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Public Procurement as a Tool for Achieving Emissions Reduction Targets

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SAPIENS NETWORK | Sustainability and Procurement in International, European, and National Systems

PUBLIC PROCUREMENT AS A TOOL FOR ACHIEVING EMISSIONS REDUCTION TARGETS

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KEY FINDINGS

1. **Leveraging public procurement as a decarbonization tool**
2. **Set Emission Reduction Target quotas for contracting authorities**
3. **Define technical specifications in terms of performance requirements**

Target Audience: This policy brief is mainly addressed to national and EU legislators (Key findings 1 and 2). In case Member States have already in place a system of distribution of Emission Reduction Targets quotas comprising contracting authorities, this policy brief is addressed also to public buyers (Key finding 3).

1. INTRODUCTION

In the EU, the term Green Public Procurement (GPP) traditionally refers to the voluntary inclusion of environmental considerations in public procurement processes. The adoption of the EU Green Deal, the Fit for 55 strategy and the EU Climate Act has undoubtedly elevated public procurement to a key position within the broader EU environmental agenda.[1] The introduction of these policies has resulted in the enactment of new legislation across various sectors, including environmental protection, energy and transport. These new laws mandate specific requirements that directly impact public procurement procedures, effectively superseding the previous facultative framework.[2]

In light of the EU's ambitious goal of achieving climate neutrality by 2050, it is worth considering whether additional ad-hoc measures might be required, particularly given that public procurement contributes 15% of global greenhouse gas (GHG) emissions.[3]

In practice, there are two ways to achieve climate change mitigation, which differs in terms of how substantive is the reduction of emissions. The first way is to bring emissions to zero, the second is to ensure that the net balance between the GHGs emitted and those absorbed through natural or

[1] Commission, 'The European Green Deal' COM (2019) 640 final; Commission, 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality COM(2021)550 final; Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJ L 243, 9.7.2021.

[2] See Andhov M., Caranta R., Janssen W., Martin-Ortega O., Shaping Sustainable Public Procurement Laws in the European Union: - An analysis of the legislative development from 'how to buy' to 'what to buy' in current and future EU legislative initiatives (The Greens/EFA in the European Parliament 2022); Janssen W. & Caranta R. (eds), Mandatory Sustainability Requirements in EU Public Procurement Law. Reflections on a Paradigm Shift (Bloomsbury Publishing, 2023).

[3] Green Public Procurement: Catalysing the Net-Zero Economy. (2022). World Economic Forum, p. 4.

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man-made carbon sinks is zero. This second approach is adopted in the EU. According to the Effort Sharing Regulation (ESR), Emission Reduction Targets (ERT) are distributed among Member States.[4] Nonetheless, the public procurement sector is not contemplated under the Regulation.

2. PROBLEM STATEMENT

While there is no doubt that the new acts mentioned above represent a significant milestone by the European legislator after years of voluntary sustainability criteria, we remain behind specifically in terms of establishing how public procurement can align with climate targets and contribute to their achievement. For this reason, many scholars tried to define Low Emissions Public Procurement (or similar nomenclatures):

"The process whereby organisations seek to procure goods, services, works and utilities with a reduced carbon footprint throughout their life cycle and/or leading to the reduction of the overall organisational carbon footprint when considering its direct and indirect emissions."[5]

"Low carbon procurement policies directly promote deployment by linking policy goals for decarbonisation to the purchasing of materials. This requires government agencies to choose a tender design that awards a contract based on criteria other than price."[6]

"Public procurement whereby public authorities seek to procure goods, services and works with the primary policy objective of contributing to climate mitigation. When awarding public contracts, LEPP requires applying an LCC methodology – or equivalent approach for emissions quantification. The LEPP seeks the best price-quality option, providing the lowest emissions, and requires quantifying and reporting the emission and their reduction derived from the purchase."[7]

What does EU law says about public procurement and climate neutrality? Are these definitions legally feasible? By building on the definitions above, this policy brief aims to advance the current state of the art by providing practical recommendations to the EU and to national legislators. This is achieved by connecting the EU Public Procurement and the EU Climate Law with insights from climate sciences.

