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The EU Sustainable Public Procurement Reform: the Green, the Mandatory and the Digital

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The EU Sustainable Public Procurement Reform: the Green, the Mandatory and the Digital

Nadia-Ariadna Sava*

1. Introduction: Green and Digital in Public Procurement

The EU Green Deal¹ sets goals and ambitions for the European Union, in terms of climate neutrality,² which have materialized in legal documents, such as Directives, Regulations or Plans.³ The new Circular Economy Action Plan has been defined as one of the ‘building blocks’⁴ of the Green Deal, and comprises several policies and legal texts that tackle both green aspects and public procurement, related to ecodesign, green claims, batteries, packaging, vehicles, waste, etc., many of which contain ‘Mandatory Green Public Procurement (GPP) criteria and targets (...) and (...) mandatory reporting on GPP’.⁵ Several have already been transposed into Regulations, Directives or are in the stage of Proposals. Many of these legal texts contain provisions related to sustainable public procurement (SPP). Through these new sectoral legislations, the SPP legal landscape is

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¹ Commission, ‘Communication from the Commission, The European Green Deal’ COM (2019) 640 final 11 December 2019.

² Commission, ‘The European Green Deal - Striving to be the first climate-neutral continent’ <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en> accessed 20 August 2024.

³ On the topic of the Green Deal and Public Procurement see: Ezgi Uysal and Willem A Janssen, ‘The European Green Deal and Public Procurement Law’ in Mar Campins Eritja and Xavier Fernández-Pons (eds), *Deploying the European Green Deal* (Routledge 2023); Marta Andhov and others, ‘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’ (The Greens/ EFA in the European Parliament 2022).

⁴ Commission, ‘Circular economy action plan’ <https://environment.ec.europa.eu/strategy/circular-economy-action-plan_en> accessed 20 August 2024.

⁵ Commission, ‘Annex to the Communication from the Commission, A new Circular Economy Action Plan For a cleaner and more competitive Europe’ COM(2020) 98 final 11 March 2020.

changing, through what has been defined as a switch from ‘voluntary to mandatory’ provisions and from ‘how to buy (...) [to] what to buy’.⁶

The term ‘twin transitions’ refers to the collaboration between the green and the digital transitions and how they ‘can reinforce each other’, more specifically ‘how digital technologies can contribute to fighting climate change’.⁷ The idea behind the twin transitions is to unite the green and digital transitions, and thus positively impact sustainability.⁸

This chapter aims to combine the mandatory SPP dispositions from new EU Green Deal legislations and their link to digitalisation. It explores the nexus between the current paradigm change in SPP and digitalisation. This chapter does not mean to exhaustively comment on the new legal dispositions that tackle mandatory SPP, but to highlight a link between these legal rules and digitalisation and to demonstrate that SPP needs to be articulated and connected with the existing digital rules and to work together in order to make progress.

More specifically, this analysis aspires to shed light on the following research questions:

- Do the new provisions concerning mandatory GPP have an inherent link to digitalisation?
- If yes, how do the SPP sectoral legislations interact with the relevant digital public procurement legal dispositions?

In order to answer these questions, the article starts by presenting the current conceptual transition from voluntary towards mandatory sustainability in public procurement (Section 1). The second part of the article synthesises the main legal provisions from the selected sectoral legislation, namely: legal provisions concerning mandatory SPP⁹ and legal provisions concerning a digital dimension related to mandatory SPP (Section 2). Thirdly, this article analyses the digital provisions related to SPP and debates whether they can be interpreted as examples for rolling out the twin transitions (Section 3).

⁶ Willem Janssen, ‘Shifting Towards Mandatory Sustainability Requirements in EU Public Procurement Law: Context, Relevance and a Typology’ in Willem Janssen and Roberto Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law. Reflections on a Paradigm Shift* (Hart Publishing 2023) 4 and 8.

⁷ Stefan Muench and others, ‘Towards a green and digital future’ (Publications Office of the European Union 2022) 3.

⁸ *ibid* 7.

⁹ In the same vein, see also: Andhov and others (n3); Inken Böttge, Helena Kumpar Zidanič and Aria Tzamalikou, ‘From Green Vision to Legal Obligation: The Case for Making Green Public Procurement Mandatory’ (2023) 19 CYELP.

The following legal texts have been selected for the analysis: The Clean Vehicles Directive¹⁰, the Regulation concerning batteries¹¹, the Deforestation Regulation¹², the Ecodesign Regulation¹³, the Raw Materials Regulation¹⁴, the Energy Efficiency Directive¹⁵ and the Energy Performance of Buildings Directive.¹⁶ These legal sources have been selected because they further the goals set in the EU Green Deal and also bring changes to the legal landscape of SPP.

