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Impact analysis of sustainability requirements in tender procedures in the Netherlands, France, Italy and Spain

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Executive summary

This report concerns an *'Impact analysis of mandatory sustainability requirements in tender procedures'*. This study was requested by Vlaanderen Circulair. In particular, this study focusses on the introduction of mandatory sustainability requirements in four EU member states, i.e. in France, Spain, Italy and the Netherlands, with a particular attention to the impact (benefits, challenges) of these mandatory requirements in the respective member states. This report presents the results of this impact analysis and contains recommendations for the inclusion of mandatory sustainability requirements in public procurement law in Belgium.

The study was performed in three subsequent phases:

- Phase 1: **Desk research**, in which a literature review was undertaken, in particular a recent publication on Mandatory Sustainability Requirements in EU Public Procurement Law¹ and further analysis was carried out with regard to the existing legal framework in each country;
- Phase 2: **Impact analysis**, during which interviews were conducted with experts while examining specific impact reports on this matter in the member states concerned;
- Phase 3: Structuring the outcome of Phase 1 and 2 into a **conclusion and specific recommendations** for the possible introduction of mandatory sustainability requirements in Belgium.

Based on the results of the impact analysis, we noticed several challenges regarding the efficient application of mandatory sustainability requirements. First of all, we noticed a lack of training and technical expertise, which reflects on preparing the tender specifications themselves.

We also perceived that there is a specific challenge regarding the limitation of the market due to the use of sustainability requirements.

In addition, we notice that stakeholders experience challenges in monitoring and verifying mandatory sustainability requirements, creating legal uncertainty.

When implementing mandatory measures, it is therefore important to pay sufficient attention to these challenges and issues and foresee the necessary tools and support for contracting authorities.

¹ W. Janssen e.a., *Mandatory Sustainability Requirements in EU Public Procurement Law, Reflections on a Paradigm Shift*, Bloomsbury Publishing, 2023.

Chapter 1. Background and Scope

In the transition towards a circular economy, green public procurement (GPP) can be an important lever. In addition to voluntary GPP measures, the EU is increasingly introducing mandatory sustainability criteria into its regulatory frameworks, leading to a paradigm shift from “how to buy” to “what to buy”. At the same time, several EU Member States are also introducing mandatory sustainability criteria into national law. In Belgium however, mandatory sustainability requirements are yet to be introduced.

This report concerns an “*Impact analysis of mandatory environmental criteria in tender procedures*”. This study was requested by Vlaanderen Circulair. The overarching goal of this study is to provide recommendations for the inclusion of mandatory sustainability criteria in public procurement law in Belgium. The study examines the impact of mandatory sustainability requirements in other EU Member States, particularly Italy, the Netherlands, France, and Spain, to weigh the benefits and challenges of their implementation. Following this impact analysis, the present study contains recommendations for the introduction of mandatory sustainability requirements into Belgian public procurement legislation.

The report is structured as follows:

1. **Chapter 2** contains a general overview of the **policy and legal framework** for green public procurement in the EU;
2. **Chapter 3 assesses** the four targeted Member States by (i) mapping relevant legislation with regard to mandatory sustainability requirements, and (ii) presenting the results of the impact assessment, including benefits, opportunities and challenges;
3. **Chapter 4 contains the conclusion and recommendations** for the introduction of mandatory sustainability requirements in Belgium.

Chapter 2. Policy and legal framework

General EU policy framework

Each year European public authorities spend a significant amount (16% in 2008) of the EU Gross Domestic Product on the purchase of goods, such as office equipment, building components and transport vehicles; services, such as buildings maintenance, transport services, cleaning and catering services and works. For most public authorities, construction and renovation works, and running costs of buildings represent a major share of annual expenditure, in some cases over 50%.²

According to the European Commission, public procurement can shape production and consumption trends and a significant demand from public authorities for "greener" goods will create or enlarge markets for environmentally friendly products and services. By doing so, it can also provide incentives for companies to develop environmental technologies.

The potential of "Green Public Procurement" as a policy instrument has been increasingly recognised. Green Public Procurement (GPP) is defined in the 2008 Communication of the Commission as "*a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured.*"

The EU has been promoting GPP since the early 2000s as a means to reduce the environmental impact of public sector activities. The EU has developed a range of tools and guidance to support the implementation of GPP. The EU's GPP policy and legal framework is based on a number of directives, regulations, and guidelines.

The EU's 2014 Public Procurement Directive (2014/24/EU) requires public authorities to consider environmental factors when procuring goods, services, and works. The directive requires that public authorities take into account environmental considerations throughout the procurement process, from the initial planning stage to the award of the contract. Examples of environmental criteria could also be found in other EU environmental legislation, e.g. in the Energy Efficiency Directive, the Timber Regulation, the EU Ecolabel regulation and the Waste Framework Directive.

In addition, the EU has developed a number of guidelines and tools to support the implementation of GPP. These include the EU GPP Criteria, which provide guidance on environmental criteria for a wide range of product and service categories. The criteria are designed to help public authorities identify products and services with a reduced environmental impact throughout their life cycle.

In the past decade, the focus was mainly on developing *voluntary* GPP criteria for several product groups. However, in the framework of the Green Deal and the transition towards a circular economy in the EU, the focus seems to be shifting rather to the introduction of

² Communication of the European Commission (COM -2008- 400) "Public procurement for a better environment", 16 July 2008.

mandatory GPP criteria and targets in sectoral legislation and phase in compulsory reporting to monitor its uptake.

The Clean Vehicles Directive for example, which was initially adopted in 2009 and subsequently amended in 2019, is an important example of sectoral mandatory requirements that limit the discretionary power of contracting authorities. Whereas the 2009 Directive required the use of technical specifications or award criteria relating to the lifecycle and environmental impact of a vehicle, the 2019 version amended this mandatory approach by including minimum procurement targets instead of the minimum procurement criteria approach (ie, technical specifications or award criteria, including the mandatory life-cycle costing method).

Another example is the EU Batteries Regulation. Article 85 of the Batteries Regulation requires contracting authorities, when procuring batteries or products containing batteries, to take into account the environmental impacts of those batteries over their lifecycle, with a view to ensuring that such impacts are kept to a minimum. To allow contracting authorities to fulfil this requirement, the Commission will adopt a delegated act establishing award criteria for procurement procedures. Any procurement procedure carried out by contracting authorities for the purchase of batteries, or products containing batteries, that fall within the scope of the Regulation must make reference in its technical specifications and award criteria to that delegated act to ensure that those batteries, or products containing batteries, are procured with significantly lower environmental impacts over their life cycle.

Chapter 3. Impact assessment selected EU Member states

France

Legal Framework

General

France has acknowledged the significance of incorporating sustainability and environmental considerations into public procurement practices. However, like other Member States, France grapples with the challenge of harmonizing economic interests with environmental priorities within its procurement processes.

Mandatory sustainability criteria have recently been introduced in French public procurement law, however the relevant provisions have not yet entered into force.

More specifically, the Law n°2021-1104 dated 22 August 2021, known as the "Climate and Resilience law", introduces a new Article L. 3-1 into the French Procurement Code (hereinafter "FPC"), under the terms of which "*public procurement participates in achieving the objectives of sustainable development, in their economic, social and environmental dimensions, under the conditions defined in this code*" (Art. 35 of the Climate and Resilience law).

Its corresponding implementing decree, n°2022-767, dated May 2, 2022, was officially published in the "Journal Officiel" on May 3, 2022.³ The concrete mandatory sustainability requirements are included in this implementing decree. However, it should be noted that they will only enter into force in August 2026.

Deep dive into relevant provisions

Implementing Decree n°2022-767

The implementing decree amends Article R. 2152-7 of the French Procurement Code. Previously, the FPC allowed contracts to be granted based solely on price criteria for specific goods. However, commencing August 21, 2026, these contracts will be awarded by contracting authorities using distinct criteria:

- A price criterion evaluating the environmental aspects within the submitted tender.
- Alternatively, multiple criteria, such as price, cost, or other factors, each mandating an evaluation of the tender's environmental aspects.