3. WHAT DOES THE LAW SAY?

Despite the growing interest of scholars in the relationship between public procurement and decarbonisation, the EU legislature has yet to address this issue in a comprehensive manner. The role of public procurement in contributing to the achievement of emissions reduction targets (ERTs) is not addressed directly in EU law.

The EU is equipped with legislation establishing an overarching mandatory climate target, distributing these targets among Member States, delineating the sectors from which emissions should be reduced, and defining the mechanisms

[4] Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, OJ L 156, 19.6.2018;

[5] Correia, F., Howard, M., Hawkins, B., Pye, A., & Lamming, R. (2013). Low carbon procurement: An emerging agenda. Journal of Purchasing and Supply Management, 19(1), 58–64. https://doi.org/10.1016/j.pursup.2012.11.004

[6] Dunford, E., Niven, R., & Neidl, C. (2021). Deploying Low Carbon Public Procurement to Accelerate Carbon Removal. Frontiers in Climate, 3. https://doi.org/10.3389/fclim.2021.686787, p. 2.

[7] Andhov, M., & Muscaritoli, F. (2023). Climate Change and Public Procurement - Are we shifting the legal discourse? Manuscript submitted for publication. In W. Janssen, & R. Caranta (Eds.), Mandatory green and social requirements in EU public procurement law Reflections on a paradigm change in the European Union Hart Publishing, pp. 27-28.

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through which they can be traded.[8] Regulation 2018/842 on annual greenhouse gas emissions by Member States from 2021 to 2030, otherwise known as the Effort Sharing Regulation, is particularly relevant in this analysis. In alignment with the Paris Agreement and the EU Climate Law, this regulation delineates the ERTs each Member State must attain to reduce emissions by 55% by 2030. The act establishes a system whereby the Member States must report to the Commission by submitting an annual National Energy and Climate Plan (NECP), which details how they intend to achieve their national target. The Regulation's lack of specificity regarding the means of achieving the target suggests that member states have discretion in this regard. What role, if any, has public procurement?

A review of the available documentation[9] reveals that National Energy and Climate Plans (NECPs) frequently refer to public procurement, mainly intended as an auxiliary tool to achieve the targets. To illustrate,[10] the most recent Portuguese NECP includes, among its lines of action, the objective of "a low-carbon built stock and the adoption of low-carbon requirements in public procurement." Similarly, the Lithuanian NECP presents a table of instruments, predominantly of a regulatory or economic nature, designed to achieve a specific ERT. Among the above-mentioned instruments, a green public procurement plan is included, projected to reduce emissions by 322,110 kilo-tonnes of CO2eq. In contrast, while Greece's NECP refers to the potential for public procurement to contribute to emissions reduction, there is no clear indication of a direct link between the two. These examples suggest a general tendency to take procurement into account, but in very different ways and to very different degrees. Of these, the Lithuanian case seems to be the most virtuous, provided it has been properly implemented.

Since Member States are already, in theory, willing to merge climate targets with public procurement, it is now desirable to advance what has already been proposed and suggest more concrete actions. Ideally, Member States should distribute ERTs to regions, municipalities, cantons, districts and either establish rules as to how to reduce or leave discretion to contracting authorities – provided, of course, that these rules comply with national and EU laws.

4. KEY FINDINGS: HOW TO DECARBONIZE PROCUREMENT IN PRACTICE

1. Leverage Public Procurement as a Decarbonization Tool

The first step is to understand the enormous potential of distributing decarbonisation budgets on a smaller scale than the national one, and the second is to include public procurement as a tool for this decarbonisation.

