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Towards mandatory SPP for buildings/works

Roberto Caranta

Abstract

The European Green Deal and the Circular Economy Action Plan are bringing about a tectonic shift in public procurement from the traditional market opening approach focused on 'how to buy' towards a framework for 'what' is bought. Buildings account for 40% of the EU's energy consumption and 36% of energy-related direct and indirect greenhouse gas emissions. In the EU, heating, cooling and domestic hot water account for 80% of households' energy. Logically, buildings are at the core of EU policy and legislation proposals aiming at fighting climate change. This article focuses on the role SPP is to play with reference to buildings and more generally to works procurements and this specifically in the light of the reform proposals following from the European Green Deal and the Circular Economy Action Plan. It highlights both the progress proposed and the limitations that may yet be corrected during the legislative process.

Keywords

Building, Energy efficiency, Green deal, Procurement.

1. Introduction

Our societies are faced with enormous challenges, starting from - but far from stopping at - climate change. Public procurement - and more specifically sustainable public procurement - SPP - has a role to play in addressing those challenges.

The 2030 Agenda for Sustainable Development Agenda lists 17 Sustainable Development Goals (SDGs). Harnessing Sustainable Public Procurement (SPP) to achieve the SDGs can significantly impact achieving these goals (Caranta, forthcoming). So much so that Target 12.7 of the SDGs expressly refers to the need to "Promote public procurement practices that are sustainable, in accordance with national policies and priorities". SPP is potentially also relevant to the achievement of many, if not most, of the SDGs (<https://sapiensnetwork.eu/>).

In the EU, the 2019 Green Deal refers to public procurement as one of the tools of choice to achieve its objectives. The Circular Economy Action Plan indicated that public authorities' purchasing power represents 14% of EU GDP and can serve as a powerful driver of the demand for sustainable products. To 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)¹. Public procurement is a major opportunity for EU public authorities to initiate sustainable change in many markets by becoming trendsetters that pursue sustainable outcomes.

Buildings account for 40% of the EU's energy consumption and 36% of energy-related direct and indirect greenhouse gas emissions (COM(2020) 662 final). In the EU, heating, cooling and

¹ https://ec.europa.eu/environment/circular-economy/pdf/new_circular_economy_action_plan.pdf, paragraph 2.2.

domestic hot water account for 80% of households' energy. Logically, buildings are at the core of EU policy and legislation proposals aiming at fighting climate change.

This article focuses on the role SPP is to play with reference to buildings and more generally to works procurements and this specifically in the light of the reform proposals following from the European Green Deal and the Circular Economy Action Plan. The current legal framework will be briefly examined, considering both general EU public procurement and concessions law (§ 2) and building and works specific rules (§ 3). The proposals tabled by the European Commission will be analysed next (§ 4). Short conclusions will assess how these proposals might be strengthened (§ 5).

A preliminary terminological caveat is that until now the terminology - and the coverage - of public procurement rules is different from that of the rules pertaining to buildings. Under Article 2(1)(7) of Directive 2014/24/EU, the classic or general procurement directive, “a work’ means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function”. ‘Buildings’ is narrower than ‘works’. Under Article 2(1) of Directive 2010/31/EU, the Energy Performance of Buildings Directive (EPBD), “building’ means a roofed construction having walls, for which energy is used to condition the indoor climate;” the latter definition excludes major infrastructures, which are instead covered under ‘works’. However, the EPBD covers both public and privately owned ‘buildings’, while Directive 2014/24/EU is focused on ‘public works’. More of an interest from a public procurement point of view, the provision in the EPBD specifically applicable to the public sector (Article 9) refers to “buildings occupied and owned by public authorities”. While the use of ‘and’ would suggest that the two conditions are cumulative, Recital 21 focuses on ‘occupation’. This is at variance with the approach in the procurement directive, whose Article 10(a) excludes from the scope of application of the EU rules “the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon”. This variance is not surprising as the EPBD focuses on both new - meaning having required works - and old buildings. Still, as it will be shown, the reform proposals tabled by the Commission seek to bridge some of the (terminological) gaps between the different bodies of EU rules.

