

# TOWARDS MANDATORY GREEN PUBLIC PROCUREMENT IN EUROPE: COMPARATIVE LESSONS FROM ITALY AND NORWAY ON APPLICATION AND ENFORCEMENT

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*While the 2014 Public Procurement Directive neither requires nor prohibits the use of public procurement as a tool to reduce environmental externalities and combat climate change, sectoral legislation introduced under the Green Deal increasingly prescribes public authorities to buy 'green'. Given the limited supranational experience with the shift from voluntary to mandatory Green Public Procurement (GPP), this article undertakes a comparative assessment of two jurisdictions whose experience with mandatory GPP predates the current European trend: Italy and Norway. By examining the legislative frameworks, application, and enforcement concerning Italy's minimum environmental criteria (CAMs) and Norway's 30% weighting requirement for climate and environmental considerations in award criteria, the article identifies key ambiguities that will characterise this emerging phase of mandatory GPP in Europe.*

## 1 INTRODUCTION

In the EU, public procurement accounts for approximately 14% of the GDP.<sup>1</sup> As climate change calls for a comprehensive approach, this purchasing power can be leveraged in prioritising the EU's ambitions for a green transition.<sup>2</sup> The current public procurement framework in Europe, i.e. the Public Procurement Directive, which regulates the award of contracts for works, supplies and services, allows these purchases to be carried out strategically with non-pecuniary objectives. Within this framework, Green Public Procurement (GPP), as defined by the Commission, is procurement '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'.<sup>3</sup>

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<sup>1</sup> European Court of Auditors, 'Public procurement in the EU – Less Competition for contracts awarded for works, goods and services in the 10 years up to 2021' 28/2023 (Court of Auditors Special Report).

<sup>2</sup> Enrico Letta, 'Much More Than a Market' (April 2024), 45  
<<https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf>> accessed 3 November 2025 (Letta Report).

<sup>3</sup> European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Public Procurement for a Better Environment' COM(2008) 400 final 4. The Commission's definition of GPP is criticised for being too narrow, see Marta Andhov and Federica Muscaritoli, 'Climate Change and Public Procurement: Are We Shifting the Legal Discourse?' in Willem Janssen and Roberto Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law* (Hart Publishing 2023). However, due to recent legislative initiatives' insistence on the term, combined with the inherent emphasis on green on the European Green Deal, this article also uses the term GPP.

The Public Procurement Directive, adopted in 2014, is yet to change more than a decade after its adoption.<sup>4</sup> However, the same cannot be said for the rest of European law with public procurement relevance. The Union's roadmap for making its economy sustainable, the European Green Deal, projected public procurement as a role model in the market to respond to climate and environment-related challenges.<sup>5</sup> With this catalyst, GPP in Europe is moving to a new phase where the facilitative framework is being replaced with mandatory requirements. In this context, a mandatory GPP requirement is a requirement that 'directs the decision-making process of a national, regional or local authority, often in their role as a contracting authority'; it may encompass different obligations for public buyers such as mandatory minimum criteria, target and sector-specific legislation.<sup>6</sup> Inevitably, this recent trend triggers scrutiny on the efficiency and effectiveness of such an approach.<sup>7</sup> However, the limited experience in the application and enforcement of mandatory GPP precludes a definitive assessment.<sup>8</sup> Nevertheless, cross-jurisdictional perspectives from procurement systems whose experiences with mandatory GPP criteria predate the supranational trend may serve as a starting point.

Comparative method is a vital element in European law.<sup>9</sup> It also complements the understanding of supranational law as the law itself may be the result of a 'compromise'.<sup>10</sup> As it mimics the method of European integration, a comparative research framework benefits the analyses of Europeanisation.<sup>11</sup> On public procurement, comparative research is 'an important tool for the development of procurement regulation and practice'.<sup>12</sup> Specifically on sustainability, comparative research is 'particularly useful' as different ways

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<sup>4</sup> Though note that the works for revision has started, see Court of Auditors Special Report (n 1); Council of the European Union, 'Council Conclusions on the European Court of Auditors' Special Report No. 28/2023 - Improve a fair and effective competition for EU public procurement contracts awarded for works, goods, and services' (C/2024/3521) (Council Conclusions on the European Court of Auditors' Special Report); Ursula von der Leyen, 'Political Guidelines for the Next European Commission 2024-2029' <[https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648\\_en?filename=Political%20Guidelines%202024-2029\\_EN.pdf](https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf)> accessed November 2025.

<sup>5</sup> European Commission, 'Communication from the Commission, The European Green Deal' COM(2019) 640 final.

<sup>6</sup> Willem Janssen, 'Shifting Towards Mandatory Sustainability Requirements in EU Public Procurement Law: Context, Relevance and a Typology' in Willem Janssen and Roberto Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law* (Hart Publishing 2023) 17. Note that the author uses this typology for all sustainability requirements not only for GPP.

<sup>7</sup> See Peter Kunzlik, 'From Suspect practice to market-based instruments: policy alignment and the evolution of EU law's approach to "green" public procurement' (2013) 3 *Public Procurement Law Review* 97, 109-115; Lela Mélon, 'More than a Nudge? Arguments and Tools for Mandating Green Public Procurement in the EU' (2020) 12(3) *Sustainability* 988, 1004; Kirsi-Maria Halonen, 'Is Public Procurement Fit for Reaching Sustainability Goals? A Law and Economics Approach to Green Public Procurement' (2021) 28(4) *Maastricht Journal of European and Comparative Law* 535, 552.

<sup>8</sup> Kleoniki Poukli, 'Towards mandatory Green Public Procurement (GPP) requirements under the EU Green Deal: reconsidering the role of public procurement as an environmental policy tool' (2021) 21(4) *ERA Forum* 699, 715.

<sup>9</sup> Antonina Bakardjieva Engelbrekt, 'Comparative Law and European Law: The End of an Era, a New Beginning or Time to Face the Methodological Challenges?' (2015) 61 *Scandinavian Studies in Law* 88, 91.

<sup>10</sup> Danny Pieters, 'Functions of Comparative Law and Practical Methodology of Comparing' <<https://www.law.kuleuven.be/personal/mstorme/Functions%20of%20comparative%20law%20and%20practical%20methodology%20of%20comparing.pdf>> accessed 3 November 2025.

<sup>11</sup> Bakardjieva Engelbrekt (n 9) 103.

<sup>12</sup> Foreword by the Editors of the European Procurement Law Series by Roberto Caranta and Steen Treumer in Roberto Caranta and Martin Trybus (eds), *The Law of Green and Social Procurement in Europe* (DJØF Publishing 2010).

can be addressed ‘only if the question is examined with the technique of the ‘as opposed to’’.<sup>13</sup> Using this method, this article puts the application and enforcement of mandatory GPP requirements in Italy and Norway under investigation to gain experience on the application and enforcement to explore the challenges that may arise from such approach at the supranational level.

The article is structured as follows: Section 2 briefly introduces the European public procurement and the enforcement system. Building on the historical developments of GPP, Section 3 assesses the move towards a mandatory GPP approach in secondary legislation. Sections 4 and 5 examine the regulation, application and enforcement of mandatory GPP requirements in Italy and Norway. Building on these findings, Section 6 investigates the similarities and differences between selected jurisdictions to unveil the potential uncertainties inherent in the enforcement of forthcoming European GPP requirements. Section 7 concludes by addressing future pathways in the legal framework.

## 2 PUBLIC PROCUREMENT IN EUROPE AND ENFORCEMENT

Since the 70s, public procurement in Europe has been subject to rules arising from directives. As the award of public procurement contracts is required to comply with principles of the Treaty on the Functioning of the European Union (TFEU), secondary legislation provides rules on ‘how to buy’ in order to ensure that principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency are respected.<sup>14</sup> Pursuant to this framework, provided that their value is above the specified thresholds, contracts awarded by or on behalf of member states’ authorities for the execution of works, the supply of products or the provision of services, should be awarded pursuant to the rules on the procedures established with procurement directives.

Safeguarding the objectives of the rules harmonising the award of public contracts depends on economic operators’ ability to protect their rights through available remedies.<sup>15</sup> Since the late 80s, the enforcement of public procurement is subject to rules arising from the Remedies Directive. These rules establish the conditions on review procedures to be initiated in case of decisions of contracting authorities that are alleged to have infringed ‘Union law in the field of public procurement or national rules transposing that law’.<sup>16</sup> Such review procedures should be made available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. Under this system, depending on national law, review bodies may be courts or administrative review bodies, which offer interim measures, setting aside an unlawful

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<sup>13</sup> Mario E Comba, ‘Green and Social Considerations in Public Procurement Contracts: A Comparative Approach’ in Roberto Caranta and Martin Trybus (eds), *The Law of Green and Social Procurement in Europe* (DJØF Publishing 2010) 300.