The legislator has chosen not to list the environmental characteristics that must specifically be considered as a criterion. The wording used in Article 35 of the Climate and Resilience law remains broad to leave a certain flexibility to contracting authorities. It is therefore up to the

³ Décret n° 2022-767 du 2 mai 2022 portant diverses modifications du code de la commande publique.

contracting authorities to determine the criterion which appears to be the most appropriate in light of the characteristics of the concerned contract.⁴

In practice, this prohibits the use of solely price criteria but does not ensure that the environmental criterion will lead to more environmentally ambitious procurements and actual avoidance of, for example, greenhouse gas emissions.

Impact assessment

Given the fact that France will only have mandatory sustainability criteria as of August 2026, we can conclude that any impact analysis conducted prior to this date will not be possible. We recommend revisiting this analysis once the mandatory sustainability criteria are implemented in France to ensure the most accurate and up-to-date results.

⁴ Ministère de L'Economie, des Finances et de la Relance, Les mesures commande publique de la loi n° 2021-1104 du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets (dite loi « Climat et résilience », https://www.economie.gouv.fr/files/files/directions_services/daj/actualites/Fiche_explicative_loi_Climat.pdf.

The Netherlands

Legal Framework

General

The Dutch Procurement Act 2012 (DPA 2012) is the main body of law with regard to public procurement in the Netherlands. The DPA 2012 contains two relevant provisions regarding mandatory sustainability requirements. The first is Article 2.114(4), which states that if contracting authorities select the lowest price or cost (life cycle costing) as the award criterion, they must provide a motivation for that choice in the tender documents. The second provision is Article 1.4 (2), which requires contracting authorities to ensure that as much societal value as possible is created for public resources.

Obligation to justify the lowest price or cost as the award criterion (Article 2.114 (4))

The obligation to justify the lowest price or cost as the only award criterion was introduced in order to increase sustainable public procurement. The *ratio legis* of this 'comply or explain' principle is that a contracting authority will not be able to urge a tenderer to provide innovative and sustainable solutions in a tender procedure that is solely focused on lowest price or costs. Because in these type of tenders an offer is only evaluated on price instead of quality, an innovative or sustainable solution will consequently not emerge as it does not create any added value in relation to the evaluation of the tender in question.

Given the aforementioned, the Netherlands has decided to make the price-quality ratio the general rule, in order to provide more room for innovation and sustainability. If a contracting authority wants to deviate from this general rule and apply the lowest price or costs, an explicit justification in the tender documents is needed, which can be challenged before Court. The use of the lowest price as the award criterion is only allowed if there is no room for tenderers to offer more innovative and sustainable solutions. Whether such circumstances exist needs to be evaluated on a case-by-case basis and in view of potential relevant facts.

Obligation to procure as much societal value as possible (Article 1.4 (2))

The second relevant provision in the DPA 2012 is Article 1.4 (2), which states the following: *'The contracting authority ensures that as much societal value as possible is created for public resources when entering a public contract'*.

In other words, this Article requires a contracting authority to make an assessment of the societal value when organising a public procurement procedure. This assessment should result in the choice for the maximum societal value in that specific context, which can include not only the best price-quality ratio instead of the lowest price, but also other elements, such as sustainability, innovation, social return and external policy goals.

However, unlike Article 2.114(4) and the comply or explain principle, the provision on societal value does not require contracting authorities to include their assessment in the public procurement documents. This makes it difficult for tenderers to understand the contracting authority's reasoning and to challenge that assessment if needed.

Impact assessment

With regard to the **obligation to justify the lowest price or cost as the award criterion** it remains uncertain whether sustainability measures could be triggered. The *ratio legis* of this obligation is that if a contracting authority solely uses the lowest price as an award criterion, there will be almost no room for more innovative or sustainable solutions. However this obligation does not specifically stimulate or force a contracting authority to let sustainability play an explicit role in the public procurement procedure. Once the contracting authority has chosen the best price-quality ratio, it is entitled to use requirements or criteria relating to sustainability, but is not required to do so. We can therefore conclude that any further (impact) analysis of this requirement would not provide a complete picture of the sustainability impact and is therefore not useful.

In contrast to the justification of the lowest price or cost, the **obligation to procure as much societal value as possible** could provide a clear requirement with regard to sustainability, however practice demonstrates that this has not (or not yet) been the case.

The first significant challenge arises from the broad and vague nature of the societal value provision. It lacks a precise definition, leaving room for interpretation and making it challenging for contracting authorities to incorporate it effectively. The absence of a clear answer on what constitutes societal value complicates its assessment and weighs against its mandatory implementation.

Secondly, this provision does not require contracting authorities to transparently articulate their assessment of societal value in procurement procedures, impeding enforcement and making it challenging for tenderers to invoke this provision.

Additionally, the discretionary power vested in contracting authorities by the societal value provision has led courts to take a cautious approach. This discretion, coupled with the challenge of enforcement, limits tenderers' success in challenging compliance with this provision. Another aspect is the ownership of the "general interest" pursued by the societal value provision. Courts have questioned whether tenderers possess sufficient interest when invoking this provision, creating another layer of complexity in its enforcement.

Addressing these challenges might involve refining the societal value provision to offer clearer definitions and guidelines. Implementing a 'comply or explain' regime could also enhance clarity and enforceability.

It can be concluded that without a clearer definition of the societal value provision, any further impact analysis would not provide added value to the present study.

Italy

Legal framework

General

Italy's public procurement law is the most prominent example in the EU of requiring mandatory minimum sustainability criteria through the adoption of Minimum Environmental Criteria ('*Criteria Ambientali Minimi*' – hereafter **CAM**) for supplies, services and works of any amount.

The PAN (*Piano d'Azione Nazionale*) GPP outlines the procedure for defining the CAM, which must be tailored to the specificities of the national production system and comply with the European Commission's guidelines. Environmental criteria are identified through a market analysis of the relevant sector and by drawing from a wide range of requirements, including those proposed by the European Commission in the European GPP toolkit or those in force relating to official ecological quality labels. The definition of CAM also takes into account regulations that impose certain environmental standards, as well as input from stakeholders such as businesses, industry associations, consumers, users, and the Public Administration itself. The Circular Economy Directorate is responsible for defining the CAM, with Technical Working Groups composed of representatives and experts from the Public Administration, contracting authorities, research institutions, universities, and industry associations of operators in the relevant sector. The CAM are then submitted to the GPP Management Committee for approval. The final document is adopted by Decree of the Minister of Ecological Transition and published in the Official Gazette, providing contracting authorities with a clear and structured procedure for adopting and implementing a GPP policy.

Deep dive into relevant provisions

The CAMs have already been adopted since 2011 but became mandatory for all contracting authorities in 2017 under Article 34 (energy and environmental sustainability criteria) of the Italian Public Contracts Code⁵.

The first paragraph of this Article states that contracting authorities must contribute to green public procurement by including CAMs at least as technical specifications and contract performance clauses in public procurement documents. The second paragraph makes it possible (not mandatory) to include CAMs as award criteria when preparing tender documents for the application of the criterion of the most economically advantageous tender (MEAT). Finally, paragraph 3 provides that CAMs must be applied to all public contracts of any value in relation to the categories of supplies, services or works falling within the defined subject matter of the CAMs.

Each set of CAMs applies to a specific procurement category, constituting the mandatory requirements. The CAMs currently apply to 18 categories: office furniture, urban furniture, diapers, working shoes and leatherware, paper, ink cartridges, public works, street lighting (maintenance and management), street lighting (services), indoor lighting, heating and air-

⁵ Codice dei Contratti Pubblici.

conditioning, cleaning services and rental and cleaning of linen, urban waste, food and catering, sanitisation of hospitals, printers, textiles, vehicles and green spaces.