2. The 2014 legal framework

The 2014 reform of EU public procurement and concessions law was prepared by a Commission Green paper on “The modernisation of EU public procurement policy – Towards a more efficient European Procurement Market” (COM (2011), 15 final). The Green paper begins with reference to the Europe 2020 strategy for smart, sustainable, and inclusive growth (COM (2010), 2020). Public procurement is said to play a key role in this notably by supporting the shift towards a resource-efficient and low-carbon economy, for instance, “by encouraging wider use of green public procurement”. While the actual reform proposals were not too innovative, the case law, and specifically the judgement in the *Dutch Coffee* case (Case *C-368/10 Commission v Netherlands* [2012] ECLI:EU:C:2012:284), pushed the EU legislator to firmly root SPP in the 2014 Directives. The 2014 Directives may be seen as empowering contracting authorities to engage in SPP, more specifically in GPP, and to a certain extent lowering the regulatory risks attached to this approach under the 2004 directives. As it has been remarked, the “sustainability paradigm is almost taking over the realm of public procurement, and it is marketed as a major ‘selling point’ of the new legislation” (Dragos & Neamtu, 2014, pp. 304).

The EU public procurement and concessions directives focus on procedures rather than substance. ‘How to buy’ is what they are about, they are not about ‘what to buy’. The latter choice is left to

contracting authorities' discretion, generally guided by the Member States (Trepte, 2012, pp. 85). The leading principles of non-discrimination and equal treatment, as well as the need to ensure open competition, may constrain that choice, e.g., under Article 18(1) of Directive 2014/24/EU (Hamer, 2021). However, Article 18(2) Directive 2014/24/EU has also introduced a 'principle' of sustainability (Andhov, 2021). In the *TIM* case, the CJEU has highlighted that this principle constitutes a cardinal value of Directive 2014/24/EU (Case C-395/18, *Tim*, ECLI:EU:C:2020:58).

Still, the 2014 EU public procurement and concessions directives revision clarified that SPP is permissible but steered clear from introducing mandatory rules (Andhov & Mitkidis, 2017). It was thought better to leave sector-specific legislation to set mandatory criteria and targets (COM, (2011) 15 final, p. 41 ff) (Trepte, 2012).

Moreover, the Commission has issued guidance to help the contracting authorities willing to engage in SPP through the *Buying Green* and the *Buying Social* Guides. The Commission has also developed GPP criteria that cover a range of specific procurements. These criteria are divided into so-called 'core criteria', which are deemed to be for easy application and 'comprehensive criteria' that are designed to reach a higher environmental performance along the different phases of the procurement process.

3. Specific rules for buildings and works

Already today the building sector is the object of a number of sectoral EU legislative measures that in some cases regulate procurement or at least are relevant for it. More seldomly, even SPP is specifically regulated. Some of these measures focus on the building environment, such as the Energy Performance of Buildings Directive (EPBD) or on materials used to build, such as the Construction Product Regulation (CPR). Other measures concern energy instead, as is the case with both the Energy Efficiency Directive (EED) and the Renewable Energy Directive (RED).

Directive 2010/31/EU (EPBD), as recast by Directive 2018/884/EU, is currently laying down measures to enhance energy savings in buildings and to reduce the large differences between Member States' achievements in this sector. Those measures should take into account climatic and local conditions as well as indoor climate environment and cost-effectiveness (Recitals 7 and 8).

The EPBD foresees the adoption of national plans, which "should set more ambitious targets for the buildings occupied by public authorities" (Recital 21). Those same authorities should become 'early adopters' of energy efficiency improvements (Recital 23). To set an example showing that environmental and energy considerations are being taken into account, those same buildings should be regularly subject to energy certification (Recital 24). The plans should ensure that all new buildings are 'nearly zero-energy' buildings by 2020.

Regulation (EU) No 305/2011 - the CPR - lays down harmonised conditions for the marketing of construction products. As it is now, the CPR does not set product requirements, and the Member States are competent in relation to safety, environmental and energy requirements applicable to buildings and civil engineering works.