Several other Proposals have been developed, such as the ‘Proposal for a Regulation on shipments of waste’¹⁷; the ‘Proposal for a Regulation on marketing of construction products’¹⁸; the ‘Net Zero Industry Act’¹⁹; the ‘Proposal for a Green Claims Directive’²⁰; and the ‘Proposal for a Regulation on packaging and packaging waste’²¹, Proposal for a ‘Regulation on Construction Products’²² Regulation. However, given the possible changes that might arise in their content until their adoption, these have not been selected for the current analysis.

¹⁰ Directive (EU) 2019/1161 of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles [2019] OJ L 188/116.

¹¹ Regulation (EU) 2023/1542 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 [2023] OJ L 191/1.

¹² Regulation (EU) 2023/1115 of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 [2023] OJ L 150/206.

¹³ Regulation (EU) 2024/1781 of 13 June 2024 Establishing a Framework for the Setting of Ecodesign Requirements for Sustainable Products, Amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and Repealing Directive 2009/125/EC [2024] OJ L 2024/1781.

¹⁴ Regulation (EU) 2024/1252 of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020 [2024] OJ L 2024/1252.

¹⁵ Directive (EU) 2023/1791 of 13 September 2023 on Energy Efficiency and Amending Regulation (EU) 2023/955 [2023] OJ L 231/1.

¹⁶ Directive (EU) 2024/1275 of 24 April 2024 on the energy performance of buildings [2024] OJ L 2024/1275.

¹⁷ Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on Shipments of Waste and Amending Regulations (EU) No 1257/2013 and (EU) No 2020/1056’ COM (2021) 709 Final 17 November 2021.

¹⁸ Commission, ‘Proposal for a Regulation of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products, amending Regulation (EU) 2019/1020 and repealing Regulation (EU) 305/2011’ COM(2022) 144 final 30 March 2022.

¹⁹ Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on establishing a framework of measures for strengthening Europe’s net-zero technology products manufacturing ecosystem (Net Zero Industry Act)’ COM(2023) 161 final 16 March 2023.

²⁰ Commission, ‘Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive), COM(2023) 166 final 22 March 2023.

²¹ Commission, ‘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 30 November 2022.

²² Commission, ‘Proposal for a Regulation of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products, amending Regulation (EU) 2019/1020 and repealing Regulation (EU) 305/2011’ COM(2022) 144 final 30 March 2022. At the moment of writing, the text is close to adoption and in close connection with the Ecodesign Regulation.

When it comes to digitalisation, the European Union adopted a plethora of varied documents, such as the AI Act,²³ the EU data strategy²⁴ or the Interoperable Europe Act²⁵. When it comes to digital public procurement, the most relevant new legislations and Communications brought by the eForms Regulation²⁶, the Open Data Directive²⁷ and the Communication on the new Public Procurement Data Space²⁸. Thus, data collection and management stand out as a key element in the process of digitalising public procurement and as cornerstone for the future adoption of other emerging technologies, such as artificial intelligence (AI).²⁹

According to the literature, EU SPP is undergoing a reformative transition, from ‘voluntary to mandatory requirements’³⁰, with legislation that used to focus on <‘how to buy’>³¹ now seeing a transition towards <‘what to buy’>³². It has been noted that the new sectoral legislations focus mainly on green rather than SPP, the latter being a broader concept, that also encompasses social aspects.³³

The main GPP provisions from the new legislations are classified by Janssen as follows:

²³ Regulation (EU) 2024/1689 of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L 2024/1689.

²⁴ Commission, ‘Communication from the Commission, A European strategy for data’ COM/2020/66 final (2020) 19 February 2020.

²⁵ Regulation (EU) 2024/903 of 13 March 2024 laying down measures for a high level of public sector Interoperability across the Union (Interoperable Europe Act) [2024] OJ L 2024/903.

²⁶ Commission Implementing Regulation (EU) 2019/1780 of 23 September 2019 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation 2015/1986 (eForms) [2019] OJ L272/7; Commission Implementing Regulation (EU) 2022/2303 of 24 November 2022 Amending Implementing Regulation (EU) 2019/1780 Establishing Standard Forms for the Publication of Notices in the Field of Public Procurement’ [2022] OJ L305/12.

²⁷ Directive (EU) 2019/1024 of 20 June 2019 on open data and the re-use of public sector information [2019] OJ L 172/56.