<sup>14</sup> Recital 1 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65 (Public Procurement Directive).

<sup>15</sup> Roberto Caranta and Vítězslava Fričová, ‘EU Procurement and Concessions Law’ in Miroslava Scholten (ed), *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing 2023) 415.

<sup>16</sup> Art 1 Council Directive 89/665 of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L395/33, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 [2007] OJ L335/31 (Remedies Directive).

decision and damages.<sup>17</sup> Time limit for application for review should not be less than 10 days (or 15 days depending on the means of communication) following the communication of the decision to the candidate/tenderer.<sup>18</sup>

To a large extent, concluded public contracts are protected under this framework.<sup>19</sup> For this reason, there are procedural safeguards precluding the conclusion of the contract to ensure review procedures do not become futile due to the conclusion of the contract. In case of review of contract award decision, there is an automatic suspension which provides that a contract should not be concluded before the review body has made a decision on the application either for interim measures or for review.<sup>20</sup> Also, standstill period is another legal shield, subject to exceptions, which ensures that the public contract cannot be concluded until a certain amount of time (10/15 days) passes from the award of the contract.<sup>21</sup>

One exception to the protection given to concluded public contracts is the remedy of ineffectiveness. Unless exceptions apply, a concluded public contract can be rendered ineffective for serious breaches, including illegal direct awards, but also the breach of the abovementioned procedural safeguards in a way that robs the interested party of obtaining remedies in case of a breach of the Public Procurement Directive.<sup>22</sup> This deprivation of the contract's effect aims to restore competition for the benefit of economic operators who were deprived of potential business opportunities.<sup>23</sup> In case the said procedural safeguards are not accompanied also by the breach of the Public Procurement Directive, member states should provide either for ineffectiveness or alternative penalties.<sup>24</sup> The Remedies Directive does not provide a complete harmonisation of remedies; rather, it sets the minimum conditions required of national review systems.<sup>25</sup>

### 3 THE REGULATORY EVOLUTION OF GPP IN EUROPE: FROM PERMISSION TO PRESCRIPTION

While the first two generations of procurement directives did not include an explicit reference to GPP, towards the end of the millennium, the Commission acknowledged that the public procurement legislation accommodates the incorporation of environmental considerations by the contracting authorities in the contracts they award.<sup>26</sup> While

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<sup>17</sup> Art 2(1) Remedies Directive.

<sup>18</sup> Art 2(c) Remedies Directive.

<sup>19</sup> For concluded public contracts as sacred cows, see Steen Treumer, 'Towards an Obligation to Terminate Contracts Concluded in Breach of the E.C. Procurement Rules - the End of the Status of Concluded Public Contracts as Sacred Cows' (2007) 6 Public Procurement Law Review 371.

<sup>20</sup> Art 2(3) Remedies Directive.

<sup>21</sup> Art 2(a)(2) of the Remedies Directive.

<sup>22</sup> Art 2(d) Remedies Directive.

<sup>23</sup> Case C-23/20 *Simonsen & Weel A/S v Region Nordjylland og Region Syddanmark* EU:C:2021:490 paras 86-87; see Case C-471/21 P(R) *Inivos Ltd and Inivos BV v European Commission* EU:C:2021:984 para 83.

<sup>24</sup> Art 2e Remedies Directive.

<sup>25</sup> Case C-327/00 *Santex SpA v Unità Socio Sanitaria Locale n. 42 di Pavia, and Sca Mölnhycke SpA, Artsana SpA and Fater SpA* EU:C:2003:109 para 47; Joined Cases C-496/18 and C-497/18 *HUNGEOD Közlekedésfejlesztési, Földmérési, Út- és Vasútervezési Kft. and Others v Közbeszerzési Hatóság Közbeszerzési Döntőbizottság* EU:C:2020:240 para 73; Case C-263/19 *T-Systems Magyarország Zrt. and BKK Budapesti Közlekedési Központ v Közbeszerzési Hatóság Közbeszerzési Döntőbizottság* EU:C:2020:373 para 53.

<sup>26</sup> Commission of the European Communities, 'Green Paper Public Procurement in the European Union: Exploring the Way Forward' (1996) COM(96)583 final 40.

the Commission explained how green considerations can be legally incorporated in public procurement;<sup>27</sup> the case law of the Court of Justice of the European Union (CJEU) shed light on questions concerning the limits of the use of discretionary GPP criteria.<sup>28</sup> Parallel to this, member states were invited to adopt national action plans for the greening of their purchases within the limits of the applicable framework.<sup>29</sup> With the adoption of the 2004 Directive, the facultative use of environmental considerations was incorporated into the legislation.<sup>30</sup> While the Commission's soft law provided a step-by-step toolkit, the CJEU favoured less strict conditions concerning the limits of GPP.<sup>31</sup> In the meantime, the new Directive was adopted, allowing the incorporation of green requirements under decisions concerning 'what to buy' and 'whom to buy from' as detailed below.

Under the 2014 Public Procurement Directive, while technical specifications, the purpose of which is to set characteristics of a public purchase, can incorporate environmental characteristics, performance conditions can be prescribed to ensure the contractor adheres to certain environmental requirements in the performance of the contract.<sup>32</sup> In the determination of the most economically advantageous tender (MEAT) through comparing submitted bids, award criteria may include the best price-quality ratio, including environmental aspects.<sup>33</sup> In this assessment, contracting authorities can use life-cycle costing (LCC) not only to account for the costs borne by the contracting authorities but also for costs owed to environmental externalities.<sup>34</sup> Labels can be used to specify environmental characteristics of the purchase.<sup>35</sup> Additionally, during the qualitative selection deciding 'whom to buy from', exclusion grounds allow economic operators to be banned from participating for breach of environmental law, and selection criteria include environmental requirements concerning the economic operators' capacity to undertake the contract.<sup>36</sup>

An original provision of the 2014 Directive is Article 18(2), which obliges member states to ensure that economic operators comply with the national, European and

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<sup>27</sup> Commission of the European Communities, 'Communication from the Commission Public Procurement in the European Union' COM(1998) 143 final 27; Commission of the European Communities, 'Commission Interpretative Communication on the Community Law Applicable to Public Procurement and the Possibilities for Integrating Environmental Considerations Into Public Procurement' COM(2001) 274 final.

<sup>28</sup> Case C-513/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* EU:C:2002:495; Case C-448/01 *EVN AG and Wienstrom GmbH v Republik Österreich* EU:C:2003:651.

<sup>29</sup> Commission of the European Communities, 'Communication from the Commission to the Council and the European Parliament Integrated Product Policy Building on Environmental Life-Cycle Thinking' COM(2003) 302 final 12.

<sup>30</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114.

<sup>31</sup> European Commission, 'Buying Green! A Handbook on Environmental Public Procurement' (2004) First edition; European Commission, 'Buying Green! A Handbook on Green Public Procurement' (2011) Second edition; Case C-368/10 *Commission v Netherlands* (Max Havelaar) EU:C:2012:284.

<sup>32</sup> Arts 42 and 70 Public Procurement Directive.

<sup>33</sup> Art 67 Public Procurement Directive.

<sup>34</sup> Art 68 Public Procurement Directive.

<sup>35</sup> Art 43 Public Procurement Directive.

<sup>36</sup> Arts 57 and 58 Public Procurement Directive. Ezgi Uysal and Willem A Janssen, 'The European Green Deal and Public Procurement Law Its Extraterritorial Reach beyond the EU's Borders' in Mar Campins Eritja and Xavier Fernández-Pons (eds), *Deploying the European Green Deal Protecting the Environment Beyond the EU Borders* (Routledge 2024) 181.

international environmental, social and labour law in the performance of public contracts. Though this provision is often referred to as the ‘principle of sustainability’ alongside other principles of procurement;<sup>37</sup> it is still questionable whether it establishes an authentic principle of ‘sustainability’ since it simply refers to compliance with the applicable law.<sup>38</sup> Nevertheless, the CJEU confirmed that the provision was established as a principle and carries ‘a cardinal value’.<sup>39</sup> In sum, the current framework does not mandate GPP but maintains the facilitative approach through nudging the public buyers through soft law guidance and the dissemination of good practices, as well as voluntary sectoral GPP criteria regularly updated.<sup>40</sup>

This voluntary approach to GPP was a deliberate choice. It was explicitly noted in the Recital of the 2014 Public Procurement Directive that, due to the crucial differences between sectors, it is not appropriate to set horizontal mandatory GPP requirements with the Directive.<sup>41</sup> Taking into consideration the policies and conditions of the specific sectors, the task of introducing mandatory GPP requirements was left to sectoral legislation. Up until recently, only a limited amount of secondary legislation had, in fact, taken up such a role.<sup>42</sup> Nevertheless, post-Green Deal, there has been an increase in the secondary legislation with public procurement relevance.