In technical terms, each set of CAMs displays peculiarities adapted to specific characteristics of the relevant product or service category. They however all share a common structure. The first section of each CAM contains general references to the relevant environmental and, if applicable social, legal sources. In the same section there is also some guidance on how to include environmental considerations from the start of the procurement process. In the second section the concrete ‘basic criteria’ applicable to the contract subject matter are described such as the selection criteria, technical specifications, contract performance conditions and award criteria. As already mentioned, only the technical specifications and contract performance clauses form mandatory requirements.

The CAMs are updated periodically based on the maturity of the market segment, the public expenditures volume and the potential environmental impacts.

Impact assessment

A survey was held in 2022 by the ‘Osservatorio Appalti Verdi’ (Green Procurement Observatory) with regard to the implementation of CAM’s by capital municipalities⁶, park authorities, local health authorities, and Central Purchasing Entities⁷ in Italy. The GPP questionnaire of the Green Procurement Observatory 2022 included a first part with general questions on Green Public Procurement (GPP knowledge, training on GPP, limits to the application of CAM, ...) and, a second, on the application of the Minimum Environmental Criteria (CAM) in procurement.

We will summarise hereafter the most relevant findings regarding the use of CAM’s by the entities listed above.

Capital municipalities

Use of CAM

At least 18 cities declare that they always apply the CAM, which has increased significantly compared to last year, namely: Belluno, Bolzano, Brescia, Chieti, Cuneo, Ferrara, Forlì, Imperia, Latina, Mantua, Modena, Monza, Padua, Pavia, Pordenone, Rimini, Savona and Trento. There are 9 cities that have an application rate between 90% and 99% of the 17 CAM’s monitored: Bari, Bologna, Gorizia, Livorno, Ravenna, Turin, Treviso, Venice, Verona. 8 other cities show percentages between 80% and 90%: Brindisi, Cremona, Oristano, Perugia Pistoia, Reggio Emilia, Syracuse, Teramo.

A total of 35 capital municipalities show CAM application rates above 80%, and the highest CAM adoption rates occur in medium-sized cities, with a population between 50,000 and

⁶ There are 89 capital municipalities that have fully responded to the questionnaire of the survey. The data relating to the application of CAMs in public tenders refer to calls issued in 2021: the CAMs approved up to the year 2021 were monitored, so the CAMs released in 2022 are not taken into account.

⁷ The complete list of Central Purchasing Entities includes: Consip; 19 purchasing centers of Regional Companies; 1 for each of the autonomous provinces of Trento and Bolzano, 8 purchasing centers of Metropolitan Cities and 2 centers established in the provinces of Vicenza and Brescia.

200,000 inhabitants, such as Padua. In municipalities of this size you have on the one hand sufficiently solid bureaucratic and administrative structures that are able to adopt environmental and social criteria in tender procedures and on the other hand still a not too complex internal structure that can complicate the change and coordination that the implementation of CAM's requires.

Type of CAM used

The most frequently used CAM's by the capital municipalities are those relating to the purchase of paper and cleaning services (over 70%), followed by printers, toner cartridges and graphic paper (between 60% and 70%). On the other hand, the least used CAMs, between 30% and 40%, are those related to vehicles, energy services, textiles and footwear.

Finally, there is a ranking of the CAM's that are the most adopted by the Capital Municipalities through the data of three years to verify whether the state of implementation of the CAM in Italy is improving. Compared to 2020, for 12 out of 15 CAM there is a strong improvement in the state of implementation; for 2 CAM's, on the contrary, the percentages worsen but only slightly. For one CAM specifically (public lighting) the percentage does not vary over the two years examined.

| MINIMUM ENVIRONMENTAL CRITERIA | Capital Municipalities that adopt CAM | | | |
|-----------------------------------|---------------------------------------|-----------|-----------|----------------|
| | Anno 2019 | Anno 2020 | Anno 2021 | Var. 2021/2020 |
| Ream paper | 71% | 73,4% | 77,3 | + |
| Cleaning services | 62% | 60,9% | 70 | + |
| Printers | 67% | 65,9% | 67,9 | + |
| Toner | 58,6% | 58,9% | 65,8 | + |
| Copy & Graphic Paper | 54% | 58,2% | 61,6 | + |
| Management of public green spaces | 28% | 42,7% | 54,8 | + |
| Entertainment | 45,5% | 45,6% | 53,7 | + |
| Interior furnishings | 49,4% | 43,2% | 51,5 | + |
| Public lighting | 36% | 48,1% | 48,1 | nv |
| Waste management | 32% | 37,8% | 42 | + |
| On-road vehicles | 27% | 41,1% | 39,4 | - |

| MINIMUM ENVIRONMENTAL CRITERIA | Capital Municipalities that adopt CAM | | | |
|--------------------------------|---------------------------------------|-----------|-----------|----------------|
| | Anno 2019 | Anno 2020 | Anno 2021 | Var. 2021/2020 |
| Energy Services | 29% | 41,3% | 38,4 | - |
| Building | 18% | 28,8% | 37,8 | + |
| Uniforms (textiles) | 28% | 31,2% | 37 | + |
| Footwear | 22% | 28,8% | 34,7 | + |

Park Authorities

Use of CAM

The survey on the application of CAM's concerned 91 Park Authorities, including all National Park Authorities, some Regional and Local Parks and Reserves and Marine Protected Areas⁸.

⁸ The following 91 entities were contacted in the survey: A.M.P. "Capo Rizzuto", A.M.P. Capo Caccia - Isola Piana, A.M.P. Costa degli Infreschi e della Masseta, A.M.P. S.Maria di Castellabate, MPA Capo Milazzo, MPA Tremiti Islands, MPA/RNS Islands of Ventotene and Santo Stefano, Porto Cesareo Marine Protected Area, Capo Carbonara Marine Protected Area, Capo Testa – Punta Falcone Marine Protected Area, Autonomous National Park of Abruzzo, Lazio and Molise, Management Body of the Protected Areas of the Royal Parks, Management Body of the Protected Areas of the Cottian Alps, Beigua Park Authority, Aveto Park Authority, Madonie Park Authority, Cilento Vallo di Diano and Alburni National Park Authority, Gargano National Park Authority, Sila National Park Authority, Gran Paradiso National Park Authority, RomaNatura Regional Authority, MPA Secche di Tor Paterno, Pelagie Islands, P.N. Alta Murgia, Fanes-Senes-Braies Nature Park, Gruppo di Tessa Nature Park, Monte Corno Nature Park, Puez-Odle Nature Park, Porto Conte Regional Nature Park, Sciliar Catinaccio Nature Park, Tre Cime Nature Park, Vedrette di Ries-Aurina Nature Park,

Lucanian Apennines Val d'Agri Lagonegrese National Park, Tuscan Archipelago National Park, Sibillini Mountains National Park, Gran Sasso and Monti della Laga National Park,

The number of Park Authorities that claim to always apply CAM has increased exponentially, from 13 in 2020 to 44 in 2021.

Application Challenges

The main application challenges encountered by the Park Authorities relate to the difficulties in drafting tenders (53.8%).

Application Challenges of GPP (CAM's) in park authorities (year 2021).

| Application Challenges | % |
|--|--------|
| Lack of training | 34,1 % |
| Difficulties in preparing tender documents | 53,8 % |
| Lack of enterprises | 47,3% |

Source: Osservatorio Appalti Verdi 2022 – Legambiente e Fondazione Ecosistemi

Type of CAM used

With regard to the state of adoption of CAM in protected areas, CAM related to the printing process (paper, toner cartridges and printers) is widely implemented, ranging from 71% to 74%. On the other hand, the least adopted CAM's concern footwear (36%) and furnishings (34.8%).

