

Ecological Factors in Public Procurement and Corporate Sustainability Policies

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Abstract

European Institutions and scholars are reflecting upon the nature of the requirements that are or can be used to implement sustainability through Public Procurement. As far as public organisations are concerned, the Portuguese government's actions are in the same wavelength as the European guidelines on the matter. Public procurement involves economic operators. Thus, it is important to try to understand if the European Union proposal for a directive on "Corporate Sustainability Due Diligence" is an interesting tool in the discussion. Recently, the Portuguese Council of Ministers issued Resolution no. 132/2023, of 25 October, defining the ecological criteria applicable to certain kinds of contracts and products, goods and services concerning some administrative bodies, a Resolution which, nevertheless, is prone to criticism. May the shift of the European Union Public Procurement paradigm help implement Sustainable Public Procurement through mandatory requirements? Can the future Directive help economic operators align with contracting authorities to implement Sustainable Public Procurement? Might the obligation to include environmental factors help fulfil the Directive's due diligence obligations? And, lastly, has Portugal taken the right step with the issuance of Resolution no. 132/2023?

Keywords: ecological factors; corporate sustainability responsibility; sustainable public procurement; mandatory requirements; voluntary requirements; paradigm shift.

JEL Classification: K13, K40, K49

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1. Introduction

Presently, both the doctrine and the European institutions are discussing ways of strengthening the implementation of sustainability by reshaping the nature of the sustainability factors already provided for in the Directives through soft law documents. Yet, public procurement procedures are not only being reformed by contracting authorities, since economic operators play a key role in shifting the paradigm as well, both in terms of the business model and social perception of the absolute need to

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implement sustainability. Thus, this reflection aims to understand whether the future Directive on Corporate Responsibility could be a useful tool for the paradigm shift that is taking place in Europe and in academia regarding sustainability factors in public procurement. We will present an example of an imposition of sustainability factors enshrined in Portuguese Council of Ministers Resolution 132/2023, of 25 October, in an attempt to highlight its weaknesses, which could lead to a lack of effectiveness. The debate is still inconclusive, as emphasised throughout the text with some references to Member State solutions. However, it is a discussion that needs to be held for a conclusion to be drawn.

2. Present EU paradigm regarding sustainable public procurement

Both UN SGD goals and the European Green Deal are in the midst of the most important drivers for sustainability in public procurement². The so-called horizontal policies are not recent goals within Public Procurement rules, since the 2004 Directives already opened the path towards the sustainability goals with the CJEU's praetorian support³. The present 2014 Directives, in turn, set a paradigm of continuous inclusion of sustainable goals *vis a vis* economic one⁴, thus establishing a favourable context for the inclusion of transversal policies, namely under article 18 (2) of the Public Contracts Directive⁵, not only the more commonly known environmental policies, but also social ones, particularly those related to Human Rights⁶.

² Kleoniki Pouikli, *Towards mandatory Green Public Procurement (GPP) requirements under the EU Green Deal: reconsidering the role of public procurement as an environmental policy tool*. *ERA Forum*, 21(4), 699–721. <https://doi.org/10.1007/s12027-020-00635-5>.

³ Sue Arrowsmith, *The Purposes of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies*. *Cambridge Yearbook of European Legal Studies*, 2012; Roberto Caranta, *The changes to the public contract directives and the story they tell about how EU law works*, *Common Market Law Review*, 52 (Issue 2), 2015, 391–459. <https://doi.org/10.54648/COLA2015028>. Criticising this option, Kirsi-Maria Halonen, *Is public procurement fit for reaching sustainability goals? A law and economics approach to green public procurement*. *Maastricht Journal of European and Comparative Law*, 28(4), 2021, 535–555. <https://doi.org/10.1177/1023263X211016756>. For the transition, Lela Mélon, *More Than a Nudge? Arguments and Tools for Mandating Green Public Procurement in the EU*. *Sustainability*, 12(3), 2020, 988. <https://doi.org/10.3390/su12030988>.

⁴ See Recital (2): Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled 'Europe 2020, a strategy for smart, sustainable and inclusive growth' ('Europe 2020 strategy for smart, sustainable and inclusive growth'), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. Laura Treviño-Lozano and Ezgi Usysal, *Bridging the gap between corporate sustainability due diligence and EU public procurement*. *Maastricht Journal of European and Comparative Law*, 2023 <https://doi.org/10.1177/1023263X231213335>.