Currently, there are more than 50 pieces of secondary legislation with public procurement relevance.<sup>43</sup> While the existing GPP requirements are being amended to introduce more comprehensive requirements or an extended coverage,<sup>44</sup> a considerable

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<sup>37</sup> See Marta Andhov, ‘Contracting Authorities and Strategic Goals of Public Procurement—A Relationship Defined by Discretion?’ in Sanja Bogojevic, Xavier Groussot, and Jörgen Hettne (eds), *Discretion in EU Procurement Law* (Hart Publishing 2019) 132; Marta Andhov, ‘Article 18(2) Public Procurement Principles’ in Roberto Caranta and Albert Sanchez-Graells (eds), *European Public Procurement Commentary on Directive 2014/24/EU* (Edward Elgar Publishing 2021); Roberto Caranta, ‘Sustainability Takes Centre Stage in Public Procurement’ (2023) 85(1) *Ruch Prawniczy, Ekonomiczny I Socjologiczny* 41, 44; Janssen, ‘Shifting Towards Mandatory Sustainability Requirements in EU Public Procurement Law’ (n 6) 10.

<sup>38</sup> Ezgi Uysal, ‘Sustainability Clauses in ‘Public’ Contracts’ (2024) 20(1) *European Review of Contract Law* 105, 115

<sup>39</sup> Case C-395/18 *Tim SpA Direzione e coordinamento Vivendi SA v Consip SpA, Ministero dell’Economia e delle Finanze* EU:C:2019:595 para 38.

<sup>40</sup> Uysal and Janssen (n 36).

<sup>41</sup> Recital 95 Public Procurement Directive.

<sup>42</sup> See Art 9 Regulation (EC) No 106/2008 of the European Parliament and of the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment [2008] OJ L39/1; Arts 5-6 Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles [2009] OJ L 120/5; Art 9 Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings [2010] OJ L153/13; Art 6 Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC [2012] OJ L315/1.

<sup>43</sup> Jugatx Ortiz Gonzalez, ‘Opening Speech – News from Brussel’ in EU Public Procurement anno 2025 - Are the rules fit for purpose? <[https://jura.ku.dk/clima/calendar/2025/eu\\_public\\_procurement\\_anno\\_2025/](https://jura.ku.dk/clima/calendar/2025/eu_public_procurement_anno_2025/)> accessed 3 November 2025; Willem A Janssen, ‘The Coherence of Public Procurement Legislation in the European Union A study into the external coherence of the Public Procurement Directives and other legislative instruments regulating public procurement’ Research Report for the EU Commission, July 2025.

<sup>44</sup> See Arts 3-5 of the Directive 2009/33/EC amended with Directive (EU) 2019/1161 of the European Parliament and of the Council of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles [2019] OJ L188/116; Art 7 Directive (EU) 2024/1275 of the European Parliament and of the Council of 24 April 2024 on the energy performance of buildings (recast) [2024] OJ L2024/1275; Arts 5-7 Directive (EU) 2023/1791 of the European Parliament and of the Council of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955 (recast) [2023] OJ L231/1.

majority of the recent legislative acts foresee the introduction of mandatory GPP criteria through further acts establishing ‘a common definition of what a “green purchase” is’.<sup>45</sup> GPP in Europe is moving into its next phase, assertively prescribing to the public sector to buy green.

This being said, the European experience with mandatory GPP requirements is in its infancy. With the increasing amount of secondary legislation calling for the adoption of further acts and uncertainties concerning their enforcement once adopted, it is premature to make definitive statements on this new phase. Nevertheless, insights from jurisdictions whose experience with mandatory GPP pre-dates this new European trend, Italy and Norway, could be utilised to gain experience on the application and enforcement of mandatory GPP criteria and to identify approaching ambiguities. Accordingly, in the next sections the mandatory GPP criteria of the respective jurisdictions are investigated, and subsequently compared to find answers to questions relating to mandatory GPP requirements at the European level.

## 4 MANDATORY GPP CRITERIA IN ITALY

### 4.1 PUBLIC PROCUREMENT AND ENFORCEMENT

In Italy, public contracts are subject to rules arising from the Public Contracts Code.<sup>46</sup> The enforcement of public procurement rules is regulated partly in this Code and partly in the Administrative Judicial Procedure Code. Pursuant to the latter, in disputes concerning the procedures for the award of public contracts, the regional administrative courts and the Council of State have exclusive jurisdiction. There is no administrative review body within the meaning given under the Remedies Directive.

The Administrative Judicial Procedure Code also provides that if the contract award decision is annulled, considering the facts, such as parties’ interest or the execution state of the contract, a public contract can be declared ineffective.<sup>47</sup> Additionally, under the Public Contracts Code, if a public contract cannot be performed for certain reasons, including the ineffectiveness, the contracting authority checks other economic operators that participated that can take over the contract depending on their rankings.<sup>48</sup> The assignment takes place under the same conditions proposed by the original contractor, or the contracting authority can provide in the contract documents that the assignment is to be realised based on the conditions proposed by the economic operator consulted. Takeover is only possible if requested.<sup>49</sup>

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<sup>45</sup> European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Sustainable Europe Investment Plan – European Green Deal Investment Plan’ COM(2020) 21 final 12.

<sup>46</sup> The new Italian Public Contracts Code was adopted with Legislative Decree 36/2023 in March 2023, following Law 78/2022, giving powers to the Government.

<sup>47</sup> Arts 121-122 of the Italian Administrative Judicial Procedure Code.

<sup>48</sup> Art 124 of the Italian Public Contracts Code.

<sup>49</sup> Cons. Stato Sez. V, Sent., 17/10/2016, n. 4272; Cons. Stato Sez. V, Sent., 24/05/2017, n. 2445; Cons. Stato Sez. V, Sent., 29/10/2018, n. 6131; Cons. Stato Sez. V, Sent., 26/01/2021, n. 788.

#### 4.2 MANDATORY GPP CRITERIA: MINIMUM ENVIRONMENTAL CRITERIA (CAMS)

For a long time, due to the high level of mafia infiltration in public contracts, the predominant horizontal consideration in Italian public procurement was anti-corruption. However, public procurement was not completely oblivious to GPP. Since the late 90s, there has been differing legislation mandating environmentally conscious purchases, such as the use of recycled materials or organic production, but the requirements consisted of annual targets rather than purchase-specific criteria.<sup>50</sup>

The National Action Plan on GPP, adopted following the Commission's call was a turning point as it introduced minimum environmental criteria (*Criteri ambientali minimi* – CAM) for certain categories of purchases. While they were not initially binding on contracting authorities, with several legislative changes to the then-applicable Code, they have become binding under the title of 'energy and environmental sustainability criteria'.<sup>51</sup> CAMs, currently more than 20, are adopted per sector with decrees, are similar to the Commission GPP criteria and may also include social criteria.<sup>52</sup> They are regularly updated based on the 'maturity of the market segment, the public expenditures volume and the potential environmental impacts'.<sup>53</sup>

The public procurement legislation in Italy underwent a major change in 2023. Environmental sustainability was given a predominant role even before the formal adoption of the new Code through the Law delegating to the government.<sup>54</sup> Some of its objectives were achieving the goals of the UN 2030 Agenda for Sustainable Development and increasing sustainable activities in line with the Union's Taxonomy Regulation. Nevertheless, though the new Code kept the mandatory GPP criteria, sustainability or sustainable development did not make it to the text of the Code as a principle. This was discouraging, considering the importance given to principles under the new Code.<sup>55</sup> However, the Council of State acknowledged that a public contract is not simply a means for the administration to procure goods, services and works but a multi-purpose instrument functional to the

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<sup>50</sup> 'Regional Guidebook on Circular Procurement – Italy', 26 fn 71 <[https://projects2014-2020.interregeurope.eu/fileadmin/user\\_upload/tx\\_tevprojects/library/file\\_1622539554.pdf](https://projects2014-2020.interregeurope.eu/fileadmin/user_upload/tx_tevprojects/library/file_1622539554.pdf)> accessed 30 March 2025.

<sup>51</sup> For historical development of CAM see Stefano Colombari, 'Le considerazioni ambientali nell'aggiudicazione delle concessioni e degli appalti pubblici' (2019) 1 *Urbanistica e appalti* 5, 16-17; Roberto Caranta and Sofia Marroncelli, 'Gli appalti pubblici tra mitigazione e resilienza: il contributo del gpp alla lotta contro i cambiamenti climatico' (2021) 1 *Rivista giuridica dell'ambiente* 83.

