

FINAL COMMENTS

Green Public Procurement “Compra Pública Verde” Research Group

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The following comments arise from an extensive research experience by our group; alongside practical insights gained from the Spanish public procurement market. This dual perspective—combining academic analysis with real-world implementation challenges—has revealed both the transformative potential and persistent limitations of the current EU framework.

As mentioned in the report Implementation of the OECD Recommendation on Public Procurement in the OECD and Partner Countries 2025 in recent years, the Signatories have become aware of the strategic role of public procurement as a tool to advance broad policy objectives, moving from being an administrative function to a central element of public governance. This shift requires aligning procurement with objectives that are central to national agendas, and which may include urgent economic, environmental, social and public interest objectives. Achieving these priorities, ensuring that they are not pursued at the expense of others amid fiscal constraints, requires robust methodologies to manage commitments and effectively assess policy impacts.

In this regard, we would like to make the following comments and ask that they be taken into consideration during the review process of the Public Procurement Directives.

1.	GREEN	3
1.2.	Reinforcing Strategic Public Procurement directly through the Core Procurement Directives	3
1.3.	Obstacles to connecting social and environmental considerations with the subject matter of the contract.....	3
1.4.	The urgent need of ecological technical specifications in provision with environmental impact	5
1.6.	Standardising at European level the methodology for the application of the concept of life cycle cost as an award criterion.	5
1.7.	Systematised weighting for strategic award criteria, including organic ones	6
1.8.	Introduce differentiated special conditions for the implementation of strategies and require an ecological condition in each harmonised contract (Conditions for performance of contracts)	6
1.9.	Ecological division of contract lots	7
1.10.	Definition of the terms of abnormality of the offers taking into account environmental vectors.....	7
2.	COHERENCE	8
2.1.	Urging for clear and mandatory sustainable public procurement.....	8
2.2.	Constitutional issues.....	8
2.3.	Coherency issues with secondary legislation	8
3.	CONCESSIONS	9
4.	DIGITALISATION	10
5.	MADE IN EUROPE	10
5.1.	Pleading for a mandatory European preference applicable in strategic sectors	10
5.2.	The need to articulate European preference with international trade	11
6.	BPQR	12

1. GREEN

1.2. Reinforcing Strategic Public Procurement directly through the Core Procurement Directives

The 2014 European public procurement Directives reflect a clear political commitment to conceiving public procurement as a strategic instrument. This approach does not imply abandoning the traditional objectives of public procurement or disregarding the rules of the internal market — such as competition, equal treatment or transparency — but rather integrating them with a deliberate intention to pursue broader objectives of general interest. In this regard, provisions such as Article 18 explicitly express the EU legislator’s willingness to promote, through public procurement, environmental, social and innovation-related considerations.

Experience gained over more than a decade of application of this legal framework shows that it has enabled meaningful progress in the integration of these strategic objectives, while also revealing the inherent limitations of a system that relies largely on voluntary mechanisms. In practice, the effective uptake of sustainability-related criteria by member States has been uneven and, in many cases, insufficient to achieve the objectives pursued.

Against this background, it appears necessary to take a further step and move towards a more structured and, in certain areas, mandatory integration of strategic objectives within public procurement law itself. Such a development should be articulated through the public procurement Directives, which should continue to serve as the organising backbone of the system, without prejudice to appropriate coordination with sectoral legislation, which in recent years has significantly expanded the environmental, social and economic obligations applicable to public contracts.

Nevertheless, overall coherence, systematic consistency and legal certainty require that the general public procurement framework itself set out the core principles, limits and mechanisms for this integration, rather than allowing the organisation of strategic procurement to depend exclusively on fragmented sector-specific developments

1.3. Obstacles to connecting social and environmental considerations with the subject matter of the contract

The main issue identified in Spain, as highlighted in the last two triennial reports on public procurement, concerns the divergent interpretation of the link between award criteria and the subject matter of the contract. This divergence, noted among the administrative review bodies, stems from different readings of Recital (92) of Directive 2014/24/EU, which states that “award criteria shall be formulated so as to allow a comparative assessment of the level of performance of each tender in relation to the subject matter of the contract, as defined in the technical

specifications.” Based on this wording, one restrictive interpretation argues that only criteria directly improving the performance or quality of the deliverable are admissible, whereas a broader approach allows consideration of social, environmental or innovation-related aspects linked to any stage of the contract’s life cycle.

The Spanish tribunals had considered that no comparative assessment can be made because the criterion itself does not add value to the performance and therefore is not linked to the subject matter of the contract. For example, an award criterion based solely on increasing wages or prices is deemed irrelevant, since such an improvement does not enhance the quality or performance of the contracted service.

In light of the interpretative difficulties revealed in administrative practice and in the case law of review bodies, it is necessary to emphasise that EU law itself already enshrines a broad conception of the requirement linking award criteria to the subject matter of the contract, particularly where social, environmental or innovation-related considerations are concerned. Nevertheless, experience shows that an excessively restrictive reading of this requirement has significantly limited the transformative potential of public procurement as an instrument of public policy.

