is an acknowledgement that public money can meaningfully contribute to support for social justice and the fight against climate change and environmental degradation. To this end, the present EU legal framework, together with more advanced experiences in Italy and in a few other EU Member States, are illustrated before an analysis of the many initiatives currently under consideration by the EU law makers as per the European Green Deal and the Sustainable Products Initiative. The article then highlights the need to reconsider the theory of public procurement law and practice as well as the current EU legislative framework for public procurement (and concessions).

Keywords: public procurement; sustainable public procurement (SPP); green public procurement (GPP); sustainability

Niniejszy artykuł ma na celu przedstawienie, w jaki sposób środek ciężkości zamówień publicznych przesuwa się ze stanowiska, w którym główny nacisk pada na najniższą cenę, do stanowiska, w którym w sposób bardziej wyważony uwzględnienia się różne cele społeczne, do osiągnięcia których mogą przyczynić się środki publiczne, w tym takich celów, jak walka o sprawiedliwość społeczną i przeciwdziałanie zmianom klimatycznym oraz degradacji środowiska. Ocena działań podejmowanych przez wybranych prawodawców – państw członkowskich UE – w ramach Europejskiego Zielonego Ładu i inicjatywy na rzecz zrównoważonych produktów zostanie poprzedzona charakterystyką obecnych ram prawa unijnego oraz doświadczenia Włoch i kilku wybranych państw członkowskich. Następnie w artykule podkreśla się nowe spojrzenie na formalne oraz praktyczne uwarunkowania funkcjonowania systemu zamówień publicznych (w tym umów koncesji) w ramach Unii Europejskiej.

Słowa kluczowe: zamówienia publiczne; zrównoważone zamówienia publiczne; zielone zamówienia publiczne

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I. INTRODUCTION

Our societies at large face momentous challenges and disruptions resulting from the COVID-19 pandemic and political conflicts, particularly the Russian invasion of Ukraine. These health and socio-political risks have exacerbated environmental and social issues directly linked to climate change. To effectively address such matters, the EU requires all hands-on deck, including the public procurement sector. Public procurement mobilizes approximately 14% of the EU Member States' GDPs and thus should contribute to the Union's environmental, social and political efforts.¹ Many official documents from international organizations and EU institutions attest to the relevance of sustainable public procurement (SPP) in achieving societal goals, including championing social justice and taking action against climate change and environmental degradation. Target 12.7 of the SDGs requires countries to 'Promote public procurement practices that are sustainable, in accordance with national policies and priorities.' The *2022 Sustainable Public Procurement Global Review* recently released by UNEP highlights that 'Shifting government spending towards more sustainable products and services can ... have a significant impact on the fight against climate change, as well as a transformative effect on markets by driving them towards greener and more innovative products. Public procurement can also promote local industries, small and medium-sized enterprises, and disadvantaged groups including women and minorities'.²

Throughout the past decades, the practice of public procurement has been characterized by a fixation on attaining the lowest price. Notably, a pattern of widespread budget cuts in developed countries have pushed contracting authorities to save on spending. Neoconservative doctrines calling for fiscal probity made saving 'taxpayers' money' a rallying cry. The 'tyranny of the lowest price'³ has been much strengthened by the neoliberalist regulatory approaches prevalent at the European and Global levels.⁴ States had traditionally used public purchasing as an economic mechanism to develop their own economic and social conditions. This implied reserving contracts to their domestic firms, as exemplified by the United States' 1934 Buy American Act signed by President Hoover on the last day of his presidency. The Act has often been recast, for example in 2022.⁵ Tellingly, in 1961 Luc Boursier de Carbon was fast to remark that the (then) EEC Treaty made it impossible to discriminate against firms from other Member States, and to lament that contracts awarded to those firms would have weakened the economic lever in the hand of the State (in this case of France).⁶ Opening public procurement markets to other Euro-

¹ Schooner (2021): esp. 31; Martinez Romera, Caranta (2017); Wiesbrock, Sjöfjäll (2016).

² UNEP (2022): 2.

³ Schooner, Speidel (2020): 37.

⁴ Kunzlik (2013).

⁵ Yukins, Schooner (2007): 536.