Concerning energy, Directive 2012/27/EU on energy efficiency, the first EED, was enacted to introduce a set of binding measures to help the EU reach energy efficiency targets aiming at mitigating climate change. It has been modified several times, including by Directives 2018/2002/EU and 2018/844/EU, which further modified the EED to reflect more ambitious targets.

Public authorities are given a specific role under the EED, including with reference to public procurement. The first phrase in Recital 39 indicates that “[l]ocal and regional authorities should be given a leading role in the development and design, execution and assessment of the measures laid down in Directive 2012/27/EU”. This leading role is reflected in Articles 5 and 6, the latter focusing specifically on public procurement (referred to as purchasing). More specifically, Article 5 (*Exemplary role of public bodies’ buildings*) provides for the exemplary role of public bodies’ buildings, indicating that each Member State shall ensure that “3 % of the total floor area of heated and/or cooled buildings owned and occupied by its central government is renovated each year to meet at least the minimum energy performance requirements” (near zero energy buildings). Under Article 6 (*Purchasing by public bodies*), subject to some proviso, the Member States shall ensure that central governments purchase “only products, services and buildings with high energy-efficiency performance”. Moreover, the Member States shall encourage public bodies, including at regional and local levels, “to follow the exemplary role of their central governments to purchase only products, services and buildings with high energy-efficiency performance”.

Finally, Directive 2009/28/EC (RED) as recast by Directive 2018/2001 sets a common target – currently at 32% – for the amount of renewable energy in the EU’s energy consumption by 2030. It establishes common principles and rules to remove barriers, stimulate investments and drive cost reductions in renewable energy technologies. The RED does not refer to public procurement explicitly but refers back to the EPBD. Under Art. 15(5), “Member States shall ensure that new public buildings, and existing public buildings that are subject to major renovation, at the national, regional and local level, fulfil an exemplary role in the context of this Directive from 1 January 2012. Member States may, inter alia, allow that obligation to be fulfilled by complying with nearly zero-energy building provisions as required in Directive 2010/31/EU or by providing for the roofs of public or mixed private-public buildings to be used by third parties for installations that produce energy from renewable sources.”

The measures just analysed follow two different approaches to SPP. The EPBD and the RED set targets for the Member States. The EED instead relies on specific criteria or requirements to be adhered to by public bodies. This is a big difference - at least for lawyers - as only the non-adherence with the latter might be justiciable in the context of an individual award procedure under the provisions of Directives 89/665/EEC and 92/13/EC. Missing targets might be instead challenged in those Member States having developed a case law on the lines of the Dutch *Urgenda* judgment (*Urgenda Foundation v. State of the Netherlands* ECLI:NL:HR:2019:2007).

Construction specific EU GPP Criteria, including for Office Building Design, Construction and Management (currently under revision) and Road Design, Construction and Maintenance are to be categorised as (non mandatory) criteria/requirements.

The 2016 EU GPP Criteria for Office Building Design, Construction and Management address the procurement process for office buildings, including their design, site preparation, construction, servicing and ongoing management. For the purposes of the criteria, the product group “Office buildings” shall comprise buildings where mainly administrative, bureaucratic and clerical activities are carried out. Major renovations of office buildings are also addressed within the scope of the criteria.

The revision of the GPP Criteria for Office Building Design, Construction and Management will expand the scope to other types of buildings purchased and/or maintained by public authorities, in particular schools and social housing. The criteria will also try to be in line with recent policy developments relating to the Renovation Wave, the Level(s) common framework and the EU

Taxonomy. Criteria will aim to be clear and ambitious, based on a life-cycle approach and a scientific evidence base.

The EU GPP Criteria for Road Design, Construction and Maintenance - also from 2016 - contain recommendations that apply to both the construction of new roads and maintenance and rehabilitation of existing ones. The criteria address the main hot-spots along the whole life cycle of a road, from materials production (including raw materials extraction and transportation), to construction, use (fuel consumption during the road service life due to the pavement-vehicle interaction), maintenance (and operation) and end of life. The most significant environmental impacts are related to greenhouse gas emissions from fuel consumption during the use of the road and resource use to manufacture construction materials. Other environmental areas of interest, such as water, habitat preservation and noise emissions reductions are also addressed.