Finally, it is possible to draw up a ranking of the CAM most adopted by the Park Authorities and compare this ranking with what emerged in the previous two years (three-year period 2019-2021). The table shows a very positive trend in all the categories monitored, also compared to past years and in particular compared to the year 2020.

| MINIMUM ENVIRONMENTAL CRITERIA | Managing Bodies that adopt CAM | | | |
|--------------------------------|--------------------------------|-----------|-----------|----------------|
| | Anno 2019 | Anno 2020 | Anno 2021 | Var. 2021/2020 |
| Ream paper | 78% | 58,9% | 73,8 | + |
| Cartridges & Toner | 64% | 45,8% | 72,6 | + |
| Printers | 57% | 42,9% | 71,4 | + |
| Cleaning services | 60% | 56,9% | 66 | + |
| Copy & Graphic Paper | 73% | 46,7% | 63,6 | + |
| Building | 42% | 27,5% | 58,3 | + |
| Uniforms (textiles) | 18% | 13% | 54,3 | + |
| Energy Services | 47% | 43,4% | 48 | + |
| On-road vehicles | 21% | 31,3% | 46,9 | + |
| Footwear | 0% | 16,7% | 36 | + |
| Interior furnishings | 34% | 25% | 34,8 | + |

Local Health Authorities

Use of CAM

Park 131, National Park of Vesuvius, Regional Park of the Euganean Hills, Regional Park of the Apuan Alps, Northern Grigna Regional Park, Pollino National Park, Diaccia Botrona Nature Reserve, Monte Navegna and Monte Cervia Nature Reserve, Monte Genzana Alto Gizio Regional Nature Reserve, Regional Nature Reserves of the eastern Taranto coast.

The survey on the application of CAM's comprised 114 local health authorities (hereafter 'LHA') participated in the survey, obtaining useful answers for 35 questionnaires. For now, there are 15 local health authorities that apply CAM in 100% of the purchasing procedures⁹.

Application Challenges

As far as the application challenges highlighted by the LHA are concerned, unlike the other subjects investigated on this topic (Park Authorities, Central Purchasing Entities) there appears to be a clear lack of training. This is due to the absence of a specific training policy in the health field equivalent to that provided for the other subjects.

Application Challenges of GPP (CAM's) in LHA (year 2021).

| Application Challenges | % |
|--|----------|
| Lack of training | 57,9 % |
| Difficulties in preparing tender documents | 36,8 % |
| Lack of enterprises | 15,8 % |

Source: Osservatorio Appalti Verdi 2022 – Legambiente e Fondazione Ecosistemi

Type of CAM used

Among the most adopted CAMs are those relating to printing processes (reams of paper, printers and toner cartridges) and cleaning services, also around 70%. Also high, still between 60% and 70%, are the CAM relating to interior furnishings, the management of public green areas and laundry hire services, which still have a value of 66.7%. However, it should be noted that no CAM has adoption rates lower than 40%.

Finally, it is also possible for Local Health Authorities to draw up a ranking of the most adopted CAM's taking into consideration the % of Local Health Authorities that in Italy, for each individual CAM, claim to "always"adopt it.

⁹ The Local Health Authority of Bari, the Local Health Authority of Bologna, the Local Health Authority of Bologna, the Local Health Authority 7 Pedemontana, the Rieti Local Health Authority, the Imola Local Health Authority, the Rome 4 Local Health Authority, the Liguria Social and Health Authority 3 (Genoa), the Asur Marche Area Vasta 3 Macerata, the Central Tuscany Local Health Authority, the North West Tuscany Local Health Authority,

Brianza Health Protection Agency, Reggio Emilia Local Health Authority, Udine Regional Health

Coordination Agency, Syracuse Technical Unit, Trento Provincial Health Services Agency.

| MINIMUM ENVIRONMENTAL CRITERIA | Local Health Authorities that always adopt CAM | |
|--------------------------------|--|-----------|
| | Year 2020 (% of Total) | Anno 2021 |
| Ream paper | 68% | 76,9% |
| Printers | 50% | 72,2% |
| Toner cartridges | 24,2% | 70,6% |
| Cleaning services | - | 70% |
| Lavanolo | - | 66,7% |
| Interior furnishings | 44% | 63,6% |
| Building | 48,3% | 60% |
| Public green management | - | 60% |
| Catering | - | 58,8% |
| Copy paper | 40% | 57,9% |
| Vehicles | 19,1% | 55,6% |
| Incontinence Aids | - | 53,8% |
| Energy Services | 48,5% | 53,3% |

| MINIMUM ENVIRONMENTAL CRITERIA | Local Health Authorities that always adopt CAM | |
|--------------------------------|--|-----------|
| | Year 2020 (% of Total) | Anno 2021 |
| Footwear | 35% | 40% |
| Textile | 13,6% | 40% |

Central Purchasing Entities

Use of CAM

A total of 10 Central Purchasing Entities responded. The table hereunder confirms that a total of 8 out of the 10 Central Purchasing Entities consistently apply CAMs in tenders related to product categories that have them available. Due to their knowhow and administrative capabilities, these entities seem very well equipped to integrate the CAM's into their public procurement procedures.

The percentage of adoption of CAMs in CPE (year 2021)

| Central Purchasing Entities (CPE) | % CAM |
|---|-------|
| Stazione Unica Appaltante Calabria | 100% |
| SO.RE.SA. SPA | 100% |
| Intercent-ER | 100% |
| CUC-SA FRIULI VENEZIA GIULIA | 100% |
| Direzione Regionale Centrale ARL | 85,7% |
| InnovaPuglia SpA | 100% |
| Direzione Generale della Centrale di Committenza della Regione Sardegna | 100% |
| PuntoZero Scarl – CRAS | 0% |
| IN.VA. S.p.A | 100% |
| CRAV | 100% |

Source: Osservatorio appalti verdi 2022 – Legambiente e Fondazione Ecosistemi

Application Challenges

The examination of the application challenges confirms that the most relevant is the one relating to the drafting of the tenders.

Application Challenges of GPP in CPE (year 2021).

| Application Challenges | % |
|--|-------|
| Lack of training | 20% |
| Difficulties in preparing tender documents | 45,5% |
| Lack of enterprises | 33,3% |

Source: Osservatorio Appalti Verdi 2022 – Legambiente e Fondazione Ecosistemi

Type of CAM used

Among the most adopted CAMs are those relating to cleaning services (70%), the management of public green areas (54,8%) and catering (53,7%).

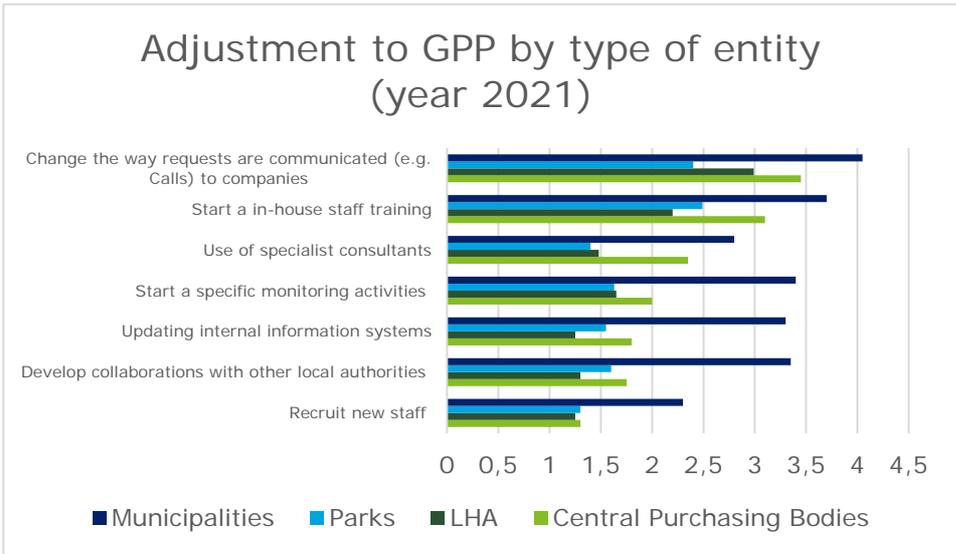
Transformation process

With the mandatory introduction of CAM’s, there have been transformation and change processes in public administrations necessary to adapt to the new regulations. The survey also investigated this topic to understand how the Public Administrations have adopted CAM’s.