⁶ Boursier de Carbon (1961): 475.

pean firms, and to some extent to non-European firms, required doing away with open and direct discrimination and fighting indirect or covert forms of discrimination. Our US colleagues are fast in recalling that, when the WTO Government Procurement Agreement started opening procurement markets to foreign competition, the USA had a Buy American Act issue, yet many European States engaged in covert discrimination.⁷ Open and direct administration had, at the time, been against the European Treaties for decades. Lowest price is an eminently transparent and non-discriminatory criterion for choosing a contractual partner. Boursier de Carbon again acknowledged that focusing on price would have made it difficult to pursue different macroeconomic objectives (*Des solutions fondées sur des critères de prix peuvent méconnaître les objectifs macro-économiques d'une politique financière qui s'exprime très largement par la passation de marches*).⁸

Necessarily, firms called to compete on price only tend to externalize as many costs as possible. However, the costs that public purchasers allegedly save are ultimately paid by the environment, thus impacting the wellbeing of people and society at large. Unless costs are not just externalized but further offshored, it is again the State who must pick up the bill, not as a purchaser but as a provider of social services. Yet not even offshoring is always a safe – if immoral – bet, as shown by the climate crisis. And the trouble does not stop with climate change, the circumstances of a persistent pandemic and the war in Ukraine have highlighted the extent to which security of supply had been sacrificed upon the altar of lowest price.⁹

Unsurprisingly, while not necessarily denying other aspects of 'modern' public procurement theory such as transparency and equal treatment, EU institutions have sought to widen the possible goals of public purchasing beyond brute price competition on the Internal Market only. Other Member States have gone further, mandating some form of SPP for their contracting authorities (§ 2); more recently, the EU itself has enlisted procurement money to contribute to fighting for social justice and against climate change and environmental degradation (§ 3). These developments, while welcome by themselves, must be considered within the context of their requisite consolidation into the EU's general legal framework for procurement and subsequent integration into a new public procurement theory.

II. THE CURRENT EU LEGAL FRAMEWORK FOR SPP AND THE EXPERIENCE IN SOME MEMBER STATES

Historically, the EU approached public procurement from the perspective of the Internal Market. Discrimination against firms – economic operators in EU procurement parlance – from other Member States is forbidden.

⁷ Yukins, Schooner (2007): 536.

⁸ Boursier de Carbon (1961): 466.

⁹ Hasquenoth (2021): 69.

Since 1971, the then EEC enacted directives aimed at laying down procedural rules to guide contracting authorities in the Member States in their choice of contractual partners and thus limit the risk of indirect or covert discrimination. Beginning in the late 1980s, social and environmental considerations managed to gain some traction thanks to the Court of Justice case law.¹⁰ The Court rebuffed attempts to shape public procurement around economic considerations only in notable cases, such as *Concordia Bus*¹¹ and, more recently, *Max Havelaar*.¹²

The 2014 directives consolidated the case law of the Court.¹³ Moreover, a principle of sustainability was enshrined in Article 18(2) of Directive 2014/24/EU.¹⁴ In *TIM* it was again the Court of Justice that strongly supported sustainability, holding that ‘that such a requirement constitutes, in the general scheme of that directive, a cardinal value with which the Member States must ensure compliance’.¹⁵ Despite all the progress made in 2014, the EU directives do not generally mandate SPP but rather operate as a vehicle to simply lay down requirements allowing contracting authorities to pursue sustainable purchasing without compromising the more traditional principles of public procurement, with non-discrimination being first among them.¹⁶ To the same effect, the European Commission has produced a number of guidance documents on both green public procurement (GPP) and socially responsible public procurement (SRPP), and has readied GPP criteria for a number of procurement products and services.¹⁷

A limited number of sectoral EU provisions provide for mandatory sustainable public purchasing, however. This is the case, for instance, enacted in Regulation (EC) No 106/2008, the so-called EU Energy Star Regulation. Regulation No 106/2008 requires contracting authorities to introduce in their public contracts a certain level of energy efficiency; Directive 2012/27/EU on energy efficiency calls on the public sector to play an exemplary role; and Directive 2019/11/61 on clean vehicles contains targets for the share of clean vehicles that are bought by contracting authorities.

Some EU Member States have gone beyond what is provided under EU law, having introduced a general clause directing contracting authorities to prefer sustainable products and services. In the Netherlands, Article 1.4(2) of the Dutch Procurement Act 2012 (*Aanbestedingswet 2012*) requires contracting authorities to ensure that ‘as much societal value as possible’ is created for public resources.¹⁸ A similar provision is found in Article L.2111-1 of the 2018 French Code de la commande publique. However, a new Article L3.1 has

¹⁰ Arrowsmith, Kunzlik (2009); Caranta, Trybus (2010).

¹¹ Case C-513/99, *Concordia Bus*, EU:C:2002:495.