4. The commission's proposals

The Commission's *Reflection Paper Towards a Sustainable Europe by 2030* highlighted the need to "make the circular economy the backbone of EU industrial strategy, enabling circularity in new areas and sectors, empowering consumers to make informed choices and enhancing efforts by the public sector through sustainable public procurement". The EU Green Deal indicated that "[p]ublic authorities, including the EU institutions, should lead by example and ensure that their procurement is green" (COM(2019) 640 final, pp. 8). The Commission committed to proposing further legislation and guidance on green public purchasing (Janssen & Andhov, 2020; Pouikli, 2020). As already recalled, (above § 1), the Circular Economy Action Plan indicates the Commission's intention to 'propose minimum mandatory green public procurement (GPP) criteria and targets in sectoral legislation'². Furthermore, the EU Green Deal Investment Plan stated: "The Commission will propose minimum mandatory green criteria or targets for public procurements in sectoral initiatives, EU funding or product-specific legislation. Such minimum criteria will 'de facto' set a common definition of what a 'green purchase' is, allowing the collection of comparable data from public buyers and setting the basis for assessing the impact of green public procurements. Public authorities across Europe will be encouraged to integrate green criteria and use labels in their procurements" (COM(2020), 21 final, pp. 12). As the Circular Economy Action Plan avows, the shift towards mandatory criteria is born out of the realisation that instruments such as the EU GPP criteria "have reduced impact due to the limitations of voluntary approaches"³.

The first implementing act for the European Green Deal was the EU Climate Act (Regulation (EU) 2021/1119) which wrote into the law the goal for Europe's economy and society to become climate-neutral by 2050. The law also 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 specifically targeting climate change (COM(2021), 550 final). It is a very complex package of proposals for both new and amended legislation. The EPBD, the CPR, the EED and the RED are among the legislative measures whose amendment is foreseen to contribute in reaching the ambitious EU climate targets. Those proposals have been drafted based on a balanced policy mix. According to the analyses, "an over-reliance on strengthened regulatory policies would lead to unnecessarily high economic burdens, while carbon pricing alone would not overcome persistent market failures and non-market

² https://ec.europa.eu/environment/circular-economy/pdf/new_circular_economy_action_plan.pdf, paragraph 2.2.

³ https://ec.europa.eu/environment/circular-economy/pdf/new_circular_economy_action_plan.pdf, paragraph 2.1.

barriers. The chosen policy mix is, therefore, a careful balance between pricing, targets, standards and support measures” (COM/2021/550).

In parallel, in the European Green Deal the Commission indicated that “[t]o address the twin challenge of energy efficiency and affordability, the EU and the Member States should engage in a ‘Renovation Wave’ of public and private buildings” (COM(2019), 640 final, pp. 9). The strategy for the Renovation Wave was laid down in a 2020 Communication (COM(2020), 662 final). Administrative, educational and healthcare facilities, as well as social housing, are at the core of the Renovation Wave, which translates directly into potential relevance for SPP. Since Building Information Modelling (BIM) improves transparency and reduces costs and resource use, the Commission is to “provide a recommendation to promote Building Information Modelling in public procurement for construction and provide a methodology to public clients to conduct cost-benefit analysis for the use of BIM in public tenders” (pp. 16).

Another relevant reform strand is linked to the Sustainable Product Initiative (SPI) (COM(2022), 140 final), which is part of the Circular Economy Action Plan. The SPI aims to make products placed on the EU market more sustainable to help in reaching the Green Deal objectives of lower resource consumption and less environmental impact. The main legislative proposals regarding sustainable products are the reforms of the current Ecodesign Directive 2009/125/EC and the consumer empowering directives (Directives 2005/29/EC and 2011/83/EU). Public procurement is given a prominent place in the SPI, with the aim of leveraging public budgets to increase market demand for sustainable products. The 2022 Communication of the Commission on making sustainable products the norm indicates that the Ecodesign Regulation “[...] aims to leverage the weight of public spending to boost demand for more environmentally sustainable products by setting mandatory criteria for the public procurement of these products, drawing where appropriate on existing voluntary criteria. This means that contracting authorities would be required to use green procurement criteria to purchase specific groups of products” (COM(2022), 140 final, pp. 6).