⁵ Case C-395/18 *Tim SpA – Direzione e coordinamento Vivendi SA v. Consip SpA and Ministero dell'Economia delle Finanze*, EU:C:2020:58, para. 38. Marta Andhov, *Contracting Authorities and Strategic Goals of Public Procurement - A Relationship Defined by Discretion*, in S. Bogojevic, X. Groussot, & J. Hettne, *Discretion in EU Public Procurement Law*. Oxford: Hart, 2019.

⁶ Olabisi. Akinkugbe, *Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer*, *Business and Human Rights Journal*, 6(1), 2021, 174–177, <https://doi.org/10.1017/bhj.2021.1>; Joaquín Tornos Mas, *Public Procurement and Human Rights*, *Revista Digital de Derecho*

Yet, there are also some voices against this inclusion. Saussier and Tirole, for instance, stated in 2015 that “using public procurement to achieve social, environmental and innovation related objectives is ineffective for a number of reasons”⁷. The policy for “rectify[ing] a market failure must be uniform and comprehensive if it is to be effective”; such objectives give rise to certain difficulties with regard to measurement” and risk of “favouritism”⁸.

The path to include social sustainability has not been easy⁹. For the time being, very few mandatory rules exist, as the European Union has not yet assumed the necessary shift of paradigm in public contract procedures. With a particular link to sustainability, we can find in article 69 (3), related to dismissal of abnormally low tenders, and in article 42 (1), regarding accessibility requirements.

Article 42 (1) rules a particular dimension of social sustainability: “For all procurement which is intended for use by natural persons, whether general public or staff of the contracting authority, the technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users. Where mandatory accessibility requirements are adopted by a legal act of the Union, technical specifications shall, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto”¹⁰.

On the other hand, Article 69 clearly imposes an environmental sustainability dimension: “Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services. 2. The explanations referred to in paragraph 1 may in particular relate to: (...) (d) compliance with obligations referred to in Article

Administrativo, 24, 2020, 11–41. <https://doi.org/10.18601/21452946.n24.02>; Fiona McGaughey, Rebecca Faugno, Elise Bant, & Holly Cullen, *Public procurement for protecting human rights*, *Alternative Law Journal*, 47(2), 2022, 143–149. <https://doi.org/10.1177/1037969X221083832>; Olga Martin-Ortega, *Public Procurement as a Tool for the Protection and Promotion of Human Rights: A Study of Collaboration, Due Diligence and Leverage in the Electronics Industry*, *Business and Human Rights Journal*, 3(1), 2018, 75–95. <https://doi.org/10.1017/bhj.2017.35>; Sofia Lundberg & Per-Olov Marklund, *Green Public Procurement and Multiple Environmental Objectives*. *Economia e Politica Industriale*, 45(1), 2018, pp. 37–53. <https://doi.org/10.1007/s40812-017-0085-6>.

⁷ Stéphane Saussier, & Jean Tirole, *Renforcer l’efficacité de la commande publique*. *Notes du Conseil d’analyse Économique*, 22(3), 2015, 1. <https://doi.org/10.3917/nae.022.0001>; Sofia Lundberg & Per-Olov Marklund, *Green public procurement and multiple environmental objectives*. *Economia e Politica Industriale*, 45(1), 2018, 37–53. <https://doi.org/10.1007/s40812-017-0085-6>.

⁸ Stéphane Saussier, & Jean Tirole, *Renforcer l’efficacité de la commande publique*. *Notes du Conseil d’analyse Économique*, 22(3), 2015, 1. <https://doi.org/10.3917/nae.022.0001>.

⁹ Olga Martin-Ortega, Fatimazahra Dehbi, Valerie Nelson, V., & Renginee Pillay, *Towards a Business, Human Rights and the Environment Framework*. *Sustainability*, 14(11), 2022, 6596, p. 14. <https://doi.org/10.3390/su14116596>.

¹⁰ Recital 74 establishes that “the technical specifications drawn up by public purchasers need to allow public procurement to be open to competition as well as to achieve objectives of sustainability. To that end, it should be possible to submit tenders that reflect the diversity of technical solutions standards and technical specifications in the marketplace, including those drawn up on the basis of performance criteria linked to the life cycle and the sustainability of the production process of the works, supplies and services”. This embraces sustainability but does not impose it.