¹² Case C-368/10, *Commission v. Netherlands*, EU:C:2012:284.

¹³ Dragos, Neamtu (2014); Andrecka, Mitkidis (2017).

¹⁴ Andhov (2021).

¹⁵ Case C-395/18, *Tim SpA*, ECLI:EU:C:2020:58; para 38.

¹⁶ Andhov et al (2020): 41.

¹⁷ Schebesta (2018).

¹⁸ Janssen (2020); Heijnsbroek (2023).

been added recently, and is expected to enter into force in 2025, according to which public purchasing contributes to the attainment of sustainable development in its different components, including the environmental and social ones. In Spain, Article 122.2 of the Law 9/2017 of 8 November on Public Sector Contracts requires contracting authorities to include social, labour and environmental considerations in public procurement documents in the form of selection criteria or award criteria, or as conditions relating to the performance of a contract. Article 124 of the same law requires the inclusion of environmental and social aspects in the technical specifications.¹⁹

Under Article 30(1), sustainability and energy efficiency are general principles of the Italian Public Contract Code as well. However, Article 34 thereof provides for the mandatory inclusion in all relevant contracts of the detailed technical specifications and contract performance clauses as drafted in ministerial bylaws for a growing number of goods and services (so called CAMs).²⁰ Contracts concluded based on a procedure which disregarded the mandatory specifications and clauses are ineffective.²¹ The award criteria provided therein are, instead, not mandatory, but obviously their articulation in bylaws facilitates the uptake of SPP by contracting authorities.²² Remarkably, more recent iterations of the CAMs do not confine themselves to environmental criteria, but have additionally begun to include aspects pertaining to SRPP.²³

The instances recalled above demonstrate that several EU Member States – and more might be added – are having recourse to public procurement as a means of achieving societal goals; especially, but not only, to fight climate change.²⁴

III. THE EU SHIFT TOWARDS MANDATORY SPP

The EU is following suit, in particular the 2019 EU Green Deal gives SPP a prominent role. The Commission indicates that '[p]ublic authorities, including the EU institutions, should lead by example and ensure that their procurement is green'.²⁵ This initial nod to SPP was further acknowledged through the involvement of the contracting authorities of the Member States in the 2020 Circular Economy Action Plan. The Plan begins with the familiar refrain as to the relevance of public procurement as a lever for good: '[p]ublic authorities' purchasing power represents 14% of EU GDP and can serve as a powerful driver of the demand for sustainable products'. However, the Plan then adopts a substantial change in tone, from promoting the stance of an

¹⁹ Lazo Vitoria (2023).

²⁰ Botta (2023); Sica (2022).

²¹ Cons. Stato, Sez. III, 14 October 2022, n. 8773; Iurascu (2023).

²² Botta (2023).

²³ Botta (2022): 59 f.

²⁴ Schooner (2021); Martinez Romera, Caranta (2017).

²⁵ COM(2019) 640 final: 8; Pouikli (2021).

exemplary role to insisting upon mandatory SPP: '[t]o tap into this potential, the Commission will propose minimum mandatory green public procurement (GPP) criteria and targets in sectoral legislation and phase in compulsory reporting to monitor the uptake of Green Public Procurement (GPP) without creating an unjustified administrative burden for the public buyers'.²⁶ As the Circular Economy Action Plan avows, this dramatic shift towards mandatory SPP criteria is born out of the realization that instruments such as the EU GPP criteria that were mentioned above 'have reduced impact due to the limitations of voluntary approaches'.²⁷

While the reasons behind the promotion of mandatory SPP are clear, it remains the case that mandatory SPP represents a quantum leap in EU public procurement law. EU law is experiencing a paradigm shift from an almost exclusive focus on procedures ('how to buy') to also regulating what goods and services are purchased ('what to buy'), thus limiting the choices of contracting authorities in the 27 Member States. As previously recalled, a small number of EU provisions mandating different forms of mandatory SPP were already in existence, but this paradigm shift represents a new, higher standard for SPP.