The survey therefore focused on some specific changes in the internal organisation:

- attention to internal skills both in terms of staff training and in the form of new hires;
- support from specialized consultants;
- development of forms of peer-to-peer collaboration (with other local authorities);
- updating of information systems;
- initiation of specific monitoring activities;
- modification of the way in which tenders are communicated to potential contractors.

Below is a graph illustrating how the various entities have responded.



Comparing the various entities, the Capital Municipalities have started a broader process of adaptation to GPP (and CAM’s), showing average values generally higher than other entities. In fact, specific monitoring activities and the related updating of internal information systems

also emerge with values above 3. At the same time, cooperation with other local authorities is also an area of adaptation to GPP. The intervention on the methods of communicating the tenders to companies is overall the largest area of investment.

The changes in the internal organization clearly demonstrate that the main challenges about the efficient application and enforcement of CAMs regard the lack of training and technical expertise, difficulties in designing and managing 'green tenders,' and a shortage of economic operators in local markets. In addition, we see that stakeholders also experience challenges in monitoring and verifying sustainability considerations. Enforcement mechanisms outlined in the Italian Public Contracts Code, aim to oversee CAMs compliance. However, challenges emerge due to limited national monitoring and supervision, creating space for legal uncertainty.

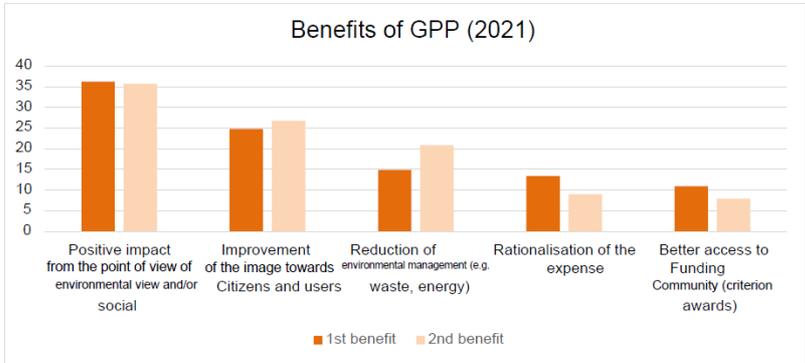
While CAMs present robust tools for steering public procurement towards sustainability (as also demonstrated by the measured benefits as described below), addressing these barriers remain imperative for their effective implementation and long-term success in Italy's GPP landscape.

Measured benefits of CAM's

The survey also focused on the main benefits that the entities have found with reference to GPP (and CAM). In this case, the perception was analyzed in relation to the positive consequences that the adoption of GPP (and CAM) can bring both at the organizational level - in the form of efficiency and resource savings, but also in terms of new financial resources - as well as more generally at the level of the territorial community.

If we consider the perceived benefits that GPP has generated, the main element (1st benefit identified by respondents) is the positive impact at the territorial level from an environmental and social point of view. In second place is the improvement of the image that the entities and their respective public administration obtains regarding citizens and users of the numerous services. These are therefore benefits that do not specifically impact the administration directly – such as cost reduction or rationalization of expenditure. Rather, GPP confirms – in the perception of the entities interviewed – its ability to generate environmental and social impacts within the territory in which the public administration adopts CAM.

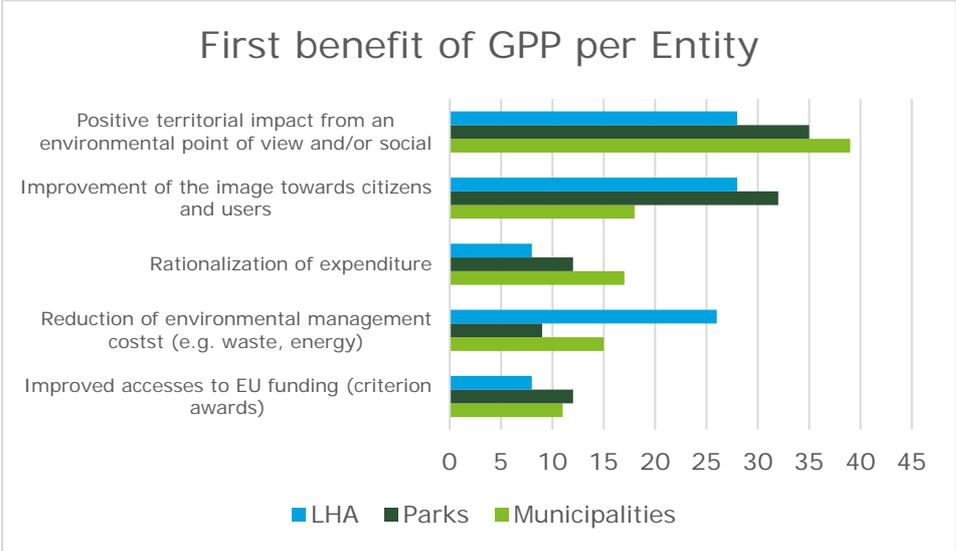
The following graphic demonstrates the results.



, the positive environmental at is reported (the graph does

not demonstrate the percentages for Central Purchasing Bodies due to low number of responses; the responses are in line with what is shown in the graph). The improvement of the image towards citizens and users is greater for Park Authorities and Local Health

Authorities than for the Capital Municipalities. For the Local Health Authorities, the reduction of environmental management costs is also important, as the first perceived benefit, while the reduction of expenditure is considered a benefit above all by the Capital Municipalities. The results are shown in the graph below.



Conclusions with regard to the survey

The application of CAM in public procurement contracts presents several critical issues and challenges, despite their mandatory nature. These include complex and ambiguous formulations of CAM, difficulties in monitoring and controlling adherence to CAM, potential increases in costs, bureaucratic complexity, and a lack of available suppliers. To address these challenges, contracting authorities require clear and detailed guidelines on the application of CAM, as well as specialized technical support and investment in human and technological resources for effective monitoring and control of adherence to CAM.

The actual impact of CAM on environmental change in Italy is complex, and further efforts are needed to ensure that CAM lead to real change. It is important to assess whether the minimal formulations of CAM are sufficient to promote significant change and whether there are effective tools to monitor and ensure compliance. Additionally, it is necessary to evaluate whether CAM are applied consistently and coherently in all stages of the procurement process and whether there is adequate support for buyers to terminate contracts in case of non-compliance. Ongoing monitoring and evaluation of the impact of CAM are necessary to ensure that they effectively contribute to promoting environmental sustainability in public procurement processes.

Spain

Legal framework Spain

General

In Spain, the **primary legal framework governing public sector contracts** is Law 9/2017 of 8 November on Public Sector Contracts (referred to as “**LCSP**”). This law was established to comply with the Classic Directive and Concessions Directive at the national level, while the Utilities Directive was swiftly integrated into Spanish Law in 2020 (known as RD-L 3/2020). Most of the content of the aforementioned legislation applies to the entire public sector in Spain, including the autonomous regions and local authorities.

Additionally, apart from LCSP and RD-L 3/2020, other relevant regulatory areas include mandatory sustainability requirements in:

- Climate change legislation, which entered into force in May 2021, specifically Law 7/2021 dated 21 May 2021, focusing on climate change and energy transition (hereafter referred to as “**LCCTE**”);
- Legislation on the **Next Generation EU Funds**, an instrument for economic recovery designed by the EU to help repair the immediate economic and social damage caused by the COVID-19 pandemic;
- **Sector-specific legislation**, among others, in the food and waste sector.

Deep dive into relevant provisions

Legislation on Public contracts

The LCSP and RD-L 3/2020 set forth a wide array of mandatory requirements with regard to sustainable public procurement.