The SPI is relevant here since the reform of the CPR is to be read as part of the overall SPI architecture. Indeed, the Circular Economy Action Plan already foresaw the revision of the CPR, including the possible introduction of recycled content requirements for certain construction products, taking into account their safety and functionality, and the use of Level(s) to integrate life cycle assessment in public procurement, also exploring the appropriateness of setting of carbon reduction targets and the potential of carbon storage (COM(2020), 98 final, pp. 12; see also COM(2020), 662 final).

Sustainability in the built environment is therefore part of a multi-pronged and very complex reform push articulated in numerous policy documents. The focus here is on the Commission’s reform proposals for the EPBD, the CPR, the EED and the RED.

4.1 The reform of the EPBD

The revised EPBD will be tasked to promote “the improvement of the energy performance of buildings and the reduction of greenhouse gas emissions from buildings within the Union, with a view to achieving a zero-emission building stock by 2050 taking into account outdoor climatic and local conditions, as well as indoor climate requirements and cost-effectiveness” (Article 1).

While in principle, all provisions in the proposed revised EPBD apply to buildings occupied or owned by public authorities (e.g. Article 11(3) on measuring and control devices for the monitoring and regulation of indoor air quality or Art. 12 on infrastructures for sustainable mobility), specific

provisions apply to 'public bodies', i.e. "contracting authorities' as defined in Article 2(1) of Directive 2014/24/EU". The reformed EPBD is thus aligning its terminology with public procurement jargon.

Basically, buildings occupied or - 'and', previously in the text, is now gone - owned by public bodies must reach the objectives laid down in the EPBD before the rest of the building stock. More specifically, under Article 7(1), new buildings occupied or owned by public bodies must be 'zero-emission' as of 1 January 2027, while for other buildings the date is 1 January 2030. Concerning existing buildings under Article 9(1), the Member States shall ensure that (a) buildings and building units owned by public bodies achieve at the latest (i) after 1 January 2027, at least energy performance class F; and (ii) after 1 January 2030, at least energy performance class E. The target dates just mentioned - and those for non-residential buildings and building units - anticipate those for 'residential buildings and building units' by three years.

Under different provisions, public authorities are required to double down on specific efforts or to show their commitment to high-energy performance. Under the last sentence of the proposed Article 12(2) EPBD, "In case of buildings owned or occupied by public authorities, Member States shall ensure pre-cabling for at least one in two parking spaces by 1 January 2033". Under Article 18(1) EPBD, in the case of buildings occupied by public authorities and frequently visited by the public, "the energy performance certificate is displayed in a prominent place clearly visible to the public".

4.2. The reform of the CPR

From the point of view of SPP, the most relevant proposal is the one concerning the Regulation laying down harmonised conditions for the marketing of construction products, amending Regulation (EU) 2019/1020 and repealing Regulation (EU) 305/2011 – CPR (COM(2022), 144 final). The CPR revision answers the two general objectives to achieve a well-functioning single market for construction products and to contribute to the objectives of the green and digital transition, particularly the modern, resource-efficient and competitive economy. Indeed, "[t]he EU Green Deal Communication, the Circular Economy Action Plan and the Renovation Wave Communication highlighted the role of the CPR as part of efforts towards energy- and resource-efficient buildings and renovations and in addressing the sustainability of construction products" (pp. 1).

Concerning specifically the linkage with the Circular Economy Action Plan and the SPI, the CPR must be seen as a dedicated instrument or product specific legislation (COM(2022), 142 final). As such, it has the same level of stringency as the Ecodesign for Sustainable Products Regulation (ESPR) (pp. 4). At the same time, specific construction products are still to be regulated by the ESPR, such as energy-related construction products (COM(2022), 144 final, pp. 4). The proposal, therefore, establishes new environmental obligations and lays the ground for "the development and the application of an assessment method for the calculation of the environmental sustainability of construction products" (Recital 7).