²⁸ European Commission, ‘Communication from the Commission, Public Procurement: A Data Space to Improve Public Spending, Boost Data-Driven Policy-Making and Improve Access to Tenders for SMEs’ [2023] C 98 I/01.

²⁹ For an overview of the literature concerning artificial intelligence and public procurement, see: Nadia-Ariadna Sava, ‘Artificial Intelligence and Public Procurement Deciphering the Interdisciplinary Perspectives of the Literature’ (2023) 4(2) European Review of Digital Administration & Law – Erdal 79. For more on the importance of data monitoring in public procurement see: Albert Sanchez-Graells, *Digital Technologies and Public Procurement: Gatekeeping and Experimentation in Digital Public Governance* (Oxford University Press 2023) 176 and next; Nadia-Ariadna Sava, ‘The eForms Regulation and Sustainable Public Procurement Data Collection’ (2023) 18 European Procurement & Public Private Partnership Law Review 178.

³⁰ Janssen 4.

³¹ *ibid* 8.

³² *ibid* 8. See also: Marta Andhov and others (n3).

³³ *ibid* 14.

- A ‘Minimum Mandatory Public Procurement Requirement’, which refers to a ‘legal requirement that directs the decision-making process of a national, regional or local authority, (...) in a mandatory manner’.³⁴

- ‘Targets’, which set a specific ‘environmental or social objective within a certain timeframe’ for the ‘public authorities’.³⁵

- ‘Product specific’ requirements, which refer to the ‘product or the producer’ and only ‘indirectly’ impact ‘public procurement’.³⁶

‘Product specific’³⁷ requirements are not analysed in this article because they only indirectly impact public procurement. To this classification, I add a third topic for analysis – the exclusion of economic operators that breach the sectoral legislations, a potential penalty that is present in several of the selected texts.

Mostly all of the selected legislations reference the Public Procurement Directive,³⁸ which means they refer to procurement procedures above the EU thresholds. This can translate into a limitation in the unfoldment of green dispositions below the thresholds, unless Member States take further action in this sense. Some of the legislations create minimum mandatory requirements, some set targets, while others impose exclusion as a penalty and many of them have references to reporting obligations. Most of the legal sources mix at least two of these possibilities, for example, impose minimum mandatory requirements and set a target, finally creating reporting obligations as well.

As I will showcase in this paper, the main links to digitalisation identified in these legislations refer to:

1) SPP data collection and data monitoring – this can be used to track the use of minimum mandatory requirements and the achievement of targets.³⁹

2) the creation of an EU database with penalised economic operators.

³⁴ *ibid* 17.

³⁵ *ibid* 18.

³⁶ *ibid* 19.

³⁷ *ibid* 19.

³⁸ Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.

³⁹ In this sense, see the work of the Open Contracting Partnership, for example: Open Contracting Partnership, ‘Open and Sustainable Public Procurement Toolkit’ <<https://sustainable.open-contracting.org/>> accessed 23 August 2024; Sophie Brown, ‘How Lithuania fast-tracked green procurement’ <<https://www.open-contracting.org/2023/12/06/how-lithuania-fast-tracked-green-procurement/>> accessed 23 August 2024.

2. The New Green in Public Procurement

The following section will analyse the main provisions from the selected legislation concerning SPP as well as their digital dimension – if this exists. As mentioned in the introduction, this section will not detail the legal regime of SPP in the selected legislations. It will summarise the main provisions related to sustainability (mainly in its green dimension) and highlight existing links to digitalisation in public procurement.

a) Minimum Mandatory Requirements and / or Targets

i) The Clean Vehicles Directive

The Clean Vehicles Directive⁴⁰ differentiates itself from many of the other selected legislations, because it has a history – it replaces an older Directive on Clean Vehicles. For the first time, the previous Directive set ‘mandatory SPP requirements at the EU level, outside the (...) Public Procurement Directives’.⁴¹ However, the former Directive did not reach the desired goals,⁴² primarily in terms of ‘implementation’,⁴³ and was replaced, with substantive changes when it comes to sustainability in public procurement.

The new Directive asks for a ‘more ambitious approach’⁴⁴, that involves ‘minimum targets’⁴⁵. That is why the previous ‘how to buy’, which was materialized in ‘technical specifications’ and ‘award criteria’,⁴⁶ is now replaced by ‘what to buy’⁴⁷, measured in ‘targets’⁴⁸. Article 5 further details these targets, that come in the form of ‘minimum percentages of clean vehicles in the total number

⁴⁰ Directive (EU) 2019/1161 (n10).