18(2). (...) 3. (...) Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 18(2)". Article 18 (2) displays that "Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X"¹¹.

Aside from these stipulations, the Directive only enshrines voluntary provisions¹². Still, recital (41) clearly sets that "nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life, the preservation of plant life or other environmental measures, in particular with a view to sustainable development, provided that those measures are in conformity with the TFEU". Thus, for the time being, the decision to make certain provisions mandatory has been left to the Member States, provided that they are tailored to those purposes and do not breach the TFEU.

Still, there are several provisions allowing MS to include environmental requirements:

a) technical specifications: "Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, 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;"¹³

b) labels: "Where contracting authorities intend to purchase works, supplies or services with specific environmental, social or other characteristics they may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, services or supplies correspond to the required characteristics", provided that a set of requirements are met¹⁴;

¹¹ Annex X establishes the following: "ILO Convention 87 on Freedom of Association and the Protection of the Right to Organise; ILO Convention 98 on the Right to Organise and Collective Bargaining; ILO Convention 29 on Forced Labour; ILO Convention 105 on the Abolition of Forced Labour; ILO Convention 138 on Minimum Age; ILO Convention 111 on Discrimination (Employment and Occupation); ILO Convention 100 on Equal Remuneration; ILO Convention 182 on Worst Forms of Child Labour. Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention); Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention); Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10 September 1998, and its 3 regional Protocols". See also recital (37), where the fulfilment of these indications is recommended.

¹² Laura Treviño-Lozano and Ezgi Usysal, *Bridging the gap between corporate sustainability due diligence and EU public procurement*. *Maastricht Journal of European and Comparative Law*, 2023, p. 3 <https://doi.org/10.1177/1023263X231213335>.

¹³ Article 42, no. 3 Directive 2014/24/EU.

¹⁴ Article 43, no. 1 Directive 2014/24/EU.

c) Article 62: “Quality assurance standards and environmental management standards”;

d) Article 67 – award criteria: “The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.”¹⁵;

e) Article 68: Life-cycle costing, closely related to environmental features and environmental externalities’ assessment;

f) “Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract within the meaning of Article 67(3) and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations”¹⁶.

The CJEU has been demanding, and the Directive embraced, the fulfilment of a set of requirements to be used such factors and technical specifications: the link to subject matter, the demonstration that there is no infringement of competition.

To summarise, the EU Directive does not (yet) impose ecological factors¹⁷ in public procurement, either as technical specifications or as a factor in the award criteria, but it does not seem to hinder each MS from making this choice.

This brief description confirms Martin-Ortega’s statement that “traditionally, public contracting authorities have been much freer to impose environmental and social conditions when negotiating conditions governing how the contract with the supplier must be performed, while they are relatively restricted from imposing such conditions in the other phases of procurement”¹⁸.

3. The relevance of shifting stakeholders’ minds

Most of the literature has been written about contracting authorities’ powers to include (or not, and how) ecological factors in public procurement procedures. Many experiences have been made, most of them with some success. The law of the market regarding this issue is quite simple: the more you demand a certain kind of good, service or work with specific characteristics, the more the market tends to give answers to that

¹⁵ Laura Treviño-Lozano and Ezgi Usysal concluded that this requirement must be discussed considering its definition, limits and applicability as it has been more discussed in the environmental field than in the Human Rights’ (Laura Treviño-Lozano and Ezgi Usysal, *Bridging the gap between corporate sustainability due diligence and EU public procurement*, *Maastricht Journal of European and Comparative Law*, 2023, p. 17, <https://doi.org/10.1177/1023263X231213335>).

¹⁶ Article 70 Directive 2014/24/EU.

¹⁷ This reflection is only about environmental/ecological issues. However, sustainability is not only about environment issues, but also about social ones.

¹⁸ Olga Martin-Ortega, *Public Procurement as a Tool for the Protection and Promotion of Human Rights: A Study of Collaboration, Due Diligence and Leverage in the Electronics Industry*, *Business and Human Rights Journal*, 3(1), 75–94. 2018, p. 87 <https://doi.org/10.1017/bhj.2017.35>.

demand. If the demand is low, though, the market's response is slow. Therefore, even without any provisions related to economic operators, contracting authorities' demands are an important driver for shifting economic operators' minds and business models.