Some of the proposals advanced by the European Commission provide for the enactment, by the Commission itself, of possibly mandatory GPP criteria, setting down technical specifications, contract performance conditions and award criteria. For instance, Article 4(3)(h) of the proposed Ecodesign Regulation provides that the Commission, in laying down ecodesign products requirements may establish 'requirements applicable to public contracts, including implementation, monitoring and reporting of those requirements by Member States'. Article 58 thereof – entitled Green public procurement – clarifies that they 'may take the form of mandatory technical specifications, selection criteria, award criteria, contract performance clauses, or targets, as appropriate'.²⁸ Article 84 – again dedicated to GPP – of the proposed recast Construction Products Regulation (CPR) asserts that the Commission is empowered to supplement the Regulation by delegated acts to establish 'sustainability requirements applicable to public contracts, including implementation, monitoring and reporting of those requirements by Member States'. Again, those requirements 'may take the form of mandatory technical specifications, selection criteria, award criteria, contract performance clauses, or targets, as appropriate'.²⁹ The parallelism should not come as a surprise, given that the CPR proposal is part of the Sustainable Products Initiative, of which the proposed Ecodesign Regulation is the main pillar and also serves to regulate some construction products, such as boilers.³⁰

Article 7 of the proposal for a recast Energy Efficiency Directive (EED) provides that the Member States shall ensure that contracting authorities

²⁶ COM(2020) 98 final: para 2.2; Tátrai, Diófási-Kovács (2021).

²⁷ COM(2020) 98 final: para 2.1.

²⁸ COM(2022) 142 final.

²⁹ COM(2022) 144 final.

³⁰ Caranta (2022): 14.

and contracting entities, when concluding public contracts and concessions with a value equal to or greater than the EU thresholds, (a) ‘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’ and (b) ‘apply the energy efficiency first principle referred to in Article 3 of this Directive, including for those public contracts and concessions for which no specific requirements are provided in Annex IV’.³¹

Article 70 of the proposed Batteries Regulation requires that contracting authorities and contracting entities, ‘when procuring batteries or products containing batteries in situations covered by those Directives, take account of the environmental impacts of batteries over their life cycle with a view to ensure that such impacts of the batteries procured are kept to a minimum’. The European Commission is empowered to establish ‘minimum mandatory green public procurement criteria or targets’.³² This provision is different from the ones examined up to this point as it provides for ‘targets’ as an alternative to mandatory ‘criteria’ or requirements. Reference to targets is already found in the revised Directive 2019/11/61 which amends Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles (AKA the Clean vehicles directive). The new Clean vehicles directive sets binding targets for each Member State in terms of the number of low and zero emission vehicles procured as a percentage of overall vehicle procurement.³³

Other proposals include targets. Targets are indeed at the heart of the Green Deal. As is well known, the EU Climate Act (Regulation (EU) 2021/1119) sets the goal for Europe’s economy and society to become climate neutral by 2050. The seminal Act sets the intermediate target of reducing net greenhouse gas emissions by at least 55% by 2030, compared to 1990 levels. The ‘Fit for 55’ Commission’s Communication is the cornerstone of the initiatives targeting climate change as discussed in this article.³⁴

Specifically concerning public procurement, targets are set in the proposal to recast the Directive on the energy performance of buildings (EPBD).³⁵ Under the proposed Article 9(1), a building owned by contracting authorities must reach higher energy performance classes before the rest of the built stock. Moreover, under the proposed Article 12(2), ‘In case of buildings owned or occupied by public authorities, Member States shall ensure pre-cabing for at least one in two parking spaces by 1 January 2033’.³⁶

The draft provisions mentioned above are not yet approved and it is important to note that they might yet be changed by the European Parliament and/or the Commission. At the time of writing this article, several Green Deal proposals are undergoing trialogue exactly because an agreement is needed. And indeed, they might be improved. Some of the proposals in question, es-

³¹ COM(2021) 558 final.

³² COM(2020) 798 final.

³³ Semple (2023).

³⁴ COM(2021) 550 final.

³⁵ COM(2021) 802 final.

³⁶ Gruyaert, Pissierssens (2023).

pecially the CPR, are very much rooted in a traditional Internal Market approach leaving very little room for more courageous Member States.³⁷ As the proposals aim at furthering sustainability, and the environment is a big component for this, minimum harmonization should instead be preferred.³⁸ A much better solution is incorporated in Article 1(2) of the EED proposal, under which ‘The requirements laid down in this Directive are minimum requirements and shall not prevent any Member State from maintaining or introducing more stringent measures. Such measures shall be compatible with Union law ...’.³⁹

Also, when giving the Commission guidelines to draft mandatory SPP criteria, reference to the already existing GPP criteria is often missing,⁴⁰ thus forfeiting a possibility to save on rather time-consuming and effort intensive processes.⁴¹

Still, the sheer number of provisions concerning mandatory SPP in the proposals flowing from the Green Deal – and some are still in the pipeline, such as those linked to the Farm to Fork Strategy⁴² – attest to a paradigm change in EU public procurement. The many societal challenges we face have pushed the EU to follow the example of some of the Member States on the path towards mandatory SPP.⁴³

IV. SPP THINKING AND A REFORM OF THE 2014 DIRECTIVES

Evidently, law itself is not enough to steer the boat decisively towards sustainability. Best practices and professional norms must be involved in sustainability efforts alongside the development of guidance and training, including on ‘basic carbon literacy’.⁴⁴

The focus, however, in this instance, remains squarely on the law. A paradigm change requires a significantly different approach to public procurement, and consequently the EU public procurement and (concessions) directives should be reformed.