A first set of these requirements are similar to those in the Netherlands. Given their rather general and procedural nature, we will not discuss these requirements during our impact analysis¹⁰. We will focus on the more concrete and specific mandatory sustainability requirements instead, as they do exist within the LCSP and RD-L 3/2020 legal framework.

A first example of these more concrete mandatory sustainability requirements is the requirement in the Law that for some specific service contracts (Appendix IV, among others, social, post, healthcare, administrative services) the criteria related to quality should account for at least 51 per cent of the score¹¹.

As stated above, a second concrete example is the mandatory inclusion of at least one environmental, social or innovation condition as execution specification in each public

¹⁰ It is also worth mentioning the existence of a national Plan of Ecological Public Procurement for the period 2018-2025, establishing voluntary guidance to incorporate ecological provisions in public tenders as part of selection and awarding criteria, as technical specifications of special execution criteria. Additionally, it includes detailed criteria applicable to different groups of products and services (e.g., food and restaurant services: ecological and seasonal food, bulk or reusable packaging, reusable cutlery and crockery, food waste prevention plans; Hospital electric and electronic equipment: energy efficiency, water consumption, carbon footprint of the EEE; construction and buildings: related to energy efficiency, management of waste generated during works; highways construction: specific actions to reduce noise pollution and carbon footprint of the roads during its entire life cycle; use of durable materials and reducing maintenance requirements in the construction).

¹¹ Articles 145.4 LCSP and 66.4 RD-L 3/2020.

contract (whatever the type of the contract or its economic threshold)¹². The LCSP provides an open-ended list of environmental considerations that may be required by contracting authorities as special execution condition for performing the contract (Article 202.2 LCSP).

In this regard, environmental considerations may be established, among others:

- The reduction of greenhouse gas emissions;
- The maintenance or improvement of environmental assets that may be affected by the implementation of the contract;
- Encouraging the use of renewable energy;
- Sustainable water management;
- The promotion of recycling of products and the use of reusable containers;
- The promotion of bulk and ecological products.

Non-compliance with the special conditions of implementation of the contract may result in penalties, the annulment of the contract or prohibition of contracting in future tenders (past performance) (Art. 192). The legislator appears to have chosen for a 'shock therapy' to accelerate the sustainability of tenders in Spain.

Compliance with this mandatory sustainability requirement also takes place in the execution phase to avoid problems which selection or award criteria can typically present (entry barrier, proportionality, equal treatment) and set a clear contractual obligation.

Climate Change legislation - LCCTE

As mentioned above, Spanish legislation on climate change has been in force since May 2021 (LCCTE).

The LCCTE establishes the requirement, for the General Administration of the State and the set of organizations and entities being part of the state public sector, to include **mandatory technical tender specifications aimed at reducing emissions and carbon footprint**¹³. The Ministry for Ecological Transition and Demographic Challenge, along with the Ministry of Finance were charged with the task to prepare a catalogue which specifies emission reduction and carbon footprint requirements for each specific subject matter. The LCCTE established a timeframe of one year from its entry into force to prepare the aforementioned catalogue (Art. 31.1). Unfortunately, this legal deadline has not been met and there is still no fully developed catalogue.

A second element of the LCCTE is the introduction of **award criteria** mandated for works contracts, works concessions, and project plans. Article 31.2 of the LCCTE outlines six categories of these award criteria, such as 'maximum energy rating requirements for buildings subject to tenders¹⁴' or 'use of sustainable construction materials¹⁵, considering their useful life.' However, some award criteria in Article 31.2 are expressed so generically that their

¹² Articles 148.4 LCSP and 67.3 RD-L 3/2020.

¹³ Article 22 LCCTE already provides the possibility to included as special execution condition the provision of fresh or seasonal food with a short value chain (as a way to reduce carbon footprint of food).

¹⁴ Moreover, it is forbidden to extend beyond 2030 the rental in which the Administration is tenant in buildings that are not certified as energy neutral.

¹⁵ Art. 31.3 LCCTE establishes very specific technical provisions such as using wood from sustainable managed forests or reforestation practices with local species to compensate carbon footprint of projects.

mandatory content becomes unclear. This ambiguity is evident in criteria related to for example the 'minimization of waste generation' and, notably, 'measures for adaptation to climate change.'

It is worth mentioning that the state legislator has restricted the applicability of the two aforementioned rules to contracts tendered by the State Public Administration. This means that Autonomous Regions, local authorities and the rest of the (non-state) public sector have been left out.

Legislation on the Next Generation EU Funds

The Next Generation EU (NGEU) initiative is an instrument for economic recovery designed by the EU to help repair the immediate economic and social damage caused by the COVID-19 pandemic. To manage the substantial resources allocated to Spain, a set of measures was approved by the Spanish Government and various Autonomous Regions for the administration and implementation of these resources. These rules feature a section devoted to public procurement since it is one of the obvious channels that will have the greatest impact on the use of these funds.

The Spanish government adopted the Royal Decree-Law 36/2020 of 30 December (RD-Law 36/2020) which emphasises in a rather generic way the aim of standardising procurement processes to ensure they always include 'all the green, digital, innovation, SME-empowerment and social responsibility criteria deemed necessary, and which are covered by the corresponding legislation¹⁶.

Likewise, the legislation of some Autonomous Regions such as Catalonia and Andalusia set out a similar legal framework. In this context, it is worth taking a closer look at the regulation in Catalonia, which imposes a specific obligation that award criteria and execution conditions for the performance of the contract must include one or more of the following¹⁷:

- Improvements in salary or working conditions;
- Employment stability;
- Incorporation of people at risk of social exclusion (including the long-term unemployed);
- Subcontracting with a specialised work centre or reintegration enterprise;
- Calculation of life cycle;
- Fair trade;
- Locally-sourced products;
- Environmental criteria;
- Digitalisation;
- Innovation and knowledge criteria;
- Promotion of SME's and tertiary sector organisations;
- Gender equality.

The Canary Islands have another concrete example of a mandatory sustainability requirement in respect of the Next Generation Funds. The rules for implementation of the EU funds state that the choice of the award criteria must be clearly aligned with the best quality-price ratio,

¹⁶ Article 54 RD-Law 36/2020.

¹⁷ Article 16 Catalan Decree Law 5/2021.

with the idea of value rather than price. Therefore the price can only represent a maximum of 30 percent of the total points that can be awarded¹⁸. Again, it is questionable whether this really stimulates or force a contracting authority to let sustainability play an explicit role.

Sector-specific legislation in the food and waste sector

In this last chapter we will discuss some concrete examples of sector-specific legislation. Some autonomous regions have adopted **specific laws on food and food waste** that contain mandatory sustainability requirements. A primary example is Catalonia's Law 3/2020 of 11 March on the prevention of food loss and waste which requires the inclusion of clauses aimed at targeting food loss and waste in public contracts (Art. 7). With regard to Castile-La Manche, Decree 19/2019 of 26 March, we see an obligation to incorporate requirements concerning food redistribution in procurement documents, especially in the form of award criteria (Art. 22)¹⁹.

A second relevant area is the waste sector. The recent Spanish Law 7/2022 of 8 April on waste and contaminated soils for a circular economy requires public contracts to include the use of products that are highly durable, reusable, repairable or made of recyclable materials, as well as products made with waste materials or by-products; encouraging the purchase of products marked with the European Union ecological label, considering said marking as a technical prescription (Art. 16). Additionally, Royal Decree 1055/2022 of 27 December of packaging also includes a provision to incorporate reusable, recyclable and recycled material packaging in public tenders (Art. 11).

Another very relevant example of a mandatory sustainability requirement in the waste sector can be found in the Basque Country Legislation (Law 10/2021 of December 9 on the Environmental Administration of the Basque country) which stipulates the inclusion of a minimum percentage of 40 per cent of by-products, secondary raw materials and recycled materials in works and supply contracts (Art. 84).