However, other diligences concerning economic operators themselves have been made, materialised in the Proposal of Corporate Due Diligence Directive.

This future Directive is linked to the UN Guiding Principles on Business and Human Rights. The Proposal is also related to the Strategy For CSR, EC Communication, and the Action Plan on Human Rights and Democracy 2020-2024.

Businesses have a vital role to play in the sustainability transition: "in 2017, 78% of the world's top companies included corporate social responsibility (CSR) in their annual reporting"¹⁹. "At EU level, working to identify a number of appropriate measures and tangible ways in which more sustainable business conduct can be promoted bring further results and reinforce the EU companies' competitive edge in this area"²⁰. The implementation of the corporate social responsibility strategy is one of topics included in the 9th, 12th and 16th SGD in the Reflection Paper. Thus, the EU considers corporate social responsibility as an opportunity to foment a deeper incorporation of sustainability in public procurement procedures. There are several EU recent proposals related to CSR:

a) 2023: Proposal for a Regulation on the transparency and integrity of Environmental, Social and Governance (ESG) rating activities²¹;

b) 2020_Sustainable Corporate Governance Initiative: "This initiative aims to improve the EU regulatory framework on company law and corporate governance. It would enable companies to focus on long-term sustainable value creation rather than short-term benefits. It aims to better align the interests of companies, their shareholders, managers, stakeholders and society. It would help companies to better manage sustainability-related matters in their own operations and value chains as regards social and human rights, climate change, environment, etc."²². Martin-Ortega stresses that "a public procurement model that involves contractor due diligence is consistent with the current tendency in the field of business and human rights, an approach which assumes an active role on the part of businesses to manage adverse human rights impacts beyond considering them mere business risks"²³. Thus, the sustainability responsibility of companies has already been linked to human rights and the environmental and other social dimensions of corporate responsibility enriched business models.

Despite the absence of mandatory rules, many companies already include

¹⁹ European Commission Reflection Paper, "Towards a Sustainable Europe by 2030", p. 26, consulted December 9th 2023, <https://op.europa.eu/en/publication-detail/-/publication/3b096b37-300a-11e9-8d04-01aa75ed71a1/language-en/format-PDF>.

²⁰ Ibidem, p. 27.

²¹ COM (2023) 314 final, 13.6.2023 - <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023PC0314>.

²² Summary consulted December 9th, 2023, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en.

²³ Olga Martin-Ortega, *Public Procurement as a Tool for the Protection and Promotion of Human Rights: A Study of Collaboration, Due Diligence and Leverage in the Electronics Industry*. Business and Human Rights Journal, 3(1), 75–94. 2018, <https://doi.org/10.1017/bhj.2017.35>.

corporate social responsibility (CSR) in their annual reporting, while in open public procedures is not allowed to insert factors related to economic operators in the award criteria proposed. As for proposal evaluation factors, these may include “organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract”²⁴.

While the 2004 Directives were still in force, the CJEU, in its judgement in *Commission v. Netherlands*²⁵, addressed the requirement for social responsibility in a notice published in the Official Journal of the European Union, which mentioned “appraising the ability of operators, criteria and evidence concerning sustainable purchasing and socially responsible business”. It was included in the technical specifications, under sub-chapter 4.4, and “that condition was reiterated in section 6 (...) in the following terms: «11. Sustainability of purchases and [socially responsible business: knock-out criterion]». This factor was considered not to have any connection to the factors described in article 44(2) and 48 of Directive 2004/18”²⁶.

Cuomo published a study on the “effects of the corporate social responsibility reporting requirements introduced by the EU Non-Financial Reporting Directive (2014/95/EU). They intended to understand the effects of Directive 2014/95/EU’s reporting requirements regarding “social responsibility transparency and performance”. The existing literature on the effects of CSR regulation on social responsibility “shows that the real effects of CSR are more likely to follow from mandatory than voluntary disclosures”²⁷. Their findings “reveal the positive effects of the comply or explain approach used by the EU NFRD on the number of companies publishing CSR reports (i.e. CSR transparency) and their social and environmental performance (i.e. CSR performance)”. It is interesting to acknowledge that the positive effects are “significantly stronger for smaller firms. This is likely due to the fact that smaller firms were characterised by lower engagement with CSR reporting and performance before the Directive was enacted. Our results suggest that the Directive was effective in stimulating smaller firms to adopt more CSR-oriented practices, which ultimately led to an improvement in their environmental and social performance”²⁸. Furthermore, Treviño-Lozano & Uysal’s latest paper addresses the “the link between human rights and environmental due diligence and public procurement”²⁹.