⁴¹ Abby Semple, ‘Charge of the Light Brigade? The Clean Vehicles Directive and the Batteries Regulation’ in Willem Janssen and Roberto Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law. Reflections on a Paradigm Shift* (Hart Publishing 2023) 113.

⁴² Directive (EU) 2019/1161 (n10) rec. (10).

⁴³ Semple (n41) 114.

⁴⁴ Directive (EU) 2019/1161 (n 10). rec. (13).

⁴⁵ *ibid* rec. (18).

⁴⁶ Semple (n41) 117-118.

⁴⁷ *ibid* 118.

⁴⁸ Semple (n41) 114.

of road transport vehicles’.⁴⁹ The reference in Article 3 to the Public Procurement Directive translates to an application for contracts above the EU thresholds.⁵⁰

In order to verify that the targets are achieved, Member States should report on their obligations, using multiple tools, among which data monitoring, including in TED.⁵¹ Article 10 details the ‘reporting’ obligations that fall upon the Member States.⁵² Besides reports to the Commission every three years, data publication in TED accompanies the set of instruments for monitoring.⁵³ Surprisingly, data extraction falls under the Commission’s responsibilities – more specifically, it is the Commission that has to isolate the needed numbers (of vehicles) from the ‘contract award notices’ that are published in TED.⁵⁴ However, Semple points out that there is no enforcement mechanism for the targets and no legal basis for the ‘economic operators’ that might want to ‘enforce’ this Directive.⁵⁵ Others have pointed out that, beyond the uncertain character of this obligation to report, there is no further information of how the percentages of the targets should be calculated, nor on how the obligations should be shared between the different authorities.⁵⁶

ii) Batteries Regulation

Article 85 of the Regulation states that contracting authorities ‘shall (...) take account of the environmental impacts’ of the batteries they purchase ‘over their life cycle with a view to ensuring that such impacts are kept to a minimum’.⁵⁷ The literature points out that the phrasing of this article leaves a lot of room for discretion for the contracting authorities and leaves many questions regarding the exact meaning of the terms.⁵⁸ Unlike the Clean Vehicles Directive, this Regulation tackles ‘end-of-life considerations’.⁵⁹ Contracting authorities will integrate the green

⁴⁹ Directive (EU) 2019/1161 (n 10) art. 5 (1).

⁵⁰ *ibid* art. 3(1)a).

⁵¹ *ibid* rec. (25).

⁵² *ibid* art. 10.

⁵³ *ibid* art. 10 (2)-(3).

⁵⁴ *ibid* art. 10 (3).

⁵⁵ Semple (n41) 122.

⁵⁶ Marta Andhov and others (n3) 34.

⁵⁷ ‘Regulation (EU) 2023/1542 (n11) art. 85(1).

⁵⁸ Marta Andhov and others (n3) 36.

⁵⁹ Semple (n41) 115.

considerations into ‘technical specifications and award criteria’ that will be specified in a delegated act.⁶⁰

Related to the delegated acts that will establish the award criteria,⁶¹ Semple observes the contrast with ‘recent data’ which shows that the majority of purchases still use cost-based award criteria.⁶² Moreover, the scholar highlights the potential issues that might arise concerning the ‘subsidiarity’ principle,⁶³ an observation that can be applied to all of the recent legislations that develop green requirements using delegated acts. As already pointed out, the Regulation does not regulate the ‘monitoring of the implementation of the mandatory GPP criteria or targets’⁶⁴, which might have been directly linked to digitalisation aspects.

iii) The Energy Efficiency Directive⁶⁵

Already from the recitals, the Directive points out that monitoring the use of ‘energy efficiency requirements and the subsequent publication of that data on procedures ‘above the thresholds’ is of utmost importance, particularly for transparency purposes.⁶⁶ Another point made in the recitals is that the transition towards greener procurement can be eased by the use of ‘digital tools’.⁶⁷ Generally, public procurement can positively impact the use of the ‘whole life-cycle performance, circular economy aspects and environmental impacts’ of buildings.⁶⁸

The Directive sets out mandatory SPP rules requirements for contracts above the thresholds – namely to ‘purchase only products, services buildings and works with high energy-efficiency performance’ (as defined in ‘Annex IV’ of the Directive, with one exception, that of being not ‘feasible’ from a technical point of view) and to apply the ‘energy efficiency first principle’.⁶⁹ They have to meet the following: ‘(i) the high energy-efficiency performance standard as well as; (ii)

⁶⁰ Regulation (EU) 2023/1542 (n 11) art. 85(2).