Impact assessment

Because Spain has a large number of measures in place, it would be a daunting task to study the impact of each one individually. Moreover, the measures are territorially spread out, which makes it even more challenging to conduct a comprehensive impact analysis. Finally, the majority of measures have not been in place for a long time, which means that there is limited data available on their impact.

Given the complexity of the situation, it may be more practical to focus on the most significant measures and their impact on the overall objective.

¹⁸ Article 41 Canary Law 4/2021 of 2 of August

¹⁹ Contrarily, the Draft national Law of prevention of food waste has not included specific obligations to public Administrations to incorporate similar provisions to the ones herein indicated in the public tenders (art. 10). This has been pointed out as a missing opportunity by the Spanish Authority of Competence (CNMC) to foster these practices given the economic and exemplary nature of public procurement.

https://www.cnmc.es/sites/default/files/3804052_0.pdf

Firstly, to assess the evolution of the incorporation of strategic criteria in public procurement, it is necessary to conduct an initial analysis of the situation in 2017 in order to determine the progress that has been made.

In this regard, the following will present an analysis of the situation existing in the year 2017, and subsequently compare it with the most recent data available, with the latest report analysing these aspects being from 2022.

To do this, we will analyse (i) the Report on Public Procurement in Spain (2017) (hereinafter, “**2017 Report**”²⁰), prepared by the central state administration, and (ii) the Special Supervision Report on Strategic Procurement (2022) (hereinafter, “**2022 Report**”²¹), prepared by the Independent Office for Regulation and Supervision of Procurement (Oirescon).

Notwithstanding, it should be noted that, unlike the 2022 Report, the 2017 Report does not have specific information regarding the inclusion of sustainability clauses, so these could be analysed specifically. The 2022 Report also takes into account clauses with a different purpose (protection of minorities, upgrades of the working conditions, etc.).

2017 Report

Qualitative information

Regarding qualitative information, the 2017 Report found the following barriers to the integration of sustainability requirements in public procurement:

- a. Normative:
 - i. Regulatory dispersion or unclear regulations.
 - ii. Lack of specific regulations.
 - iii. May limit free competition and could be challenging to reconcile with the principles of equal treatment and non-discrimination.
 - iv. Lack of knowledge and the need for expert advice in the field.

- b. Contractual specifications:
 - i. Lack of technical knowledge due to lack of training and/or shortage of qualified personnel in the field.
 - ii. Difficulty in drafting tender documents to establish technical specifications that can be met by bidding companies.
 - iii. Regulatory dispersion and difficulty in exhaustive knowledge due to their quantity and specialization.
 - iv. Difficulty in relating environmental criteria to the object of the contract.
 - v. Difficulty in obtaining reliable quantitative data on environmental parameters.
 - vi. Definition of technical specifications with environmental characteristics that can be assessed.
 - vii. Widespread lack of knowledge about the range of products available in the market and uncertainty about whether the introduction or requirement of

²⁰ https://www.miteco.gob.es/es/ministerio/planes-estrategias/plan-de-contratacion-publica-ecologica/cronologia_contratacion_ecologica.html

²¹ <https://www.hacienda.gob.es/es-ES/Oirescon/Paginas/HomeOirescon.aspx>

certain technical characteristics of those products in the tender documents could pose excessive restrictions on competition.

c. Certifications:

- i. Requiring certifications, such as ISO 14001, EMAS certification, ecological labels, product life cycle, directly related to the object of the contract can limit competition.
- ii. Difficulty in finding companies that meet the appropriate requirements and can demonstrate that the company is prepared for compliance, especially difficult for SMEs.
- iii. Complexity of criteria or specific standards that certify an ecological behavior of companies.
- iv. Difficulties in determining criteria for technical and professional competence, since the means of accreditation do not specifically refer to environmental considerations, but generically.

d. Compliance with the criteria by bidding companies:

- i. Difficulty in verifying effective compliance with sustainability requirements, sometimes due to lack of resources.
- ii. Difficulty for companies, especially SMEs, in obtaining documents proving compliance with sustainability requirements.
- iii. Some companies do not have certificates or labels proving compliance with the standard.
- iv. The culture of sustainable public procurement is not sufficiently established in business practice.

e. Others:

- i. Difficulty in defining award criteria.
- ii. If there are no official mechanisms/verifications regarding the life cycle, it is necessary to track a product throughout its life cycle to verify what the supplier indicated in its offer in this regard. It is unknown whether there are proven methodologies in the field of public procurement for monitoring and analyzing the life cycle costs of products and services.
- iii. Lack of training and knowledge among technicians for including environmental aspects in the drafting of technical specifications or in the assessment proposals of offers.
- iv. Difficulty in identifying sustainable requirements that truly impact the environmental improvement of the product or service acquired.
- v. Difficulty in assessing and establishing monitoring of these contracts due to lack of specialized human resources in the field.
- vi. Introducing ecological procurement implies increasing the price.
- vii. Difficulty in introducing sustainability requirements as an award criterion and its valuation.

Quantitative information

According to the data collected in the 2017 Report, the percentages of the total volume of national public procurement corresponding to procurement procedures that include sustainable requirements would be as follows:

| State level | Regional level | Local level | Total |
|-------------|----------------|-------------|-------|
| 11,66 % | 13,33 % | 10,19 % | 12 % |

2022 Report

The current situation is reflected in the conclusions of the 2022 Report. In this regard, the 2022 Report has analysed the penetration of strategic procurement criteria in certain supply and service contracts. More specifically, the contracts analysed are as follows:

- Services with CPV codes starting with the digits 80 (CPV 80): Education and training services.
- Supplies with CPV codes starting with the digits 37 (CPV 37): Musical instruments, sports equipment, games, toys, handicraft articles, artistic materials, and accessories.

The limitation of the analysis scope is due to the lack of open data with sufficient detail, making massive exploitation of this information impossible²². Furthermore, there is still no verification or quality control of the registered information, hindering the certainty and quality of the data. Therefore, the supervision analysis conducted involves a meticulous and detailed manual examination "contract by contract" by studying the impact of the inclusion of strategic clauses in the (i) admission conditions, (ii) the awarding criteria and the (iii) special conditions of execution set forth in the specifications of its tenders.

- Regarding the inclusion of admission conditions of a social, environmental, innovative, or other nature, none of them are included in 97.27% of the analysed service contracts, with a percentage of 93.75% in the case of the studied supply contracts. When these criteria are incorporated, the trend is to include environmental aspects at the state, regional, and local levels.
- Regarding the criteria for awarding contracts, the percentage of absence of use is 71.13% in service contracts and 67.86% in supply contracts. In service contracts, the majority of contracts that include strategic criteria incorporate social aspects, preferably exclusively, as award criteria. In the case of supply contracts, no strategic criteria are included at the state level, except in one case that incorporates an innovation criterion. At the regional level, the use of sustainability requirements clearly predominates, while the situation is much more diverse at the local level, although there is a slightly higher presence of sustainability requirements exclusively or combined with social criteria.
- Regarding the obligation derived from the LCSP to include social, environmental, innovation, or other criteria, as special conditions of execution, a degree of non-

²² With regard to the impact report, it should be noted that these are not included in open data in sufficient detail. As a result, work has been carried out to capture information from the specifications of 1,322 contracts (1,098 for services and 224 for supply). The information obtained allows us to provide results on the degree of use of the strategic parameters that the LCSP imposes in the procedures.

compliance of 24.04% in service contracts and 12.05% in supply contracts is detected. In service contracts, the most used criteria as special conditions of execution in all areas are social criteria, mainly in the state and local areas and, to a lesser extent, in the regional area. In supply contracts, it is worth noting the scarce use of these criteria at the state level, especially considering their mandatory nature, not to mention cases where the formulation of these criteria does not exceed the legal minimum established. On the other hand, the most used criteria in the regional area are environmental, as well as in the local area, although to a lesser extent.