<sup>52</sup> See CAM Vigenti <<https://www.mase.gov.it/portale/cam-vigenti>> accessed 3 November 2025. More on the CAMs, see Rosaria Costanzo, 'Lo sviluppo sostenibile negli appalti pubblici. I criteri ambientali minimi' (2023) 1 *Rivista Giuridica AmbienteDiritto.it* 1; Ilaria Baisi, 'Impresa ed economia circolare: una rilettura della contrattazione ecologicamente orientata alla luce del nuovo Codice dei contratti pubblici?' (2024) 3 *Rivista scientifica trimestrale di diritto amministrativo* 1233; Federico Francesco Guzzi, 'La rilevanza ambientale nel settore dei contratti pubblici?' (2024) 2 *Rivista Giuridica AmbienteDiritto.it* 1.

<sup>53</sup> Giulia Botta, 'Italy: Leading the Way Towards Mandatory Sustainable Public Procurement through Minimum Environmental Criteria' in Willem Janssen and Roberto Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law* (Hart Publishing 2023) 195-196.

<sup>54</sup> Law 78/2022.

<sup>55</sup> Andrea Maltoni, 'Contratti pubblici e sostenibilità ambientale: da un approccio "mandatory-rigido" ad uno di tipo "funzionale"?' (2023) 3 *CERIDAP* 64, 82.

implementation of public policies.<sup>56</sup>

The new Code provides that, in order to contribute to the achievement of the environmental objectives, technical specifications and contract clauses in the CAMs should be incorporated in the tender documentation.<sup>57</sup> Other criteria to be found under CAMs, particularly award criteria, are to be taken into consideration, which does not establish a rigid obligation rather incentivises it.<sup>58</sup> Similar green criteria can be used by analogy in purchases with different subject matter.<sup>59</sup> CAMs not only aim for the reduction of environmental externalities but also the promotion of sustainable and circular production and consumption, as well as the development of green employment.<sup>60</sup>

#### 4.3 APPLICATION AND ENFORCEMENT OF MANDATORY GPP CRITERIA

The proactive role of the Italian judiciary has been crucial in giving effect to the CAMs.<sup>61</sup> The Council of State established that they constitute immediately binding obligations on the contracting authorities.<sup>62</sup> The obligation incumbent on the contracting authorities under the Code is not simply to pursue environmental sustainability but to do so through the CAMs.<sup>63</sup> Their incorporation in tender documents serves a dual purpose: (i) to provide economic operators with the necessary elements to formulate their tender and (ii) to ensure that the procedure contributes to the evolution of public procurement from a mere instrument for the acquisition of goods and services to an instrument of economic policy.<sup>64</sup> Moreover, contracting authorities should factor these obligations in when determining the tender value.<sup>65</sup>

CAMs should be included in the tender notices from the outset, where the contracting authority's failure to do so prejudices the legitimacy of the procedure.<sup>66</sup> Errors in the application of the criteria may lead to annulment of the tender notice, as well as the contract award decision.<sup>67</sup> Moreover, the potential remedy of ineffectiveness of concluded contracts is utilised by the judiciary in the enforcement of CAMs.

A case before the Council of State concerned a tendering procedure where the public buyer failed to include relevant criteria, even though the purchase fell under the scope of

<sup>56</sup> Cons. Stato Sez. III, Sent., 29/12/2023, n. 11322.

<sup>57</sup> Art 57 Italian Public Contracts Code.

<sup>58</sup> See Cons. Stato Sez. III, Sent., 17/04/2018, n. 2317.

<sup>59</sup> Botta (n 53).

<sup>60</sup> Cons. Stato Sez. V, Sent., 05/08/2022, n. 6934.

<sup>61</sup> Giuseppe Franchina, 'Contratti pubblici e criteri ambientali minimi' (2002) 2 *Rivista Giuridica AmbienteDiritto.it* 1, 12; Aura Iurascu, 'How Will the Adoption of Mandatory GPP Criteria Change the Game?' (2023) 18 *European Procurement & Public Private Partnership Law Review* 6, 15.

<sup>62</sup> Cons. Stato Sez. V, Sent., 03/02/2021, n. 972; Cons. Stato Sez. III, Sent. 20/03/2023, n. 2799. See also Cons. Stato, III, 21/01/2022 n. 397; Cons. Stato Sez. V, Sent., 10/11/2022, n. 9879 and TAR Lazio Roma Sez. II ter, Sent., 06/03/2024, n. 4493 in case of a lack of reference in the documents.

<sup>63</sup> Cons. Stato Sez. V, Sent., 03/02/2021, n. 972.

<sup>64</sup> Cons. Stato Sez. III, Sent., 20/03/2023, n. 2799.

<sup>65</sup> Cons. Stato Sez. V, Sent., 27/11/2019, n. 8088.

<sup>66</sup> Cons. Stato Sez. III, Sent., 20/03/2023, n. 2795. Whether the obligations arising from CAMs can be considered automatically incorporated in the contract pursuant to the Civil Code has been discussed, see Massimiliano Pinti, 'L'insostenibile leggerezza dei Criteri ambientali minimi. La difficile integrazione delle istanze ambientali nell'ambito dei contratti pubblici' 2022(3) *Rivista Quadrimestrale di Diritto dell'ambiente* 192, 203.

<sup>67</sup> Cons. Stato Sez. V, Sent., 05/08/2022, n. 6934.

applicable CAMs.<sup>68</sup> In the tender documents, there was simply a generic reference to the law applicable. Following the contract award, one of the tenderers brought an action before the regional administrative court by alleging the wrongful application of the Code regarding CAMs. Not only that the Council of State established the procedure should be annulled, but as the public contract was concluded in the meantime, also declared the contract ineffective.

In another case, unlike the above-noted case, in the tender documents, there was a mere reference in the tender requirements to the relevant CAM decrees. The regional administrative court established that such a reference is adequate since a tenderer can formulate an informed offer.<sup>69</sup> However, the Council of State established that the reference to the relevant decrees without incorporation of the criteria in the tender documentation is not sufficient to consider the relevant obligation on CAMs complied with and decided to annul the tender documents.<sup>70</sup>

Another matter giving rise to uncertainties in the enforcement of mandatory GPP criteria in Italy is the time of challenge to the non-incorporation or mis-incorporation of CAMs. While the majority of the Council of State case law established that such a breach does not call for an immediate challenge of the tender notice;<sup>71</sup> there were also cases reaching a different conclusion.<sup>72</sup> The Council of State most recently established that whether an immediate challenge of the breach is necessary depends on its effect on the participation and tender preparation.<sup>73</sup>

Additionally, though a contracting authority incorporates CAMs in the procedure, a tenderer may fail to respect them in their bids. In this context, the failure of a tenderer to produce documentation relating to compliance with CAMs could be penalised with exclusion at the award stage.<sup>74</sup> In the scenario that the selected tenderer should have been excluded for failure to comply with CAMs, the award of a contract to a tenderer that should have been excluded will be subject to review procedures. However, unlike the above-mentioned cases, in such a situation, the illegality does not arise from the lack of CAMs.

For instance, in the case of a contract awarded to a tender that does not comply with CAM, even where the contracting authority provided them in the tender documents, the Council of State declared the contract ineffective, and the contract was taken over by

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<sup>68</sup> Cons. Stato Sez. III, Sent., 14/10/2022, n. 8773.

<sup>69</sup> TAR Campania Naples I, Sent., 15/01/2024, n. 377. On the same line see TAR Lazio II-ter, Sent., 06/03/2024, n. 4493.

<sup>70</sup> Cons. Stato Sez. III, Sent., 27/05/2024, n. 4701. But see TAR Lazio I, Sent., 26/11/2024 n. 21224.

<sup>71</sup> Cons. Stato Sez. V, Sent., 03/02/2021, n. 972; Cons. Stato Sez. V, Sent., 05/08/2022, n. 6934; Cons. Stato Sez. III, Sent., 14/10/2022, n. 8773; Cons. Stato Sez. III, Sent., 20/03/2023, n. 2795; Cons. Stato Sez. III, Sent. 20/03/2023, n. 2799; Cons. Stato Sez. III, Sent., 27/05/2024, n. 4701; Cons. Stato Sez. III, Sent., 30/12/2024, n. 10473.

<sup>72</sup> Cons. Stato Sez. V, Sent., 04/04/2023, n. 3542; Cons. Stato Sez. V, Sent., 18/04/2025, n. 3411.

<sup>73</sup> Cons. Stato Sez. V, Sent., 25/07/2025, n.6651; Cons. Stato Sez. V, Sent., 08/10/2025 n.7898. (i) In case of a total absence of CAMs in the tender documents, this constitutes a serious deficiency in data necessary for preparing an offer and therefore calls for an immediate challenge of the tender notice; (ii) In case there is only a generic reference to the relevant CAM decrees, the need for an immediate challenge depends on whether the omission created a serious deficiency affecting offer formulation; and (iii) In case CAMs are incompletely or inconsistently applied, an immediate challenge is necessary only if it can be shown that such defects effectively hindered participation in the procedure.