⁶¹ *ibid* Art. 85(3).

⁶² Semple (n41) 123.

⁶³ *ibid* 123.

⁶⁴ Böttge, Kumpar Zidanič and Tzamalikou (n9) 266.

⁶⁵ On the topic, see: Alexandru Buftic. ‘Directive 2023/1791 EED: A Step Closer to Mandatory Green Public Procurement Criteria Through Sectorial Legislation’ (2023) 5 *European Journal of Public Procurement Markets*.

⁶⁶ ‘Directive (EU) 2023/1791 (n 15). rec. (51).

⁶⁷ *ibid* rec. (54).

⁶⁸ *ibid* rec. (55).

⁶⁹ *ibid* art. 7 (1). Article 7 and Annex IV further detail this legal regime.

the energy efficiency first principle'.⁷⁰ Annex IV of the Directive offers details that follow up article 7(1). Beyond these obligations, the doctrine notes that all of the other dispositions related to SPP are voluntary.⁷¹

The Directive establishes several data disclosure obligations. Firstly, contracting authorities need to publish data concerning the 'energy efficiency impact of' their contracts above thresholds in TED.⁷² Secondly, 'contracting authorities' can ask the 'tenderers' to provide them with further information on the sustainability, specifically for 'new buildings' that surpass a certain size, and subsequently publish this data,⁷³ with the goal to 'increase awareness of the circular economy and the whole life-cycle of carbon emissions in public procurement practices'.⁷⁴ The literature has noted that this does not mean mandatory publication of 'technical/SPP-related information'.⁷⁵

Member States have to offer 'support' to the 'contracting authorities', mainly legal, methodological and upskilling wise, to create the legal and administrative framework as well as to eliminate legal or non-legal 'barriers to energy efficiency' and to further report to the Commission on the actions undertaken to remove these barriers.⁷⁶

iv) The Raw Materials Regulation

Article 26 of the Raw Materials Regulation⁷⁷ affirms that Member States have the responsibility to take 'measures' that lead to an uptake in the employment of 'secondary raw materials'.⁷⁸ In public procurement, this can be done 'through measures such as taking recycled content into account in award criteria'.⁷⁹

⁷⁰ Dorothy Gruyaert and Veerle Pissierssens, 'Transforming the Construction Sector Through Minimum Requirements', in Willem Janssen and Roberto Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law. Reflections on a Paradigm Shift* (Hart Publishing 2023) 175.

⁷¹ *ibid* 176.

⁷² Directive (EU) 2023/1791 (n 15) art. 7 (5).

⁷³ *ibid* art. 7 (5).

⁷⁴ Gruyaert and Pissierssens 176.

⁷⁵ *ibid* 176.

⁷⁶ Directive (EU) 2023/1791 (n 15) art. 7 (5)-(8).

⁷⁷ Regulation (EU) 2024/1252 (n14) art. 26.

⁷⁸ *ibid* art. 26(1)d).

⁷⁹ *ibid* art. 26(1)d).

The Regulation has a weaker phrasing compared to the previously analysed legal documents. When it comes to SPP, this is just a measure that can be taken among others: ‘including through measures such as (...) award criteria’.⁸⁰ Therefore, it can be argued that this Regulation only brings the potential for mandatory requirements in public procurement if Member States take such measures. The responsibility is left to the Member States to create such measures.⁸¹ If Member States adopt such obligation, this has been classified as a ‘substantive requirement’ instead of a ‘procedural requirement’ – the latter referring to, for example, the obligation to explain why an award criterion was chosen.⁸²

In the political program for 2024-2029, the president of the Commission, Ursula von der Leyen stressed the relevance of access to raw materials and suggested there will be new legislation on the topic, to be included in a ‘new Circular Economy Act’.⁸³

b) Debarment Penalty

i) The Deforestation Regulation

The Deforestation Regulation sets a public procurement penalty for economic operators that fail to obey its dispositions – that of a ‘temporary exclusion’ from public procurement procedures.⁸⁴ The Member States are the ones responsible to develop the rules on the sanctions to be applied and ‘shall take all measures necessary to ensure’ their implementation.⁸⁵ The ‘temporary exclusion’ from public procurement procedures of economic operators that fail to comply with the Regulation can be established for a ‘maximum period of 12 months’.⁸⁶

The literature differentiates between ‘debarment (...) and exclusion’ and explains that the former has a stronger, general effect (exclusion from all procedures), whilst the latter has a milder,

⁸⁰ *ibid* art. 26(1)d).