As anticipated, this does not mean doing away with centuries-old public procurement knowledge. Transparency must be given to contracting opportunities and the contractor must be chosen based on a fair and non-discriminatory procedure. Non-discrimination, however, does not mean that a contracting authority must give up on some of its requirements to allow for wider participation or competition. In *Concordia Bus*, the appellant con-

³⁷ COM(2022) 144 final: Article 7(2) last phrase.

³⁸ Caranta (2022): 20.

³⁹ COM(2021) 558 final.

⁴⁰ e.g. COM(2022) 142 final: Article 58(2).

⁴¹ Backes, Boeve (2023).

⁴² COM(2020) 381 final.

⁴³ Janssen, Caranta (2023).

⁴⁴ Andhov et al. (2020); Klingler, Schooner (2022); Lozano, Santos, Barreiro-Gen (2022); Piga, Schooner (2022); Berg (2022); Nicolas, Schotanus (2023).

sidered discriminatory the fact that buses powered by natural gas were in practice the only ones capable of meeting one of the additional criterion of reducing the level of nitrogen oxide emissions and the noise level. In this case, only one company, owned by the contracting authority itself, was operating those buses. However, according to the Court of Justice, ‘the award criteria at issue in the main proceedings were objective and applied without distinction to all tenders. Next, the criteria were directly linked to the fleet offered and were an integral part of a system of awarding points. Finally, under that system, additional points could be awarded on the basis of other criteria linked to the fleet, such as the use of low-floor buses, the number of seats and tip-up seats and the age of the buses’.⁴⁵ Therefore, the Court held that, ‘in such a factual context, the fact that one of the criteria adopted by the contracting entity to identify the economically most advantageous tender could be satisfied only by a small number of undertakings, one of which was an undertaking belonging to the contracting entity, is not in itself such as to constitute a breach of the principle of equal treatment’.⁴⁶ What the Court is requiring is not the widest competition possible, but fair competition based on non-disproportionate criteria corresponding to legitimate requirements from the contracting authority.⁴⁷

The paradigm change comes first from the fact that those requirements need not to be purely economic but can very well concern the environmental and social aspects the contracting authority cares about. As Advocate general Kokott brilliantly clarified it in *Max Havelaar*, ‘From the point of view of a contracting authority which, as the contract documents show, attaches importance to socially responsible trade, the question whether or not the goods to be supplied were purchased from the producer thereof on fair conditions can indeed be relevant in determining best value for money. Of course, the taste of sugar does not vary depending on whether it was traded fairly or unfairly. A product placed on the market on unfair conditions does however leave a bitter taste in the mouth of a socially responsible customer’.⁴⁸ The Court of Justice itself held that contracting authorities are ‘authorised to choose the award criteria based on considerations of a social nature, which may concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons’.⁴⁹

With the increase in instances of mandatory SPP foreseen under the Green Deal, it is not just that contracting authorities are ‘authorised’, but rather they are directed to buy sustainably. Still, willing contracting authorities might in many cases be allowed – and frankly should be – to do more and better than what is already required from them by EU law.

Mandatory or not, SPP requires subtlety that is totally inconsistent with the lowest price or any other simple and mechanical criterion. Not without

⁴⁵ Para 83.

⁴⁶ Para 85.

⁴⁷ Sabockis (2022): 178 ff.

⁴⁸ Case C-368/10, *Commission v. Netherlands*, ECLI:EU:C:2011:840: para 110.