<sup>74</sup> Cons. Stato Sez. V, Sent., 26/04/2022, n. 3197. However, provided that there is an undertaking at the award stage, assessment of factual compliance with the CAMs can also be placed at post-award, see Cons. Stato Sez. III, Sent., 21/01/2022, n. 397; Cons. Stato Sez. V, Sent., 04/03/2025, n. 1857.

the tenderer that came second.<sup>75</sup> This option gives an additional incentive to interested economic operators in bringing review procedures where the breach does not arise from non-incorporation of CAMs in the tender documents by the contracting authority. In synopsis, the peculiarities of the Italian public procurement remedies system admit intervention in concluded contracts for the sake of enforcement of CAMs, supplemented by the potential of takeover by other tenderers.

## 5 MANDATORY GPP CRITERIA IN NORWAY

### 5.1 PUBLIC PROCUREMENT AND ENFORCEMENT

As part of the EEA, Norway is under the obligation to transpose, amongst many others, rules on public procurement and remedies. As it currently stands, the applicable legislation is the Public Procurement Act<sup>76</sup> and Public Procurement Regulation,<sup>77</sup> both of which entered into force in 2017 but have been amended since then.<sup>78</sup> While the Act is more general and contains the main principles, detailed rules are to be found in the Regulation.<sup>79</sup>

Enforcement is regulated by the Public Procurement Act. In the transposition of the Remedies Directive, Norway, in principle, left the enforcement of public procurement to the jurisdiction of courts; civil courts have jurisdiction to hear disputes on public procurement.<sup>80</sup> District courts are first-instance courts, the judgments of which can be appealed before the Appeal Courts and then the Supreme Court. Nevertheless, the Public Procurement Complaints Board (KOFA), an administrative organ with court-like roles, functions as a ‘quasi-court’ in the enforcement of public procurement rules.<sup>81</sup>

KOFA is, in principle, an advisory body; however, it can impose an administrative fee in cases of illegal direct awards.<sup>82</sup> KOFA may advise that the tender procedure should be cancelled if errors have been made that may have affected the outcome of the competition or the interest of the participants, and which cannot be corrected in any other way than by cancellation.<sup>83</sup> It is accepted that KOFA *de facto* functions as the most important enforcement

<sup>75</sup> Cons. Stato Sez. III, Sent., 2/11/2023, n. 9398.

<sup>76</sup> Norwegian Public Procurement Act 2016/73.

<sup>77</sup> Norwegian Public Procurement Regulation 2016/974.

<sup>78</sup> It should be noted that the structure of the public procurement legislation is planned to change, see NOU 2023: 26 Ny lov om offentlige anskaffelser - Første delutredning; NOU 2024:9 Ny lov om offentlige anskaffelser - Andre delutredning.

<sup>79</sup> NOU 1997:21 111 Offentlige anskaffelser 129.

<sup>80</sup> All procedures that are not criminal or special fall under civil jurisdiction, see Anna Nylund, *Civil Procedure in Norway* (Wolters Kluwer International 2020) 20–22.

<sup>81</sup> *ibid* 33; Marius Mikkjel Kjølstad, Sören Koch, and Jørn Øyrehagen Sunde, ‘An Introduction to Norwegian Legal Culture’ in Sören Koch and Marius Mikkjel Kjølstad (eds), *Handbook on Legal Cultures* (Springer International Publishing 2023) 808.

<sup>82</sup> Established in 2003, KOFA is mainly an advisory body, and its decisions are not normally binding. Yet, in 2007, it was given the authority to issue administrative fines for cases of illegal direct awards. Following the amendment in the Remedies Directive introducing new remedies, KOFA’s power over illegal direct awards was repealed. However, after the change, the number of cases of illegal direct awards before the courts has decreased. The abolition of the powers of KOFA on illegal direct award following the 2007 amendment of the Remedies Directive hindered the effectiveness of the system foreseen with the Remedies Directive. In 2017, the power of KOFA to impose administrative fees in case of illegal direct award was established again. See Prop. 51 L (2015–2016) Proposisjon til Stortinget (forslag til lovvedtak) Lov om offentlige anskaffelser (anskaffelsesloven) 66.

<sup>83</sup> KOFA referring to HR-2019-1801-A.

body, with 89.8 % of the public buyers reported to follow its advisory opinions.<sup>84</sup>

## 5.2 MANDATORY GPP CRITERIA: 30 PER CENT WEIGHTING TO CLIMATE AND ENVIRONMENT

The so-called principle of sustainability finds a solid national equivalent in Norway. Though not provided alongside principles, the provision titled ‘environment, human rights and other social concerns’ introduces obligations to state authorities, county and municipal authorities and bodies governed by public law to procure sustainably.<sup>85</sup> Said authorities should consider reducing their adverse environmental impact and promoting climate-friendly solutions when relevant, as well as have appropriate routines to promote respect for human rights in case of risk.<sup>86</sup>

Similar to its European counterpart, what the provision entails is not clear. While it is ambiguous what ‘when relevant’ refers to, it is also unclear what stage of procurement is referred to.<sup>87</sup> The provision could be read as an obligation concerning contracting authorities at an organisational level to have aggregate requirements concerning their purchases.<sup>88</sup> Contracting authorities are expected to analyse which procurements entail higher risk, set requirements accordingly and follow up on those contracts; yet how contracting authorities design individual procurements to comply with this obligation is left to their discretion.<sup>89</sup>

In the past, mandatory sustainability requirements in Norway were predominantly focused on the fight against social dumping, especially following the widening of the EU to Eastern Europe.<sup>90</sup> Until recently, GPP requirements were not as ambitious.<sup>91</sup> Before the recent change, the Regulation provided that, where relevant, contracting authorities should include criteria to reduce environmental impact and promote climate-friendly solutions; if the environment is used under the award criteria, it should be weighed at least 30%. Though it signalled the importance of GPP criteria, it was argued that the provision could not have been relied on before a court, as it was possible to deviate from it in case of factual circumstances.<sup>92</sup> However, since the amendment introduced to the Regulation, which

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<sup>84</sup> NOU 2024:9 (n 78) 216. Oslo Economics, Inventura og Advokatfirmaet Arntzen, ‘Samfunnsøkonomisk analyse av prekontraktuell håndheving av anskaffelsesregelverket ved klage til KOFA’ <<https://www.ks.no/fou-sok/2025/254022/>> accessed 9 November 2025.

<sup>85</sup> Section 5 of the Norwegian Public Procurement Act.

<sup>86</sup> On human rights considerations in Norwegian public procurement, see AC Jacobsen and N Backer Malm, ‘Norway Socially Responsible Public Procurement (SRPP) in Norway – Respect for Human Rights in Supply Chains’ (2017) 12(3) *European Procurement & Public Private Partnership Law Review* 365; Isabel M Borges, ‘Safeguarding human rights through public procurement law: recent developments in Norway’ (2018) 4 *Public Procurement Law Review* 121.

<sup>87</sup> The Nordic Council of Ministers, ‘Climate Accounting in Public Procurements Status in the Nordic Countries’ (2022) 21.

<sup>88</sup> Prop. 51 L (2015–2016) Proposisjon til Stortinget (forslag til lovvedtak) Lov om offentlige anskaffelser (anskaffelsesloven) 66; Tonje Platou, ‘Den rettslige rekkevidden av miljøkravet i lov om offentlige anskaffelser § 5’ (2021) 60(9) *Lov og Rett* 533, 539–540.

<sup>89</sup> Prop. 51 L (2015–2016) (n 88) 82–83, see also KOFA 2019/413 para 51; KOFA 2019/90 paras 24–29.

<sup>90</sup> NOU 2014:4 Enklere regler – bedre anskaffelser 92. Line Voldstad, Caroline Sandberg, and Morten Gullhagen-Revling, ‘Sosial dumping – ulovlig direkteanskaffelse?’ (2018) 57(6) *Lov og Rett* 378. These are provisions on wages and working conditions, workplace crime and limits in supply chain links.

<sup>91</sup> See The Norwegian Agency for Public and Financial Management, ‘Action Plan to Increase the Proportion of Green Public Procurements and Green Innovation’ (September 2021).

<sup>92</sup> Kristian Jåtog Trygstad, *Tildeling Av Offentlige Kontrakter Rettslige Vurderinger i Tildelingsfasen Ved Offentlige Anskaffelser* (2nd edn, Gyldendal akademisk 2017) 105.

entered into force in 2024, mandatory GPP criteria took a turn in Norway.

The amended Regulation provides that climate and environment (*klīma- og miljōbensyn*) requirements should be at least given a 30% weighting in the award criteria.<sup>93</sup> The aim of the provision is to reduce the procurement's overall climate footprint or environmental impact.<sup>94</sup> If the award criteria are to be listed according to the order of importance (either because it is not possible to give a relative weighting or the value of the procurement is below the threshold), climate and environment should be among the top three. If the climate and environmental criteria cannot be given the required priority, climate and environmental requirements should be incorporated under technical specifications.