⁸¹ *ibid* art. 26(1)d).

⁸² Janssen 17-18.

⁸³ Ursula von der Leyen, ‘Europe’s Choice, ‘Political Guidelines for the Next European Commission 2024-2029’, [Strasbourg 18 July 2024] <https://commission.europa.eu/document/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en> accessed 5 August 2024.

⁸⁴ Regulation (EU) 2023/1115 (n12) art. 25. Read more: Chiara Falvo and Federica Muscaritoli, ‘Towards Deforestation-Free Public Procurement?’ (2024) 19 European Procurement & Public Private Partnership Law Review 91.

⁸⁵ Regulation (EU) 2023/1115 (n 12) art. 25 (1).

⁸⁶ *ibid* art. 25 (2) d.

individual effect (exclusion from one procedure).⁸⁷ Falvo and Muscaritoli note that the absence of a reference to the Public Procurement Directive⁸⁸ makes it unclear whether the Regulation applies both below and above the EU thresholds.⁸⁹ While the Regulation does not specify the nature of the exclusion (*i.e.* discretionary or mandatory), it has been argued that it should be mandatory.⁹⁰

The means of proof for the infringement come in the form of a ‘final judgment’ that concerns violations of the Deforestation Regulation – and it falls under the obligation of Member States to inform the Commission of such document, accompanied by the applied sanctions, within a period of ‘30 days from the date on which the judgments become final’.⁹¹ In turn, the Commission has to ‘publish on its website a list of such judgments’⁹², with relevant information to identify:

- ‘(a) the name of the legal person;
- (b) the date of the final judgment;
- (c) a summary of the activities for which the legal person was found to have infringed this Regulation; and
- (d) the nature and, where financial, the amount of the penalty imposed.’⁹³

This poses the problem of a balance between privacy and transparency. When Member States communicate the information to the Commission, they should do it whilst ‘taking into account the relevant data protection rules’⁹⁴. However, it is not clear how the protection of data will be reconciled with the publication of data from judgements.

From a technical point of view, it has been pointed out that the Regulation leads to a novelty in EU public procurement law, that of creating a ‘EU-wide debarment (...) system’, in the form of a ‘centralised collection of data’ with the excluded economic operators.⁹⁵ The central system would

⁸⁷ Falvo and Muscaritoli (n 84) 99.

⁸⁸ Directive 2014/24/EU (n 38).

⁸⁹ Falvo and Muscaritoli (n 84) 99.

⁹⁰ *ibid* 101.

⁹¹ Regulation (EU) 2023/1115 (n 12) art. 25 (3).

⁹² *ibid* art. 25 (3).

⁹³ *ibid* art. 25 (3).

⁹⁴ *ibid* art. 25 (3).

⁹⁵ Falvo and Muscaritoli (n 84) 99.

have two layers – a national database and an EU database, yet the exact practical dimension of how contracting authorities would need to integrate this innovation is missing.⁹⁶

Another final point that comes up represents the articulation of this new exclusion ground with the possibility of self-cleaning. Based on article 57(6), fourth paragraph, which prohibits an economic operator that has been excluded from using the self-cleaning, the literature argues that, in this case too, the economic operator should not be allowed to self-clean.⁹⁷

c) All of the above (minimum mandatory requirements, targets, exclusion)

i) The Ecodesign Regulation

Prior to any presentation of legal content, it is interesting to note that, due to its detailed rules on the digital product passport, this Regulation has already been pointed out as an example for the twin transitions.⁹⁸ This observation only reinforces the idea that digital and sustainable are interlinked in this series of legislations that also concern public procurement.

The Ecodesign Regulation has multiple aims, one of which being to define the framework for ‘mandatory green public procurement requirements’.⁹⁹ Article 65 presents the GPP framework as based on ‘minimum requirements’ for different categories of products (to be defined in ‘delegated acts’), as well as ‘for works or services’ contracts that use those types of products for ‘activities constituting the subject matter of those contracts’.¹⁰⁰ The ‘minimum requirements’ defined by the European Commission, can take multiple forms: ‘technical specifications, award criteria, contract performance conditions or targets’.¹⁰¹ The Regulation explains that the ‘award criteria’ can incorporate weightings, expressed in percentages.¹⁰²

When it comes to targets, those can be set annually or for multiple years, with a minimum goal of ‘50%’ either at contracting authority level or at ‘national level’, ‘of the most environmentally

⁹⁶ *ibid* 100.

⁹⁷ *ibid* 101.