2. Set ERT Quotas for Contracting Authorities

One of the initial strategies identified for reducing GHG emissions through procurement is to assign specific ERT directly to public procurement

[8] Eu Climate Law (see footnote 1); Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, OJ L 156, 19.6.2018; Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system, OJ L 130, 16.5.2023.

[9] National energy and climate plans. Retrieved from https://commission.europa.eu/energy-climate-change-environment/implementation-eu-countries/energy-and-climate-governance-and-reporting/national-energy-and-climate-plans_en.

[10] Randomized choice of three EU countries.

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activities. It is up to each Member State to determine:

a. The level of discretion granted to contracting authorities in making decisions regarding these targets.
b. How they choose to allocate the ERT, whether on a regional basis, by municipality, by individual contracting authority, or by authorities with a workforce exceeding a specified size.
c. Whether these ERTs should be applied broadly across all sectors or focused on specific sectors.

3. Define technical specifications in terms of performance requirements

Directive 2014/24[11] allows contracting authorities to define technical specifications in terms of performance requirements.[12] As per Article 42(3)(a), "the technical specifications shall be formulated in one of the following ways: (a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;(…)". Furthermore, Annex VII titled 'Definition of certain technical specifications', in extending the content of the above-mentioned article, refers to "environmental and climate performance levels".[13] Ideally, therefore, once the Member States have allocated to every contracting authority a quota of emissions to be reduced, they can attain that goal not only by explicitly choosing products, services or works with a reduced environmental impact. Indeed, they can still briefly define, for clarity and transparency, the characteristics of what they wish to buy, while simultaneously requiring that the product leads to a specific ERT.

WARNING: Technical specifications define an unavoidable characteristic. This means that, if at the beginning of the contract execution phase, the products deviate from what is stated in the tender specifications documents, the contract shall be terminated. For the technical specifications to respect the public procurement principles outlined in Article 18 of Directive 2014/24, it is necessary that the contracting authority, during the procedure, could "assess […] and compare tenders in a fair and transparent way. [They] may ask the tenderer to indicate how the desired result will be achieved and meet the level of quality specified in the procurement documents […]. [They] can ask them to provide technical data to confirm the feasibility of their proposed methods."[14]

A problematic aspect in this respect is the way in which the performance requirement is formulated. Emission reductions are hard to quantify precisely, affecting transparency. In principle, the contracting authority must define the ERT in a precise and unambiguous manner, e.g. 'For this specific supply contract, it is required that the ERT is 50,000 kilotonnes CO2 eq'. One might mistakenly think that, because emissions are difficult to quantify precisely, it would be more reasonable to define the performance requirement as a range, e.g. 'For this specific supply contract, it

[11] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014.

[12] On the topic see, specifically Kuypers, P. H. M. L., & Gruppen, M. J. (2008, August). A technical specification: how precise. In Proceedings 3rd International Public Procurement Conference, Amsterdam; generally: Steinicke M, 'Article 42', Steinicke and Vesterdorf (eds), Commentary on EU Public Procurement Law and Green technical specifications under the new procurement directives. (2015). In Public Procurement Policy (pp. 205–220). Routledge.

[13] Directive 2014/24, Annex VII, para. 1(a)(b).

[14] European Commission, Directorate-General for Environment, (2016). Buying green! : a handbook on green public procurement, Publications Office, pp. 33-34.

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is required that the ERT is between 42,000 and 50,000 kilotonnes CO2 eq'. However, from a legal point of view, this is problematic because it would not put all bidders on an equal footing.

Regarding the method/instrument of quantification, the same rules apply, which have often been reiterated by the court on numerous occasions. The contracting authority may mention a specific method of emissions quantification in the contract documents, but must also use the words ‘or equivalent’. As quantification methods are not always highly precise, more sophisticated emission reduction quantification tools may raise issues among candidates. In other words, the question is posed whether it is always straightforward to demonstrate that quantification tools are 'equivalent'. On this topic, further research is therefore needed and encouraged.

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