There are two main exceptions to the 30 % requirement. First, if it is clear that it provides a better climate and environmental impact, the environmental and climate considerations can be set under technical specifications, provided that they are justified in the procurement documents. Second, the obligation to set climate and environmental award criteria does not apply if, due to the nature of the procurement, its effect on climate and environment is insignificant. In terms of the content of the requirement, climate and environment should be understood broadly, and it is within the buyer's discretion to assess which characteristics should be emphasised under the award criteria and how much emphasis should be placed on the various characteristics.<sup>95</sup> The 30% requirement also does not preclude contracting authorities from giving greater weight to climate and environment.<sup>96</sup>

### 5.3 APPLICATION AND ENFORCEMENT OF MANDATORY GPP CRITERIA

As noted above, the 30% requirement is considerably recent to have a solid jurisprudence on application and enforcement. The fact that there was no preparatory work, provides an additional ambiguity.<sup>97</sup> Nevertheless, much of the question marks concerning the exceptions to 30% requirement has been clarified with guidance from the Norwegian Agency for Public and Financial Management (DFØ) as well as the recent KOFA cases. For instance, based on the Guidance, the weighing of climate and environment under award criteria can take the form of a combination of different sub-criteria, which cumulatively can be given the weighting of 30% such as 15% emission-free and 15% waste minimisation.<sup>98</sup>

The first exception to the use of climate and environment under award criteria, i.e. the use of technical specifications for better impact is interpreted strictly by KOFA. To use this exception, (i) it must be clear that setting minimum requirements will have a better climate and environmental impact than using it as an award criterion, and (ii) this must be

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<sup>93</sup> Section 7.9 Norwegian Public Procurement Regulation. The amendment concerning 30% weighing in award criteria should be seen in light of the simultaneous amendment of the rules on award criteria, which now provides that contracting authorities should award the contract to the tender with the best price/cost and quality ratio. If climate and environmental criteria are not used as award criteria, then the contract can be awarded based on the lowest price or lowest cost see 18 Section Norwegian Public Procurement Regulation.

<sup>94</sup> Requirements and criteria under this provision shall aim to reduce the procurement's overall climate footprint *or* environmental impact (emphasis added), see KOFA 2024/639 para 32.

<sup>95</sup> TOSL-2024-173447.

<sup>96</sup> KOFA 2024/912 para 22.

<sup>97</sup> KOFA 2024/1387 para 22.

<sup>98</sup> DFØ, 'Veileder Til Regler Om Klima- Og Miljøhensyn i Offentlige Anskaffelser' <<https://anskaffelser.no/verktoy/veiledere/veileder-til-regler-om-klima-og-miljohensyn-i-offentlige-anskaffelser>> accessed 3 November 2025 (DFØ Guidance).

justified in the procurement documents.<sup>99</sup> Contracting authorities are required to compare different measures and assess their respective climate and environmental impact.<sup>100</sup> Even a marginally better climate and environmental impact is acceptable.<sup>101</sup> In the determination of technical specifications, clearly having a better impact, the value of the procurement and the size of the impact should be taken into consideration.<sup>102</sup> The reason why technical specifications are used should be justified in the procurement documents, to the extent that KOFA may establish a breach due to a lack of justifications, even if technical specifications *do* provide a better impact than using the award criteria.<sup>103</sup>

In the determination of better impact, the maturity of the respective market is a highly relevant factor. For instance, in a market where all suppliers can meet the same requirements, setting this requirement under technical specifications rather than award criteria brings a better impact.<sup>104</sup> However, if absolute requirements in technical specifications are set significantly lower than what the market could offer, their better impact becomes questionable.<sup>105</sup> In order to understand the market, contracting authorities should ensure a sufficient knowledge base, which could be obtained through, amongst others, market dialogue.<sup>106</sup>

Nevertheless, in a recent court case, referring to some of the above-cited KOFA cases, the Oslo district court established that in the determination of the better climate and environmental impact of technical specifications, KOFA's standard of review has been too rigid.<sup>107</sup> The court noted that the measurability of the environmental and climate impact is based on difficult assessments; it should be left to the contracting authority's purchasing discretion to a greater extent. It added that a very strict oversight on the contracting authority's assessment will preclude contracting authorities from resorting to use this exception.

To what extent the breach of the 30% requirement due to wrongful application of this exception calls for the annulment depends on the facts of the case. KOFA will establish that the procedure should be cancelled if the breach affects the competition due to the impact of award criteria in determining participation of economic operators and formulation of tenders.<sup>108</sup> Similarly in case of lack of justification, cancellation is called for if the competition was affected.<sup>109</sup> Nevertheless, after establishing breach, KOFA may advise that there is no obligation to cancel if the error did not affect the competition.<sup>110</sup> For instance, breach of duty to justify the use of technical specification may not require cancellation on the basis that even if the justification were included in the procurement documents the conditions of the competition would have been same.<sup>111</sup>

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<sup>99</sup> KOFA 2024/639.

<sup>100</sup> DFØ Guidance (n 98).

<sup>101</sup> KOFA 2024/1387 para 24.

<sup>102</sup> KOFA 2025/666 para 27.

<sup>103</sup> See for instance KOFA 2025/766.

<sup>104</sup> DFØ Guidance (n 98); KOFA 2024/1387 para 23.

<sup>105</sup> KOFA 2025/322.

<sup>106</sup> KOFA 2025/356 para 28.

<sup>107</sup> TOSL-2025-88304.

<sup>108</sup> KOFA 2025/910.

<sup>109</sup> KOFA 2025/819; KOFA 2024/1339; KOFA 2025/999.

<sup>110</sup> KOFA 2025/666.

<sup>111</sup> KOFA 2025/726; KOFA 2025/766.

Another exception to the use of climate and environment in award criteria with 30% weighing is the case of insignificant burden of the procurement. As interpreted, this exception requires both climate footprint and environmental burden to be insignificant and these to be justified in the procurement based on the assessment of the nature of the procurement.<sup>112</sup> DFØ noted that the factual circumstance of the volume of the purchase is not a criterion for the significance.<sup>113</sup> According to the Guidance, some of these procurements are consultancy services and services in connection with training and education.<sup>114</sup>

In a dispute before KOFA, the contracting authority in question made use of this exception as the consultancy services were deemed by their nature to have an insignificant climate footprint and insignificant environmental impact.<sup>115</sup> One of the tenderers submitted that since the consultancy service concerned the purchase of electricity with associated portfolio management, the climate footprint and environmental impact cannot be considered insignificant; it would constitute green-washing. Referring to DFØ guidance, KOFA highlighted that the term ‘by its nature’ indicates that it will not be the specific procurement’s climate footprint and environmental impact that is relevant for the assessment but rather the general features of what is to be procured. KOFA established that because the purchase of electricity was outside of the scope of this procurement, the contract in question had an insignificant climate footprint and environmental impact.

Nevertheless, with a recent case concerning the procurement for a labour market training course, KOFA established that the conditions of the use of the exception were not fulfilled, because even though it was a procurement for training services, the training also encompassed the practical parts, such as driving heavy-duty vehicles, the impact of which on climate and environment cannot be deemed insignificant.<sup>116</sup> Due to the importance of the award criteria in the competition, KOFA called for the cancellation of the tender. In synopsis, due to the peculiarities of the Norwegian public procurement remedies system, there is scarcity of case law from the courts, but KOFA case law on the 30% is abundant which seem to be steering the practice based on its role of as the *de facto* enforcement body.

## 6 COMPARATIVE ANALYSIS TO EXPLORE AMBIGUITIES IN THE APPLICATION AND ENFORCEMENT OF MANDATORY GPP REQUIREMENTS

In the previous sections, the specific features of the Italian and Norwegian legal systems were examined, with a focus on the application and enforcement of mandatory GPP requirements. Building on those findings, this section first compares the characteristics of the mandatory GPP requirements in Italy and Norway. It then scrutinises the differences in the enforcement in the respective jurisdictions. The comparison aims to classify the various mandatory GPP requirements at the supranational level and forecast the challenges in Europe concerning their enforcement.

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<sup>112</sup> DFØ Guidance (n 98).

<sup>113</sup> DFØ Guidance (n 98).

<sup>114</sup> *ibid.*

<sup>115</sup> KOFA 2024/1422.

<sup>116</sup> KOFA 2025/801.

To begin with, Italy and Norway are not only geographically located on opposite sides of Europe but also represent different legal traditions, which not only impact the law itself but also the sources of law and how legal doctrine develops. In Italy, though case law is not considered a source of law in the strict sense of precedent, it plays a crucial role, especially with the ‘law-shaping power of judges’.<sup>117</sup> On the other side, in the Norwegian legal tradition, preparatory works are similar to commentaries on legal sources.<sup>118</sup> They are not only used in doctrinal works but also frequently cited in case law as an authoritative source. As seen above, while the Council of State case law carries a lot of weight in Italy, preparatory works or, in their absence, guidance documents from public institutions function as authoritative sources in Norway.