²⁴ Article 67, no. 2 (b) Directive 2014/24/EU.

²⁵ Case C – 368/10, May 10th (ECLI:EU:C:2012:284).

²⁶ Cfr. no. 105 and ff.

²⁷ Francesca Cuomo, Silvia Gaia, Claudia Girardone, & Stefano Piserà, *The effects of the EU non-financial reporting directive on corporate social responsibility. The European Journal of Finance*, 1–27, 2022, p. 1. <https://doi.org/10.1080/1351847X.2022.2113812>; Hans B Christensen, Eric Floyd, Lisa Yao Liu, & Mark Maffett, *The real effects of mandated information on social responsibility in financial reports: Evidence from mine-safety records. Journal of Accounting and Economics*, 64(2–3), 2017, 284–304. <https://doi.org/10.1016/J.JACCECO.2017.08.001>.

²⁸ Francesca Cuomo, Silvia Gaia, Claudia Girardone, & Stefano Piserà. *The effects of the EU non-financial reporting directive on corporate social responsibility. The European Journal of Finance*, 1–27, 2022, <https://doi.org/10.1080/1351847X.2022.2113812>.

²⁹ The concept of “due diligence” has “emerged in the financial world and evolved as a good corporate practice of governance to manage a company’s risks” (Laura Treviño-Lozano and Ezgi Uysal, *Bridging*

The Proposal for a Directive on Corporate Sustainability Due Diligence³⁰ lays down several rules:

a) “on obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with whom the company has an established business relationship” [article 1, no. 1 (a)];

b) Article 4 no.1 establishes that “Member States shall ensure that companies conduct human rights and environmental due diligence as laid down in Articles 5 to 11 (‘due diligence’) by carrying out the following actions: (a) integrating due diligence into their policies in accordance with Article 5; (b) identifying actual or potential adverse impacts in accordance with Article 6; (c) preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent in accordance with Articles 7 and 8; (d) establishing and maintaining a complaints procedure in accordance with Article 9; (e) monitoring the effectiveness of their due diligence policy and measures in accordance with Article 10; (f) publicly communicating on due diligence in accordance with Article 11.

c) articles 6, 7, 8 set that “Member States shall ensure that companies take appropriate measures to [identify/prevent/bring to an end] actual and potential adverse human rights impacts and adverse environmental impacts arising from their own operations or those of their subsidiaries and, where related to their value chains, to their established business relationships [...]”;

d) article 15 states that “Member States shall ensure that companies referred to in Article 2(1), point (a), and Article 2(2), point (a), shall adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement. This plan shall, in particular, identify, on the basis of information reasonably available to the company, the extent to which climate change is a risk for, or an impact of, the company’s operations. 2. Member States shall ensure that, in case climate change is or should have been identified as a principal risk for, or a principal impact of, the company’s operations, the company includes emission reduction objectives in its plan. 3. Member States shall ensure that companies duly take into account the fulfilment of the obligations referred to in paragraphs 1 and 2 when setting variable remuneration, if variable remuneration is linked to the contribution of a director to the company’s business strategy and long-term interests and sustainability. k) there is foreseen liability for non-complying with duties of article 7 and 8 – article 22”.

These rules are designed to protect fundamental rights, but also to increase trust in businesses by both citizens and companies. This goal will also be fruitful to public procurement procedures where sustainability appears as a main goal alongside economic ones. Economic operators’ minds set towards business models can change and adapt to economic transition, incorporating sustainable concerns even in the

the gap between corporate sustainability due diligence and EU public procurement. Maastricht Journal of European and Comparative Law, 2023, p. 5 <https://doi.org/10.1177/1023263X231213335>).

³⁰ COM(2022) 71 final, 23/02/2922.

business model. If all those rules are met, it will be easier for them to be aware of the importance of presenting proposals with sustainability concerns. Even though SMEs are not concerned by these rules, there are certain measures that can, nevertheless, be indirectly affected³¹.