Product standards are normally established by European Standardisation Organisations. In case the standards are in line with EU rules, they may be cited in the O.J.E.U. and thus become binding. Development of standards is however too often very slow, and it happens that standards are in conflict with EU rules and cannot, therefore, be cited. In line with Regulation (EU) No 1025/2012 on European standardisation, the proposal for the CPR has developed a fall-back solution empowering the Commission to develop the standards itself (Recital 18). This is notably

the case under the proposed Article 4(3) CPR when there are undue delays in the adoption of certain standards, or there is urgency, or the standards developed are insufficient or “not in line with EU climate and environmental legislation and ambition”.

The proposed CPR has a specific focus on public procurement. Article 7, defining the ‘harmonised zone and national measures’ limits the power of the Member States to add ‘additional requirements’ when standards have been cited in the O.J.E.U.; this rule also applies to “public tenders or direct attributions of contracts where those public tenders or direct attributions are executed under direct or indirect control of public entities or are executed with reference to public provisions on public tenders or direct attribution of contracts” (Article 7(2)).

This strict stance is not consistent with the relevant role given to SPP under Recital 90, according to which “Member States’ public procurement practice should target the most sustainable amongst the compliant products”. True, the last phrase in Article 7(2) provides that “However, harmonised technical specifications may permit or recommend Member States to link the decisions on the attribution of public tenders, of contracts or of grants or other positive incentives to sub-classes or additional classes other than those established in accordance with Article 4(4) where these still relate to environmental performances assessed in accordance with these harmonised technical specifications”.

The default approach chosen is that, once a reference to ‘harmonised technical specifications’ has been published into the O.J.E.U. there is only what - if any - space for SPP that is left by the harmonised technical specifications themselves. The ‘harmonised zone’ is generally understood as a fully (instead of minimally) harmonised zone. However, the second phrase in Article 19(6), which is grounded on the possibility for the harmonised technical specifications to specify that their requirements only constitute ‘minimum requirement’. Reading US categories, Article 7(2) treats buying decisions as if they were regulatory decisions which are instead regulated under Article 7(3) and (4) (Arrowsmith & Kunzlik, 2009, pp. 21). A very limited departure from strict internal market orthodoxy is only allowed under Article 7(7) for mandatory deposit-refund systems.

This strict approach is confirmed by the proposed Article 84 (GPP), which is actually ‘centralising’ SPP in the construction sector. Recital 91 indicates that “contracting authorities and entities should, where appropriate, be required to align their procurement with specific green public procurement criteria or targets, to be set out in the delegated acts adopted” by the Commission (Recital 91). This is because, “Compared to a voluntary approach, mandatory criteria or targets will ensure that the leverage of public spending to boost demand for better performing products is maximised”.

On these bases, under Article 84(1) the Commission may adopt delegated acts “establishing sustainability requirements applicable to public contracts, including implementation, monitoring and reporting of those requirements by Member States”. If Article 84 is read together with Article 7(2), once the Commission has established ‘sustainability requirements’, neither Member States nor an individual contracting authority may ‘set additional requirements’.

Under the proposed Article 84(3), in setting the sustainability requirements, the Commission shall take into account (a) the value and volume of public contracts awarded for that given product family or category or for the services or works using the given product family or category; (b) the need to ensure sufficient demand for more environmentally sustainable products and (c) the economic feasibility for contracting authorities or contracting entities to buy more environmentally sustainable products, without entailing disproportionate costs.

Under the proposed Article 84(2), the sustainability requirements may - but do not need to - “take the form of mandatory technical specifications, selection criteria, award criteria, contract performance clauses, or targets, as appropriate”.