In terms of their historical development, in both jurisdictions, the current mandatory GPP criteria had voluntary origins. In Italy, the use of CAMs was initially discretionary, while in Norway, the 30% weighing requirement applied only if the environment is used under the award criteria. Out of the different types of mandatory sustainability requirements, both Italian and Norwegian requirements constitute minimum mandatory GPP criteria.<sup>119</sup> For the most part, the similarities of the chosen jurisdictions end here.

The Italian mandatory GPP criteria are to be incorporated in a tendering procedure, provided that there are criteria based on the subject matter of the purchase; as opposed to the Norwegian mandatory GPP criteria, which call for its incorporation of all purchases under the scope of the public procurement rules, regardless of the sector. This means that while the former is sectoral mandatory GPP criteria, the latter is horizontal mandatory GPP criteria.

In terms of the type of requirements, Italian CAMs are substantive requirements, as opposed to the Norwegian 30% requirement, which is more procedural, as the latter does not specify the substantive content of each sub-criterion. Nevertheless, the Norwegian 30% requirement cannot be considered fully procedural, as the criteria to be used by individual contracting authorities should, in any case, fall under the scope of climate and environment in terms of the content of the requirement. In comparison, substantive GPP requirements are ‘more muscular’ as they regulate ‘contracting authority’s demand’, whereas in procedural GPP requirements, contracting authorities have more discretion, the scope of which depends on the standard of judicial review.<sup>120</sup> As a result of this differentiation, while the litigation concerning mandatory GPP criteria in Italy is focused on procedural aspects such as the consequences of their non-incorporation, the disputes in Norway centre around the substance, i.e. the relevance of sub-criteria set under climate and environmental and the impact of individual contracting authorities’ decisions, where the limited court cases seem to indicate a greater discretion to contracting authorities.

In terms of the specific criteria used to incorporate mandatory GPP obligations, Italy uses technical specifications and contract clauses, as opposed to Norway, which employs

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<sup>117</sup> See Marinella Baschiera, ‘Introduction to the Italian Legal System. The Allocation of Normative Powers: Issues in Law Finding’ (2006) 34(2) *International Journal of Legal Information* 279.

<sup>118</sup> Kjølstad, Koch and Øyrehagen Sunde (n 81) 816.

<sup>119</sup> For the overview of typology, see Janssen, ‘Shifting Towards Mandatory Sustainability Requirements in EU Public Procurement Law’ (n 6) 17.

<sup>120</sup> Roberto Caranta and Willem Janssen, ‘Collective Reflections on the Future of Mandatory Sustainable Public Procurement’ in Willem Janssen and Roberto Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law* (Hart Publishing 2023) 257-258.

award criteria. As a result, while the former establishes absolute requirements to be complied with, the latter establishes a relational requirement, the exact obligation arising from which is only formed once the successful tenderer is chosen. The use of absolute requirements ensures a benchmark that cannot be outbid, whereas the use of relational requirements allows for more competition. However, this means that for Norway, it is possible that a contract could be awarded to a tenderer that does not incorporate any climate and environment requirements, if the its bid is low enough. On the other side, provided that the purchase concerns one of the relevant subject matters, a public contract in Italy will incorporate green requirements.

When it comes to the enforcement of mandatory GPP criteria, in Italy, the case law demonstrates that mandatory GPP requirements are enforced through the (threat of) remedy of ineffectiveness. This is far from surprising, as the concept of ineffectiveness is used loosely in Italian law. Even before the adoption of the remedy of ineffectiveness under the 2007 revision to the Remedies Directive, ineffectiveness was accepted as an autonomous concept determining the fate of a contract where the award decision has been annulled.<sup>121</sup> In the enforcement of CAMs, while the threat of ineffectiveness keeps contracting authorities alert concerning when and how CAMs should be applied, the possibility of a takeover encourages interested economic operators to police the application of the requirement by the contracting authorities.

In Norway, the combined effect of the fact that the 30% requirement is relatively new and the KOFA's role as the *de facto* enforcement body precludes an extensive assessment of court case law on procurement remedies. Taking into consideration the high rate of compliance with KOFA decisions, the assessment of its case law provides some answers, which unveil that there is a potential for annulment in case of non-application or mis-application of the 30% requirement based on the impact of this breach on competition. Nevertheless, unlike Italy, such annulment does not, but more importantly, cannot affect the fate of the concluded contracts.

In the KOFA cases assessed above, even though there is no obligation on the contracting authority to do so, it is often noted that the contract awarding entity has agreed to hold off on the contract conclusion.<sup>122</sup> Nevertheless, had the contracts the legality of which was challenged been concluded, it would not have been possible to intervene in the concluded contracts even by the courts, let alone KOFA. Such intervention in the concluded contracts beyond the Remedies Directive, as is the case in Italy, is incomprehensible in Norway. In fact, even the remedy of ineffectiveness, as is now regulated in the Remedies Directive, was objectionable in the Norwegian public procurement system when it was first introduced.

When the remedy of ineffectiveness was first proposed as an amendment to the Remedies Directive, Norway sent a letter to the Commission stating that this proposed remedy, a possible consequence for illegal direct awards, would breach the traditions of Norwegian contract law, as concluded contracts were protected.<sup>123</sup> Though this neither

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<sup>121</sup> Edoardo Chiti, 'Directive 2007/66 and the Difficult Search for Balance in Judicial Protection Concerning Public Procurements' (2010) 2 Italian Journal of Public Law 144.

<sup>122</sup> See for instance KOFA 2025/801; KOFA 2025/999; KOFA 2025/819.

<sup>123</sup> NOU 2010:2 Håndhevelse av offentlige anskaffelserp 51. For the sacredness of concluded contracts, see Treumer (n 19) 371.

prevented the 2007 amendment nor discharged Norway's obligation to transpose this remedy to its national law, Norwegian transposition limited ineffectiveness to the serious breaches listed in the Remedies Directive. As a result, even if disputes similar to those before the Council of State are taken before the Norwegian courts concerning the erroneous application of mandatory GPP criteria, the most the courts can offer is annulment and damages. Nevertheless, both in Italy and Norway, the severity of procurement remedies depends on the effect that the breach of mandatory GPP criteria had on the competitive nature, rather than the underlying objective of their incorporation in the contract.

To a large extent, the GPP requirements to be adopted at the European level with delegated and implementing acts are minimum mandatory criteria similar to Italy and Norway. However, there are also examples of procurement targets, such as Clean Vehicles Directive<sup>124</sup> or legislation that incorporates the potential of exclusion from public procurement as a penalty, such as the Deforestation Regulation.<sup>125</sup> Most of the minimum mandatory GPP criteria at the European level resemble the Italian mandatory GPP criteria, as they are predominantly sectoral and substantive minimum criteria, such as the ones signalled in Batteries Regulation<sup>126</sup> and Net-Zero Industry Act.<sup>127</sup> However, differently from Italian mandatory GPP criteria as well, they do not make a choice between absolute requirements and relational requirements but refer to multiple procurement criteria concerning what to buy, ie technical specifications, award criteria and performance conditions.

Departing from the majority, the Eco-Design for Sustainable Products Regulation<sup>128</sup> provides also for a requirement similar to the Norwegian 30% requirement as it stipulates award criteria to have a minimum weighting of between 15% and 30%. Differently from both Italy and Norway, some of the European legislation foresees the introduction of selection criteria such as the Construction Products Regulation<sup>129</sup> and the Regulation on Packaging and Packaging Waste.<sup>130</sup> However, in any case, since the final criteria are yet to be

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<sup>124</sup> Arts 3-5 of the Directive 2009/33/EC amended with Directive (EU) 2019/1161 of the European Parliament and of the Council of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles [2019] OJ L188/116.

<sup>125</sup> Art 25 Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 [2023] OJ L150/206.

<sup>126</sup> Art 85 of Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC (Text with EEA relevance) [2023] OJ L191/1.

<sup>127</sup> Art 25 Regulation (EU) 2024/1735 of the European Parliament and of the Council of 13 June 2024 on establishing a framework of measures for strengthening Europe's net-zero technology manufacturing ecosystem and amending Regulation (EU) 2018/1724 [2024] OJ L 2024/1735 (Net-Zero Industry Act).

<sup>128</sup> Art 65 Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC [2023] OJ L2024/1781.

<sup>129</sup> Art 83 Regulation (EU) 2024/3110 of the European Parliament and of the Council of 27 November 2024 laying down harmonised rules for the marketing of construction products and repealing Regulation (EU) No 305/2011 [2024] OJ L 2024/3110.