⁹⁸ Anne-Christin Mittwoch, ‘The Digital Product Passport of the Ecodesign Regulation - Passport to a Successful Twin Transformation in Product Law?’ (2024) 45 Business Law Review 67.

⁹⁹ Regulation (EU) 2024/1781 (n 13) art. 1(1).

¹⁰⁰ *ibid* art. 65(1).

¹⁰¹ *ibid* art. 65(3).

¹⁰² *ibid* art. 65(3).

sustainable products’.¹⁰³ Recital (100) explains that the 50% minimum means that ‘contracting authorities (...) entities should award at least 50 % of their annual procurement of certain products to those with more than 70 % of recyclable material’, which leaves the possibility for Member States to establish even more ambitious goals.¹⁰⁴

Besides setting minimum requirements, Member States can exclude economic operators violating this Regulation. Therefore, this legal source also defines an ‘exclusion from public procurement procedures’, which has to be ‘time-limited’.¹⁰⁵

3. The New Digital in Green Public Procurement

The analysis performed in the previous section, concerning the minimum mandatory requirements, the targets and the penalties related to public procurement leads to several research and development paths concerning the digitalisation of public procurement.

When it comes to both minimum mandatory requirements and targets, as well as the penalty of exclusion, one common digital element comes (or should come) up: *data*. Firstly, once a minimum mandatory requirement or a target is set, it should be later verified if indeed the requirement was integrated into the procedure (for example, the needed award criteria were integrated in the procedure) or if the target was reached. This verification can be done by collecting data on public procurement procedures and verifying if the mandatory element was integrated or if the target was reached. Secondly, regarding the penalty of exclusion, the idea of an EU database with debarred economic operators was brought up.

Therefore, the first research question can be answered: do the new mandatory GPP provisions have an inherent link to digitalisation? A preliminary conclusion can be that some of the new mandatory GPP requirements refer to and should be linked to digitalisation.

The second research question – if yes, how do the SPP sectoral legislations interact with the relevant digital public procurement legal dispositions? – will be answered below, by correlating the previous classification with its digital links:

¹⁰³ *ibid* art 65(3).

¹⁰⁴ *ibid* rec. (100).

¹⁰⁵ *ibid* art. 74(3) b.

- Minimum mandatory requirements and data monitoring
- Exclusion and the creation of an EU database

a) Minimum Mandatory Requirements and / or Targets and Data management

Currently, the European Union does not have a mandatory standard for SPP data collection. The eForms Regulation sets the European Union standard on collecting data, and could have been the standard for mandatory sustainable data collection. However, all sustainability fields in the eForms are voluntary.¹⁰⁶ This means that Member States will decide whether they wish to collect this data – some Member States will collect it, while others won't, leading to varied results between them.¹⁰⁷ The Open Data Directive¹⁰⁸ and its concept of 'high-value data set' have been put forward as potential solutions to the legal mandate limitation.¹⁰⁹ However, public procurement has not been classified as a high-value dataset for now.

Taking the example of the Clean Vehicles Directive, the targets set are mandatory, therefore it would be expected that monitoring these targets in the eForms would also be considered mandatory. However, as stated above, all of the sustainability fields in the eForms are optional, including the (mandatory) Clean Vehicles data.

The following set of arguments can summarize the link between the new mandatory requirements and the existing data collection legislation:

1. the EU has taken the first steps to set mandatory sustainability objectives in public procurement, using minimum mandatory requirements and targets;
2. ideally, in order to actually reach these goals, these requirements should be used and the targets should be aspired to;

¹⁰⁶ Commission Implementing Regulation (EU) 2019/1780 (n26); Commission Implementing Regulation (EU) 2022/2303 (n26).

¹⁰⁷ For a more detailed analysis, see: Sanchez-Graells (n29) 181; Sava (n 29).

¹⁰⁸ Directive (EU) 2019/1024 (n 27).

¹⁰⁹ Karolis Granickas, 'The Future of Procurement Data Architecture in the EU' (TED Conference, Public Procurement Data Superpowers, Brussels, 29-30 April 2024) accessed 21.08.2024 < chrome-extension://efaidnbmnnnibpcajpcgclefindmkaj/https://op.europa.eu/documents/d/public-procurement-data-superpowers/day1_r1_1600_1745_granickas>; Sanchez-Graells (n29) 197.

3. in order to verify if the requirements / targets are used / reached, data needs to be collected and then monitored;

4. the current legal framework for data collection is not correlated with these new green requirements – the current data collection standard – the eForms – does not provide for mandatory SPP data collection.