4.3. The reform of the EED

The recast of the EED aims at contributing to the enhanced ambitions announced in the EU Green Deal and further spelt out in the Commission’s Climate Target Plan (CTP) (COM/2020/562 final). The latter aligns with the Paris Agreement's objective to keep the global temperature increase below 2°C and pursue efforts to keep it to 1,5°C (COM(2021), 558 final, pp. 1). Buildings, including heating and cooling, still represent a major potential for energy savings, which is also true of public buildings (at p. 3). There is a strong relationship between the EED and the EPBD. Indeed, the EED “sets a framework for other energy efficiency policies by laying down the energy efficiency targets and setting the main cross-sectoral measures as well as more specific ones. It targets energy savings in the public sector, including via obligations to renovate public buildings annually and taking into account energy efficiency in procurement of goods, services, works and buildings. Its particular aim at public buildings is complementary to the EPBD, which sets the standards and specific technical obligations related to buildings” (pp. 5). Also, the EED has important interlinkages with the RED, notably in relation to heating and cooling (pp. 7).

Contrary to the EPBD and CPR, Article 1(2) of the EED proposal states: “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. Where national legislation provides for more stringent measures, the Member State shall notify such legislation to the Commission”. As it will be explained in the conclusions, this minimum harmonisation approach is generally to be preferred when legislating SPP.

The proposal for the recast of the EED strongly reinforces the exemplary role of the public sector. The evaluation of the old EED had shown reluctance in the public sectors to systematically include energy efficiency requirements in procurement, and this is because of price considerations and several limitations that prevent reaping energy savings potential in the public sector. In particular, allowing the Member States to assess if the measures were cost-effective and/or economically and/or technically feasible provided them with easy escape routes (pp. 15). Article 5 of the EED proposal introduces an obligation for the public sector to reduce its energy consumption, while Article 6 broadens the scope of the renovation obligation, making it applicable not just at the State level as it is under the rules now in force, but to all public bodies at all administration levels and in all sectors of public bodies’ activities, including healthcare, education and public housing, where the buildings are owned by public bodies. The EED proposal aligns the definition of the public bodies to the well-articulated notions defined under Directive 2014/24/EU (Recital 28), thus benefiting from the clarifications flowing from the long-standing case law of the CJEU. The renovation rate remains at least 3%. The proposal aims at renovations meeting the Near Zero Energy Buildings (NZEB) standard in line with the Renovation Wave Strategy and the more recent recast of the EPBD proposal (COM(2021), 802 final).

Concerning SPP, Article 7 EED now refers explicitly to ‘public procurement’ rather than ‘purchasing by public bodies’ as it is in the Directive now in force. Aligning the terminology is expected to ensure coherence across different legislative measures all relevant for contracting authorities. The proposed Article 7(1) too extends the obligation to take into account the energy efficiency requirements to all public administration levels by referring to “contracting authorities

and contracting entities”, the latter relevant in the utilities sectors whose procurement are regulated under Directive 2014/25/EU. The proposed Article 7(1) also does away with conditionalities, removing references to cost-effectiveness, technical and economic feasibility and providing that the 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 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”.

The proposed Article 7(3) refers to the contract design phase and creates an obligation on the Member States to “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”. The first phrase in the proposed Article 7(5) refers directly to the EU GPP criteria. It provides that “Member States may require that contracting authorities and contracting entities 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 the requirements laid down in Annex IV, Member States shall require contracting authorities and contracting entities to take into account Union green public procurement criteria”. The proposed Article 7(5) also includes a provision that contracting authorities may require that tenders disclose a Global Warming Potential of new buildings (numeric indicator in kgCO_{2e}/m² (of useful internal floor area) for each life cycle stage averaged for one year of a reference study period of 50 years), in particular for new buildings above 2000 square meters. It is linked to a provision aimed at increasing awareness of the circular economy and the whole life-cycle of carbon emissions in public procurement practices.

Finally, under the proposed Article 7(5), Member States will be required to support public bodies by providing guidelines and methodologies on the assessment of life-cycle costs, and by putting in place competence support centres and encouraging using aggregated procurement and digital procurement. Member States would be required to publish information on winning tenders (in line with the thresholds set out in the EU Public Procurement Directives).

4.4. The reform of the RED

The revision of the RED aims at increasing the share of energy from renewable resources to at least 40% by 2030 (Article 3(1)) and to at least 49% in the building sector (Article 15a(1)).