<sup>130</sup> Art 63 Regulation (EU) 2025/40 of the European Parliament and of the Council of 19 December 2024 on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC [2025] OJ L 2025/40.

adopted, there remains significant uncertainty.<sup>131</sup> An exception is the Heavy-Duty Vehicles Regulation,<sup>132</sup> which does not call for delegated law-making but directly provides the relevant criteria to be used by contracting authorities.

As the considerable portion of the mandatory GPP requirements at the European level resembles to the Italian sectoral substantive GPP criteria, the main challenge would arise mainly from procedural matters such as the consequences of failure of the contracting authority to incorporate said GPP criteria in tender documents or a tenderer's failure to comply with them in the competitive procedure. Whereas in GPP requirements where contracting authorities have more discretion like Norway, the challenge would be the extent of which review bodies can intervene. However, identifying the framework in which the relevant review procedures are to be carried out for the enforcement of mandatory GPP requirements is not as easy as categorising them.

As noted in Section 2, the Remedies Directive concerns the decisions of contracting authorities that allegedly 'have infringed the Union law in the field of public procurement or national rules transposing that law'. Both in Italy and Norway, the mandatory GPP criteria arise from the respective public procurement laws; hence there is no question concerning how they would be enforced. However, at the supranational level the same conclusion concerning the enforcement of mandatory GPP requirements is not easily drawn.

As the literal wording indicates, the Remedies Directive regulates the review procedures in case of the 'infringements of Union law in the field of public procurement'. The principal question concerning the enforcement of European GPP requirements is whether the European legislation from which these GPP requirements arose can be considered 'the Union law in the field of public procurement'. As also noted by Janssen, this is uncertain, as most of the above-mentioned legislation, though secondary legislation with public procurement relevance, is not necessarily legislation the main focus of which is public procurement.<sup>133</sup> Below are some arguments why it would be too generous to answer this question in the affirmative unless the Remedies Directive is amended.

To start, though the Remedies Directive is silent regarding this specific word choice of 'Union law in the field of procurement', preparatory documents for its latest revision stipulate that it regulates the review procedures 'in the event of infringement of the Public Procurement Directive[s]'.<sup>134</sup> The same can also be seen in the recent Commission studies, providing that the aim of the Remedies Directive is to provide rapid and effective procedures where it is alleged that contracts had been awarded in 'breach of Procurement Directive[s]' or 'infringement of Public Procurement Directive[s]'.<sup>135</sup>

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<sup>131</sup> Janssen, 'The Coherence of Public Procurement Legislation in the European Union' (n 43) 109.

<sup>132</sup> Art 3e of Regulation (EU) 2019/1242 of the European Parliament and of the Council of 20 June 2019 setting CO2 emission performance standards for new heavy-duty vehicles and amending Regulations (EC) No 595/2009 and (EU) 2018/956 of the European Parliament and of the Council and Council Directive 96/53/EC [2019] OJ L198/202; Regulation (EU) 2019/1242 as amended with Regulation (EU) 2024/1610.

<sup>133</sup> Janssen, 'The Coherence of Public Procurement Legislation in the European Union' (n 43) 111.

<sup>134</sup> Commission of the European Communities, 'Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts' COM(2006) 195 final 2.

<sup>135</sup> European Commission, 'Report from the Commission to the European Parliament and the Council on the Effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as modified by Directive 2007/66/EC, concerning the Review Procedures in the Area of Public Procurement' COM(2017) 28 final 2, 5; European Commission, 'Commission Staff Working Document Evaluation of the Modifications

Next, looking at its provision, the Remedies Directive not only mentions the breach of the Public Procurement Directive but also the breach of its own provisions to ensure effective review of the contracting authority's decisions taken under the Public Procurement Directive. To specify, it provides that, even where there is no breach of the Public Procurement Directive, the breach of the Remedies Directive's safeguards concerning the contract conclusion is also subject to penalties even when not combined with the breach of the Public Procurement Directive.<sup>136</sup> As a result, it could be argued that the reason why the scope of the Remedies Directive refers to 'Union law in the field of procurement' rather than the Public Procurement Directive is to reflect this and the potential of sanctions even where there is no breach of the Public Procurement Directive but a breach of the Remedies Directive itself.

Moreover, the International Procurement Instrument (IPI), another secondary legislation with public procurement relevance, explicitly incorporates that the Remedies Directive should apply accordingly.<sup>137</sup> The fact that even the IPI, the main focus of which is to regulate procurement is not automatically considered 'Union law in the field of procurement' but calls for such incorporation, makes it even more challenging to argue that secondary legislation the primary focus of which is not procurement, such as Heavy Duty Vehicles Regulation, automatically falls under the scope of the 'Union law in the field of procurement'. However, it is to be noted that for most of the legislation, the implementing and delegated acts are to be adopted, and the potential that they may refer to the Remedies Directive cannot be overruled. However, in case such referrals are not included in the legislation introducing mandatory GPP criteria, it is not an easy task to argue they fall under the scope of the Remedies Directive.

Even in the scenario that the Union law in the field of procurement is interpreted broadly, it is clear that in the case of contracts concluded in breach of mandatory GPP requirements, the focus of the current procurement remedies, under the Remedies Directive, is the protection of those with economic interests are at stake. What is less clear is to what extent the remedies contribute to the rationale of mandating green purchases. In this context, as noted in Section 2, the Remedies Directive was introduced because the effectiveness of the substantive rules depends on the protection of the rights incorporated with them rules through review mechanisms. Hence, if the interests protected in public procurement are becoming diversified, the enforcement cannot afford to fall behind both in terms of the scope of interested parties as well as the remedies available.

## 7 CONCLUSION

Making up a considerable percentage of the GDP, public procurement can play a significant

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Introduced by Directive 2007/66/EC to Directives 89/665/EEC and 92/13/EEC concerning the European Framework for Remedies in the Area of Public Procurement/ Refit Evaluation' SWD (2017) 13 final 12, 14, 45 and 54. See also Remedies Directive <[https://single-market-economy.ec.europa.eu/single-market/public-procurement/legal-rules-and-implementation/remedies-directives\\_en](https://single-market-economy.ec.europa.eu/single-market/public-procurement/legal-rules-and-implementation/remedies-directives_en)> accessed 3 November 2025.

<sup>136</sup> Art 2e Remedies Directive.

<sup>137</sup> Art 10 Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI) [2022] OJ L173/1.

role in the fight against climate change through reducing emissions, promoting circular economy and facilitating investment in green products, works and services. In this context, the legal framework of European public procurement, since the legislation of the 70s, allows incorporation of the environment-related requirements under the general term of GPP. Additionally, since the 90s, the Commission's soft law has been complementing this voluntary framework by demonstrating the ways in which green requirements can be incorporated in public procurement.

In the post-European Green Deal landscape, the discretionary character of GPP is evolving as more secondary legislation is being introduced mandating procurement to be green. Nevertheless, the fact that the mandatory GPP requirements at the supranational level, to a large extent, await adoption precludes a definitive assessment. Until then, the analysis of jurisdictions with a history of mandatory GPP criteria, i.e. Italy and Norway, provides insights for the application and enforcement of mandatory GPP requirements at the supranational level.

In this article, a comparative analysis between the GPP criteria from Italy, which is absolute, substantive and sectoral, and the GPP criteria from Norway, which is relational, relatively-procedural and horizontal, is used to categorise mandatory GPP requirements at the European level. While most of the recently introduced legislation foresees the adoption of GPP criteria similar to that of the Italian criteria, there are, exceptionally, some similarities also with the Norwegian experience. However, it is also possible to observe that while both Italy and Norway focus on specific what to buy decisions, supranational obligations on the GPP may also relate to targets or the use of the threat of exclusion from public procurement under sanction to enforce environmental law.

When it comes to enforcement, both Italy and Norway transpose the Remedies Directive and the respective mandatory GPP criteria are enforced accordingly as they are parts of national public procurement legislation. Nevertheless, based on their legal traditions, they also present peculiarities arising from how public procurement has been regulated and how those rules are enforced. While the former is not shy to intervene in the concluded public contracts if they were awarded in breach of mandatory GPP criteria, contracts concluded in breach of mandatory GPP criteria are shielded in the latter, potentially giving rise claim for damages.

In the enforcement of mandatory GPP requirements at the supranational level, there are further issues that should be addressed in the future. First is whether the legislation with the public procurement relevance from which mandatory GPP requirements arise can be considered to fall under the scope of the Remedies Directive. Second, whether the harmonised remedies provide adequate protection for the new interests being pursued with public procurement. Answers to both questions should steer the discussions on the revised enforcement system. However, if Europe is embracing a broader vision for public procurement, one that extends beyond the mere acquisition of goods, services, and works, and is prepared to introduce mandatory requirements to reflect this shift, enforcement should also be aligned accordingly, ensuring that remedies available keep pace with the evolving function.

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