4. The evolution in European law

To date, academics have been reflecting upon ways to adjust in order to foster sustainability through public procurement. In fact, “the ineffectiveness (or at least unclarity) of the above-described requirements in the procurement context” demands the above-mentioned reflection³². The *European Green Deal* is a driver to the paradigm shift, stating that “public authorities, including the EU institutions, should lead by example and ensure that their procurement is green”³³. Thus, some questions arise regarding the nature of sustainability requirements: should/must they be mandatory or rather remain voluntary? If the mandatory feature is to be pursued, should we have minimum mandatory requirements? Should this paradigm be regarded as definitive or merely as a transition? Should mandatory requirements be horizontal or sectorial? And, finally, should they be substantive, procedural, or both?

Economically, discretionary rules are more flexible, on the assumption that contracting authorities can make the best decision, implement it, and carry out efficient monitoring and a final evaluation³⁴. Thus, a mandatory requirement limits MS’ possibility to adjust procurement procedures to fulfil their particular public interests³⁵.

Certain areas of procurement need minimum criteria, even though they can be set either horizontally or sectorally due to the complexity of the concept of sustainability. For example, when it comes to food, how do you define and measure sustainability? What tools can operationalise imperative factors? Hanna Schebesta & Maria José Casado describe a set of difficulties regarding the “virtually infinite options” that exist “when it comes to drafting public procurement criteria with sustainability”, flagging the “negatives sides of «sustainability standardisation»”³⁶. The majority of MS resort to sectoral solutions. Portugal has some provisions in its General Waste Management Regime³⁷: “5 - It is mandatory to use at least 10 /prct. of recycled materials or materials that incorporate recycled materials in relation to the total quantity of raw materials used on site, when contracting construction and infrastructure maintenance contracts under the Public Contracts Code, approved by Decree-Law no. 18/2008 of 29 January, in its current wording (CCP)”. [article 28]

In textiles, for instance, examples in Europe are limited and dispersed. It could

³¹ For a wider information regarding this proposal, see https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en.

³² Willem Janssen & Roberto Caranta, *Mandatory Sustainability Requirements in EU Public Procurement Law - Reflections on a Paradigm Shift*. Oxford: Hart, 2023, p. 13.

³³ Ibid, p. 13. European Green Deal, p. 8.

³⁴ Willem Janssen & Roberto Caranta, *op. cit.*, 2023, p. 73.

³⁵ Ibid, p. 17.

³⁶ Ibid, pp. 144, 145.

³⁷ Decree-Law no. 102-D/2020, December 10th.

gain momentum with the European Strategy for sustainable and circular textiles³⁸.

As Janssen & Caranta conclude, the change from “regulating «how to buy» towards «what to buy» is unfolding at EU and Member State level”³⁹. Spain has included, in Law 9/2017, of November 8th, and in its emergency legislation, a “wide variety of SPP mandatory requirements”⁴⁰. The overcoming of budgetary discussions regarding SPP is identified as an advantage of mandatory requirements. Nevertheless, two paths are suggested in order to establish mandatory requirements: “the use of very opened-worded clauses” [discretionary powers] – the French option, inserted in *Code de la Commande Publique* by the Climate Law⁴¹, even though it can be translated into vague and unenforceable clauses or that already result from law. The other option is a detailed provision, the Italian solution, whose *Codici dei Contratti pubblici* sets some mandatory factors⁴².

5. Portugal’s path

Portugal has transposed the 2014 Directives to Public Contracts Code and establishes the MEAT criterion in article 74, describing in article 75 the factors which can be used in the award criterion. However, in 2020, the Court of Auditors reported, based on the former National Strategy for Green Public Procurement, that “Environmental criteria are not being defined and adapted to the national reality quickly enough, negatively conditioning their application; Dissemination and training are practically non-existent; The follow-up and monitoring of the Strategy’s implementation is not properly ensured; The degree to which environmental criteria are included in public procurement has not been evaluated, but it seems to be reduced and the relevance of the criteria applied appears to be minimal; Some of the entities that have used environmental criteria in their procurement procedures do not have systems in place to monitor compliance with the corresponding contractual clauses⁴³; There are no criteria or information for assessing the impacts of the Strategy”⁴⁴.

Portugal’s Public Procurement governance body has recently displayed the procedures using ecological factors. The picture is very disappointing (yellow: registered procedures; blue: procedures using ecological factors).

Council of Ministers Resolution no. 132/2023, of 25 October, defines the

³⁸ Willem Janssen & Roberto Caranta, *op. cit.*, pp. 166-167.