The difference in the degree of application in each case may be due, among other factors, to the fact that the inclusion of social, environmental, innovation, or other aspects in admission and award criteria is optional, while in the case of special conditions of execution it is mandatory, according to article 202 of the LCSP,

In conclusion, from the data previously described, it can be inferred that the inclusion of strategic clauses in the public procurement procedures remains in a beginning stage but as described by the 2022 Report, the lack of information and data distributed by the public bodies severely impedes its monitoring.

However, please note that, as previously stated, the number of contractual categories analysed was purposely limited to not contaminate the results and, therefore, the conclusions regarding the degree of penetration of the strategic clauses may differ depending on the type of contracts analysed.

Chapter 4: Summary & recommendations for the inclusion of mandatory sustainability criteria in public procurement law in Belgium

General

In this chapter, we provide specific recommendations for the implementation of mandatory sustainability requirements in Belgium based on the findings of our study.

Based on the results of the impact analysis, we noticed several challenges regarding the efficient application of mandatory sustainability requirements. First of all, we noticed a lack of training and technical expertise, which reflects on preparing the tender specifications themselves.

We also perceived that there is a specific challenge regarding the limitation of the market due to the use of sustainability requirements.

In addition, we notice that stakeholders also experience challenges in monitoring and verifying mandatory sustainability requirements, creating legal uncertainty.

When implementing mandatory measures, it is therefore important to pay sufficient attention to these challenges and issues and foresee the necessary tools and support for contracting authorities.

Need for training and technical expertise

First of all, a specific training could be envisaged that would be made compulsory (at least for federal and regional entities) and would explain the different mandatory requirements and their use in the tender specifications. It also seems useful to diversify this training – where possible – according to the specific sector (e.g. health sector, construction sector,...).

If necessary, depending on the (technical) complexity of certain mandatory sustainability requirements, a dedicated helpdesk could be set up to provide first-line assistance for questions that arise regarding the application of the requirements.

Supplementary, a vademecum could be prepared that will serve as a reference work in which specialist and technical information is presented in clear and concise form.

Standardisation of tender specifications can further help streamline the implementation process of sustainability requirements and make it more efficient. Examples include clear

technical specifications or performance clauses for certain products that can be inserted immediately in the tender documents, or award criteria that are clearly elaborated and immediately include the evaluation elements. It also seems useful for contracting authorities to offer them reporting methods or tools to verify effective compliance with certain specific mandatory requirements.

Avoid market limitation due to specific mandatory requirements

In order to make the market as competitive as possible, it may be opted to avoid at first the implementation of mandatory sustainability requirements in the admission or award criteria, and reflect them primarily in the execution conditions (contract performance clauses or technical specifications) of the contract itself. That way, companies can be given the necessary time and also urge them to make a particular sustainable shift in their business operations without already automatically having no chance of being able to participate in the tender or being effectively awarded this tender.

In combination with the foregoing, a 'pre-information notice'²³ could be used under Belgian Procurement Law. The pre-information notice is a concise, grouped notice of all public contracts that the contracting authority intends to award under a given budget or budgetary year. The period covered by the prior information notice is a maximum of 12 months from the date on which the prior information notice was sent. This gives interested companies sufficient time to prepare for the actual contract notice. Companies could also be granted a longer execution period which would level the playing field between companies even more and give them a little bit more time to prepare themselves for the execution of the contract in line with the specific mandatory requirements. Such matters could be included as suggestions in the vademecum mentioned above.

Ensure sufficient monitoring and enforcement

The lack of monitoring and enforcement that we identified in our study also needs to be taken into account when implementing mandatory sustainable requirements.

In Belgium, for contracts and framework agreements, there is a publication obligation after award of the contract (Art. 62 Belgian Procurement Law). The contracting authority must send this notice within 30 days of the conclusion of the contract or framework agreement on the e-Procurement platform. This notice needs to contain specific information, such as the number of offers received and price(s) paid. In cooperation with the administrator of the platform - the Federal Public Service (FPS) Policy and Support - discussions could be initiated to add a reporting obligation with regard to the use of mandatory requirements or a justification as to why these were not applicable.

An idea to remedy the lack of enforcement could be to impose an explicit motivation obligation for contracting authorities in the tender specifications (cf. the “comply or explain” regime in the Netherlands), which should substantiate which mandatory requirements apply and which do not.

In addition, the focus can be placed on (private) enforcement before the competent court. From the impact analysis of the mandatory criteria in the Netherlands, we can conclude that it seems necessary to have a clear legal basis that allows every tenderer to challenge the tender

²³ The so-called 'enuntiatieve aankondiging' in Belgian Public Procurement Law

specifications (and, if applicable, the award decision) if they for example do not contain the required mandatory sustainability requirements and/or lack any sufficient motivation. That way, there is no discussion as to whether tenderers possess sufficient interest when invoking the lack of (sufficient) mandatory requirements.

Sufficient enforcement measures should also be foreseen against the contractor after award of the contract whereby non-compliance with the mandatory sustainability requirements in the contract may result for example in penalties, the annulment of the contract or even prohibition of contracting in future tenders (past performance²⁴).

In any event, we note from our analysis that special attention clearly needs to be paid to this point to ensure compliance with the mandatory requirements.

Avoid too broad formulated obligations

Another important consideration is the fact that if one wishes to impose mandatory sustainability requirements, these should be defined as clearly and precisely as possible. One should therefore avoid overly broad catch-all provisions as this affects the compulsory nature of the provision and also sharply reduces its enforcement before the competent court.

As we could see in Spain some mandatory award criteria such as 'minimization of waste generation' and, notably, 'measures for adaptation to climate change' (Article 31.2 of LCCTE) are expressed so generically that their mandatory content becomes unclear.

The same applies to the Netherlands with the 'obligation to procure as much societal value as possible' which also lacks a precise definition, leaving room for interpretation and making it challenging for contracting authorities to incorporate it effectively, affecting the mandatory content of the provision. This broad nature also gives contracting authorities a large discretionary power, impeding enforcement and making it very difficult for tenderers to invoke these provisions.

Timing of implementing mandatory sustainability criteria throughout the tender procedure

Mandatory sustainability criteria can be implemented in the (i) admission conditions (exclusion and selection criteria) (ii) the awarding criteria and the (iii) special conditions of execution.

We understand from our research that countries (frequently) opt for compliance with mandatory sustainability requirements in the execution phase (contract performance clauses or technical specifications) to avoid problems which selection or award criteria can typically present such as an immediate entry barrier, proportionality issues, or difficulties in ensuring the equal treatment of candidates and set a clear contractual obligation.

To avoid these growing pains, it is recommended to implement a first set of mandatory sustainability criteria in the execution phase of public procurement contracts. This is ultimately also the path followed in Italy with the CAMs as well as what is largely applied in Spain (with, for example, Article 202.2 LCSP).

²⁴ See article 69-7° of the Belgian Public Procurement Law whereby past performance is described as a facultative exclusion ground.

Periodic review after implementation

A periodic review such as in Italy with regard to the CAMs seems important to evaluate the measures taken. As indicated above, the monitoring aspect obviously plays a major role in this, to be able to actually carry out an assessment and check, amongst others, whether:

- the requirements have been applied consistently by the contracting authorities ;
- the market is sufficiently mature for the mandatory requirements that were implemented;
- the bar should be raised as there are several companies that can offer higher standards in the meantime;
- the actual expenditure is not too high;
- there are actually measurable environmental impacts.

General benefits of mandatory sustainability criteria

As was clearly shown in the survey carried out in Italy by the Osservatorio Appalti Verdi, the perceived benefits that sustainability requirements have generated were mainly the positive impact at the territorial level from an environmental point of view.

This benefit does not necessarily impact the administration directly, such as cost reduction or rationalization of expenditure.

In order to create sufficient support at legislative and stakeholder level, it seems advisable – given the current economic climate – to pay sufficient attention to the long-term economic benefits (if any) of mandatory sustainability requirements to avoid too much focus on the short-term costs.