The proposed revision of the RED has limited direct specific references to public procurement. The first phrase in the proposed Article 15a(3) indicates that the “Member States shall ensure that public buildings at national, regional and local level, fulfil an exemplary role as regards the share of renewable energy used, in accordance with the provisions of Article 9 of Directive 2010/31/EU and Article 5 of Directive 2012/27/EU”. Reference is now to the old EPBD and EED and will have to be updated.

5. Conclusions: Of proposals needing to be coordinated and possibly strengthened

The European Green Deal and the Circular Economy Action Plan are bringing about a tectonic shift in public procurement from the traditional market opening approach focused on ‘how to buy’

towards a framework for 'what' is bought (Janssen & Caranta, forthcoming). This sharp acceleration towards mandatory SPP heeds the call for an EU-wide increase in the uptake of SPP avoiding fragmentation of the internal market (Andhov et al., 2020). Moreover, as was convincingly argued by Mélon, "mandatory GPP promotes the availability of information on the market, further standardisation, and more legally certain and efficient procurement processes for the authorities. Furthermore, a mandatory GPP approach is likely to increase market demand and innovation and lower the costs of environmentally-friendly products and services" (Mélon, 2020).

Against this background, the reform proposals for the EPBD and the RED are mainly setting sustainability targets for the Member States to achieve. By cross-referring to the EED, the RED however also refers to the more general 'exemplary role' to be played by the public sector as a whole, including therefore contracting authorities. Here the problem will be to monitor if targets are met and to require the application of remedial actions if they are not. Monitoring whether an 'exemplary role' is indeed fulfilled will be even more difficult.

The CPR and the EED instead foresee a role for mandatory SPP criteria, to be required when not designed by the Commission. The approach in the two cases is however very different. The proposed CPR adheres to a very traditional internal market approach of total harmonisation, leaving no space for Member States and/or contracting authorities to pursue more sustainably minded contract solutions. On the contrary, Article 1(2) of the EED proposal clearly states that the requirements foreseen thereunder are 'minimum requirements'.

There is no reason why we should have conflicting approaches and, more to the point, the total harmonisation approach will put a brake on more sustainably minded Member States and contracting authority. As already recalled, under the proposed Article 84(3) of the CPR, in setting sustainability requirements, the Commission shall take into account *inter alia* of the (c) the economic feasibility for contracting authorities or contracting entities to buy more environmentally sustainable products, without entailing disproportionate costs. This potentially contradicts the change of track in the EED proposal, as Article 7(1) of the latter did away with conditionalities, removing references to cost-effectiveness, technical and economic feasibility, to ensure a strong impact on climate targets. Again it is as if in the Commission the left hand doesn't know what the right hand is doing. But clearly what is 'economic feasible' will be very different among the Member States. Having a one size fits all approach will necessarily mean for the Commission to adopt not very ambitious standards which might benefit less SPP performing Member States. In turn, adhering to a total harmonisation approach will translate into a prohibition to pursue more ambitious standards, with the risk of a reform partaking less - not more - SPP. Minimum harmonisation should instead be the preferred manner of introducing mandatory requirements, allowing the Member States and individual contracting authorities to go beyond EU SPP requirements in their procurement procedures.

Another surprising and disturbing inconsistency between the CPR and the EED proposals is that only the latter refers to the EU GPP criteria (Article 7(5)). The EU GPP criteria have evolved much in the past years, and they are a precipitate of good practice that the proposed CPR simply ignores while they should instead provide at least inspiration for the mandatory requirement enacted by the Commission under Article 84. At a more general level, it is also true that the EU GPP should evolve rapidly into full SPP criteria (Caranta, 2022).

More generally concerning SPP, rules reinforcing monitoring and enforcement in the contract implementation phase are still ill adapted to the needs of contracting authorities. Articles 72 and

73 of Directive 2014/24/EU are both muscular and difficult to be applied in practice (Gruyaert & Pissierssens, forthcoming).

In conclusion, to meet the momentous goals our societies are facing, the current reform proposals need to be streamlined based on the more ambitious ones rather than just indulging in internal market fantasies as if dismantling barriers to trade was still the only *raison d'être* for the EU. A change in paradigm is overdue in EU public procurement and concessions law (Caranta, forthcoming).

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