³⁹ *Ibid.*, p. 255.

⁴⁰ *Ibid.*, p. 233.

⁴¹ See François Lichère and Oriane Sulpice in Willem Janssen & Roberto Caranta, *op. cit.*, pp. 237-239.

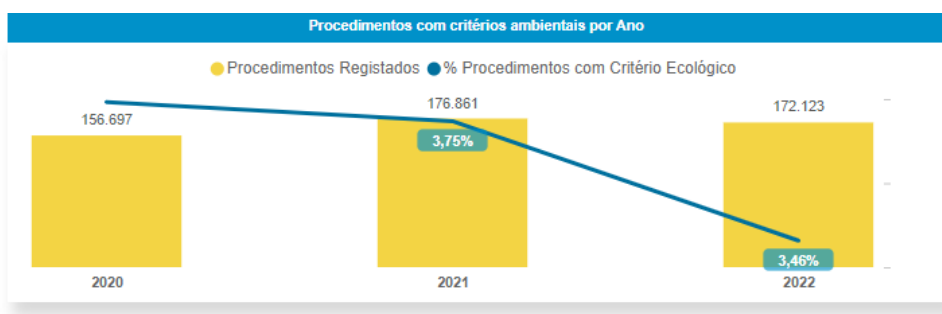
⁴² See Fredo Schotanus and Ruben Nicolas in Willem Janssen & Roberto Caranta, *op. cit.*, pp. 78-79; Giulia Botta in Willem Janssen & Roberto Caranta, *op. cit.*, pp. 189 and ff.

⁴³ Referring the importance of both planning and monitoring sustainable public procurement procedures (Raq in uel Carvalho, *O antes e o depois do procedimento de contratação pública: a importância das fases de planeamento e monitorização da execução de contratos públicos no âmbito da contratação pública sustentável*. In *Estudos em homenagem à Professora Doutora Maria da Glória Garcia* (pp. 2061-2101). Lisbon: Universidade Católica Editora, 2023.

⁴⁴ Green Public Procurement Audit Public Procurement - REPORT NO. 7/2020, 2ND SECTION, accessed December 9th - <https://www.tcontas.pt/pt-pt/ProdutosTC/Relatorios/RelatoriosAuditoria/Pages/detalhe.aspx?dset=2020>.

ecological criteria applicable to the procedures for the formation of contracts promoted by entities of the State's direct and indirect administration, including the State's business sector.

The ecological criteria specifically provided by the RCM refer not only to public works contracts (with and without the use of wood and cork), but also to public procurement contracts for: i. Clothing; ii. Wood and cork; iii. Electricity, including public electricity stations for electric mobility; iv. Energy certification, energy auditing and design services, as well as the acquisition and installation of photovoltaic systems for self-consumption; v. Vehicles and operational vehicle hire contracts; vi. Copying and printing paper; vii. Furniture; viii. Cleaning and hygiene services; ix. Travel agencies and accommodation services; x. Heating, ventilation and air conditioning system maintenance services; xi. Maintenance services for lift and escalator installations; xii. Outsourced copying and printing services, as well as contracts for the purchase of copying and printing equipment; xiii. IT equipment or IT equipment leasing contracts; xiv. Food products, catering services and vending services, as well as cooked meal services.



Source: <https://www.base.gov.pt/Base4/pt/estatisticas/indicadores-dos-criterios-ambientais/>

The ecological criteria laid down for each of the contractual objects identified above are distinguished into i. Mandatory - the contracting authority is obliged to use the ecological criterion specifically provided for unless its application would result in an appreciable restriction of competition; ii. Voluntary - the contracting authority is not obliged to use the ecological criterion specifically provided for, unless it wishes to use ecological criteria, in which case it must use those provided for in the CMR; iii. Recommended - the contracting authority is only exempted from using the ecological criteria specifically provided for in particularly well-founded cases; and iv. Eventual - the contracting authority is not obliged to use the ecological criteria specifically provided by the RCM.