Therefore, due to this lack of correlation between the new mandatory green obligations and the existing legal framework for data collection, it can be anticipated that some contracting authorities will collect the data (and share it to TED), while some will not, whilst existing data quantity and data quality issues will persist.¹¹⁰

This issue should be addressed – the new green requirements need to be monitored and data needs to be collected. In order to be collected, the existing standards for data collection need to be updated – if this is not done at EU level, this should be done at Member State level. I contend that Member States should make SPP data fields from the eForms mandatory, in order to be able to track the uptake of existing mandatory sustainability requirements and targets.¹¹¹ Member States have the capacity to do so, as specified in the eForms¹¹² and it would be in their own interest, because it would facilitate tracking and reporting on minimum mandatory requirements and targets concerning SPP.¹¹³

¹¹⁰ The literature notes multiple data quality issues around EU TED data – for more information, see: Sebastian Halsbenning and Marco Niemann, ‘The European Procurement Dilemma-First Steps to Introduce Data-Driven Policy-Making in Public Procurement’, *2019 IEEE 21st Conference on Business Informatics (CBI)* (2019); Eric Prier, Palina Prysmakova and Clifford P McCue, ‘Analysing the European Union’s Tenders Electronic Daily: Possibilities and Pitfalls’ (2018) 11 *International Journal of Procurement Management* 722; Ahmet Soylu and others, ‘Data Quality Barriers for Transparency in Public Procurement’ (2022) 13 *Information art.* 99. On the distinction between data that will be shared and data that will not be shared, see: Sanchez-Graells (n29) 180-182.

¹¹¹ Sava (n 29) 183–184.

¹¹² Commission Implementing Regulation (EU) 2019/1780 (n26); Commission Implementing Regulation (EU) 2022/2303 (n26).

¹¹³ See also: Sanchez-Graells (n29) 181-182. The Public Procurement Data Space Communication mentions that its infrastructure will facilitate reporting and monitoring obligations of Member States– which can be criticised – and mentions, for example, the ‘Clean Vehicles Directive’ and the ‘Recovery and ‘Resilience Facility (RRF)’ - Commission (n28) 2.

b) Exclusion

Some of the selected legislations create the penalty of exclusion from public procurement procedures of economic operators that violate the said legislation. For example, the Deforestation Regulation¹¹⁴ establishes that the means of proof for the violation has to be a ‘final judgement’¹¹⁵, that would be published by the Commission ‘on its website’, with relevant information to identify the concerned economic operator and the duration of the sanction.¹¹⁶ The doctrine noted that this can lead to the creation of a ‘EU-wide debarment (...) system’, in the form of a ‘centralised collection of data’.¹¹⁷

Therefore, the idea of data resurfaces again. If, indeed, such database were to be created, it would be useful to bring all judgements that temporarily exclude an economic operator from public procurement procedures in the same database, that would be accessible by all contracting authorities in all Member States. It should further be explored how contracting authorities would consult this database, so that their activity is not further complicated. It should also be determined who has access to the information, as this question might pose great issues regarding data protection and liability.¹¹⁸ As mentioned before, the issue of balancing privacy and transparency comes up and should be further explored.

Beyond the contracting authorities, it should be defined which institution should be responsible with sending the judgements to the Commission – the judicial institution who took the decision or another specific authority from each Member State? Another issue that needs further clarification is the creation of a database of judgments at Member State level, that could communicate with the EU database.

¹¹⁴ Regulation (EU) 2023/1115 (n 12), art. 25. Read more: Falvo and Muscaritoli (n 84).

¹¹⁵ *ibid* art. 25 (3).

¹¹⁶ Regulation (EU) 2023/1115 (n12) art. 25 (3).

¹¹⁷ Falvo and Muscaritoli (n 84) 99.

¹¹⁸ For more information see: Sanchez-Graells (n29) 194 and next; Case C-755/21 P Kočner v EUROPOL [2024] ECLI:EU:C:2024:202.

4. Conclusion

To conclude, it should first be observed that SPP law is undergoing a significant process of change. This evolution relies heavily on sectoral legislation that touches upon public procurement rules. The rules from the sectoral legislation that tackle public procurement create mandatory sustainability requirements or targets. Often, these new obligations are accompanied (and if not, they should be accompanied) by a monitoring obligation. The monitoring obligation implies the use of technologies, mainly of data. The legislation analysed in this article referred either to monitoring sustainability requirements and targets or to the creation of a database for excluded economic operators. It derives from this analysis that reaching the new sustainability goals in public procurement is closely connected to and relies on digitalisation – mainly data management.