⁴⁹ Case C-368/10, *Commission v. Netherlands*, ECLI:EU:C:2012:284: para 85.

some repetition, Recital 90 of Directive 2014/24/EU today reads ‘Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders.’ The fundamental requirement, often stressed in the case law, is that technical specification, award criteria or other *desiderata* are formulated in a way to allow objective evaluation of the competing tenderers.⁵⁰ The degree of objectivity is obviously somewhat relative. Article 67(2) of Directive 2014/24/EU already allows considering ‘aesthetic characteristics’ and ‘quality of the staff’ – criteria for which there are no fully objective parameters. Lowest price is for sure the most objective, but we ourselves evaluate very different things – mostly quality, often including aesthetics – in our everyday buying decisions.⁵¹ In public procurement the challenge is often how to assess merit, but reliable methodologies exist in many areas and may be developed in others. Devising SPP criteria and requirements is more complicated with reference to award criteria because a gradation needs to be introduced. Technical specifications are pass or fail, so that setting a measurable threshold is enough to determine an award. Similarly, contracts must live up to performance conditions. Methodologies for life cycle assessment (LCA) may provide evidence that sustainability assessment is possible also for award criteria. The existing GPP criteria combines criteria for technical specifications, contract performance conditions and award criteria. True, as further evidence of price fixation, EU law is trying to push life cycle costing – LCC (in EU terminology; US terminology often calls LCC what we call LCA), which requires monetization for all criteria.⁵² Still, developing LCC methodologies is not easy,⁵³ as also proven by the failure of the first Clean Vehicles Directive, which tried, fruitlessly, to introduce an adequate LCC methodology.⁵⁴

The baseline is that many of the sectoral provisions recalled in the preceding chapter indeed foresee the drafting of often mandatory SPP criteria and requirements. Due to the level of detail required, this cannot but be done sector by sector and product (or service) by product (or service).

To conclude, as Gimeno Feliu indicates, procurement must be considered as an investment rather than just as an expense. No investor would look exclusively at the price of what it is investing in.

This reality leads to the need to change the 2014 directives. During the discussion leading to the 2014 EU public procurement and concessions reform, the Commission dismissed the possibility of introducing mandatory SPP criteria in the directives to be approved, arguing that such criteria would have been better suited for sectoral legislation. This is (mostly) true. Criteria and targets require tailoring to the specificities of each sector. Still, the general

⁵⁰ *Ibid.*: para 87.

⁵¹ Schooner, Speidel (2020): 37.

⁵² Semple (2021).

⁵³ Andhov, Caranta, Wiesbroeck (2020).

⁵⁴ Semple (2023).

public contracts rules must be further adapted to empowering SPP and to making mandatory SPP truly biting.

Two issues may be sketched here. First, the consequences for breaches of the rules in Article 18(2) of Directive 2014/24/EU should be strengthened. As it currently stands, exclusion is mandatory only if the tender is abnormally low because of failure to ‘comply with applicable obligations in the fields of environmental, social and labour law’. If the tender is just low, contracting authorities – as current EU law allows – can take the bargain and look elsewhere. Which is ethically unacceptable. Exclusion must therefore be mandatory, in support of the societal goals those provisions are pursuing.

The second issue concerns the requirement that sustainability criteria are linked to the subject-matter of the contract. This comes from the developments in EU SPP that we cannot follow into details here. Suffice it to say that today the requirement is not very demanding, as criteria are ‘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’ (Article 67(3)). Seen in negative, the last phrase in Recital 97 of Directive 2014/24/EU indicates that ‘the condition of a link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy’. This makes recourse to SPP unnecessarily complicated as many certification schemes, such as those based on ISO standards, indeed refer to the general CSR of certified companies. Moreover, it is inconsistent with developments at the EU level. Directive 2022/2464/EU amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, regarding corporate sustainability reporting, have recently been approved. The European Commission has also proposed a Directive on Corporate Sustainability Due Diligence.⁵⁵ While presently they do not explicitly refer to public procurement, once approved they will become part of the ‘applicable obligations in the fields of environmental, social and labour law’ under Article 18(2) of Directive 2014/24/EU. Meaning that, as EU law stands today and *pace* to Recital 97, contracting authorities will be empowered to refer to general CSR policies with reference to the economic operators covered under those directives.⁵⁶

In a reform of the general procurement rules as envisaged above, contracting authorities will have to consider CSR policies. EU law could thus become tidier and more predictable. This legal uniformity could come to fruition not just by effacing the last phrase in Recital 97, but by further disposing of the ‘link to the subject matter’, as reasoning in terms of life-cycle is what is needed both for non-discrimination and sustainability.

In conclusion, it is clear that SPP can substantially contribute to addressing the challenges our societies face. However, to this end, both the legislative framework and the very understanding of public procurement need to be reconsidered.

⁵⁵ COM(2022) 71 final.

⁵⁶ Schoenmaekers (2023); Martin Ortega (2021).

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