The "said criteria" can be related to four instruments:

i. Qualification criteria - technical capacity requirements to be defined within the scope of procedures that include a prior qualification phase (such as a restricted tender);

ii. Award criteria - by reference to the modalities set out in Article 74(1) of the Public Contracts Code (i.e. single-factor and multi-factor);

iii. Factors/subfactors of the award criterion - performance of the signed contract, which was submitted to competition by the tender specifications, measured in the tender evaluation model, characterised by basic parameters and corresponding to the attributes contained in the tenders to be submitted by the tenderers;

iv. Aspects of the performance of the contract and technical specifications - relating to the characteristics of the works, goods or services to be purchased, the methods of construction of these works, production of these goods or provision of these services, performance requirements or functional requirements, i.e., the conditions of performance of the contractual object laid down in the specifications (i.e., not subject to competition).

The document sets principles guiding the preparation of the parts of any public pre-contractual procedure ("general principles applicable in ecological matters"), namely:

- i. The adoption of the multi-factor modality in the award criteria;
- ii. The inclusion of environmental sustainability factors whenever the multi-factor modality of the award criteria is adopted;
- iii. The setting of technical specifications by reference to minimum environmental sustainability standards, as well as certifications issued by systems of recognised reliability (e.g., the European Union Ecolabel).

This Resolution is prone to be criticised in several dimensions, though, as I already wrote before⁴⁵, concerning life-cycle costs in general, but in Portugal in particular, there is still a lack of technical preparation among the public administration's human resources. The teams working in these areas are very rigid and made up of people with little diversity of knowledge. There are examples of the use of "criteria" in other Member States, but the economic and organisational context is different. I am more in favour of sectoral solutions.

Specifically in this Resolution:

a) why the subjective scope, knowing that the local government, although autonomous, makes great use of public procurement and is trialling the incorporation of ecological "criteria"?

b) methodologically, the technical specifications are upstream of the execution of the contract; they are, in my view, the best instrument, for the time being, for trialling and testing these issues. In the execution of the contract, the co-contractor will execute the technical specifications (which were the same for all tenderers) and the attributes of his proposal. Therefore, the tables in the annex, when they refer to "Aspects of the execution of the contract and technical specifications", are not rigorous and mix up issues;

c) methodologically, they should not refer to "criteria", but to factors. According to the law, criteria can be categorised in two ways: mono-factorial and multi-factorial. Although quality may be the mono-factorial criterion, the truth is that it is usually used for the lowest price. This leaves the multifactorial criterion for the application of factors and sub-factors;

⁴⁵ Raquel Carvalho, *Life-Cycle Costing in the Member States: Does the Tool Meets Its Goals?* In *Cost and EU Public Procurement Law: Life-Cycle Costing for Sustainability* (pp. 34-64). Taylor and Francis, 2019.

d) with regard to "garment purchase contracts", the draft says that it is necessary to allocate percentages. I would point out that, in the case of multifactorial award criteria, the CCP already requires that an evaluation tree be drawn up with an indication of the weighting; there is sectoral legislation, such as that on waste, which sets this.

e) as for the "valorisation of certified tenders", the principle of competitive equality and the European and national imposition in this regard should always be safeguarded with the mention "or equivalent";

f) the issue of compliance with labour policies is not ecological, but social (equally important); care must be taken not to mix business policies with legal obligations;

g) I would advise caution when incorporating factors associated with proximity, as European bodies have already warned of the danger of violating the principles of equality and competition;

h) in the case of works contracts, it is perhaps rash to make indications because it will always be necessary to consider the functionality of the structure to be built.

Furthermore, the Resolution is incomplete if the actions to monitor the implementation of the technical specifications linked to environment and the ecological factors of the award criteria are not made imperative.

Lastly, there is an internal issue regarding the normative hierarchy: the Resolution, being a regulation, cannot amend the law since it is an under-legislative act. But its normative provisions do in fact change the law for central (direct and indirect) administrative bodies.

6. Conclusion

The pressures resulting from climate change and its pernicious effects have forced both international and national bodies to incorporate sustainability into their legal instruments. In fact, the European Union has been progressively including sustainability factors in public procurement procedures, while maintaining Member States' discretion. It is now being discussed whether these factors should become mandatory, given the lack of effectiveness they have shown so far. On the other hand, it is important to involve economic operators in pursuing this endeavour. The proposal for a Directive on corporate responsibility is an interesting instrument to change the business model and the mentality of the market. Member States have created some regulatory initiatives to make the use of sustainability criteria mandatory. The recent Portuguese attempt to address ecological factors, though, demonstrates, at various levels, that the discussion needs to keep progressing.

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