Although the Directive expressly allows the link with the subject matter of the contract to relate to any stage of its life cycle, in practice a consolidated interpretation has emerged in some legal systems that identifies such a link exclusively with the direct and immediate improvement of the performance or technical quality of the service or works. This approach leads to the exclusion of social, labour or environmental criteria which, although related to the performance of the contract or to the conditions under which it is carried out, are not regarded as capable of being directly compared in terms of performance.

Consideration could therefore be given to a flexibilisation — or even an express attenuation — of the requirement of linkage to the subject matter of the contract in relation to certain objectives of general interest, shifting the centre of gravity from the strict improvement of the performance towards the contribution of the contract to legitimate public objectives, while fully respecting the principles of equal treatment, transparency and proportionality.

Finally, any of these options should be accompanied by clear interpretative guidance addressed both to contracting authorities and to review bodies, with a view to reducing the current fragmentation of approaches and strengthening legal certainty. Only through a more flexible and functional understanding of the requirement linking award criteria to the subject matter of the contract will it be possible to effectively integrate green and social considerations into public procurement without undermining the coherence of the system.

1.4. The urgent need of ecological technical specifications in provision with environmental impact

Although Article 42 of Directive 2014/24/EU allows them to be defined on the basis of their level of ecological performance, even when these factors do not form part of the material substance of the works, supplies or services, the obligation to link them directly and immediately with the subject matter of the contract as interpreted by the doctrine of the special courts of contractual appeals in Spain has an impact on the limitation of its practical application.

The configuration of an annex to the Directive with a list of CPVs with an environmental impact would make it possible to consider a priori such ecological link with the object of the contract when determining, in advance, those public services with an environmental impact. In addition, this singularization of the services selected through CPV to guarantee the practical application of European environmental policies, in line with the DNSH principle, should be selected in order to integrate with those European products and services already available with the European Ecolabel so that; the interests of the public procurement principle on European preference and the principles derived from environmental sustainability are aligned.

1.5. Standardising at European level the methodology for the application of the concept of life cycle cost as an award criterion.

Normative and methodological heterogeneity generates inefficiencies and uncertainty for applying life-cycle cost as an award criterion. One of the greatest handicaps when applying the award criterion related to life cycle cost is in the methodology for its calculation. Recital 96 of Directive 24/2014 determines the methods used by contracting authorities to assess the costs attributed to external environmental factors and opts for their determination at national, regional or local level. It warns of the appearance of distortions of competition.

All these caveats and complexities in determining the method of calculating the life cycle cost have devalued its practical application, since neither the market is prepared to collect such environmental information nor are the contracting authorities prepared to evaluate it.

The methodology should be committed to the coherence and coordination of minimum homogeneous data at European level based on all the ecological data already available at EU level and to allow a common method, not only to study its viability.

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1.7. Systematised weighting for strategic award criteria, including organic ones

Different European regulations, such as Article 65 of Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the establishment of eco-design requirements for sustainable products, modulate the configuration of the eco-award criteria, a weighting between 15 and 30 percent of the total score of the bids submitted.

This generalist approach is not coordinated or coherent in all environmental sector regulations, including delegated and executive acts, which forces public procurement managers to decide without objective arguments what weighting they assign to each ecological award criterion, creating complexity and compliance barriers.

Proposing a systematisation of this weighting would facilitate its implementation as well as generalising a weighting relevant enough to privilege those ecological products and services of European companies in line with the principle of made in Europe. In this way, the ecological commitments of European regulations would be transferred to public services executed through a public contract.

1.8. Introduce differentiated special conditions for the implementation of strategies and require an ecological condition in each harmonised contract (Conditions for performance of contracts)

Chapter IV of Directive 24/2014, specifically Article 70, sets out the conditions for the performance of contracts. Special conditions relating to the performance of contracts may be laid down, provided they are linked to the subject matter of the contract as defined in Article 67(3). These conditions may include economic or innovation-related considerations, as well as environmental, social, or labour-related considerations.

This possibility should be extended, at least to strategic European sectors or harmonised procurement. It is therefore proposed that at least one special condition relating to differentiated performance in environmental matters be incorporated. This would ensure that the measures

for executing public contracts promote European cohesion and environmental protection policies, thereby supporting these strategic areas in particularly relevant public contracts.

Special performance conditions are proposed as they are less detrimental to competition. The Spanish experience is a good example of this, as it introduces the obligation to incorporate at least one special condition related to innovation, whether environmental or social (Article 202 of the Public Sector Contracts Act).

1.9. Ecological division of contract lots

This possibility provided for in *Article 46* of Directive 24/2014 on the division of contracts into lots, wherein contracting authorities may choose to award a contract in the form of separate lots, and may decide on the size and purpose of those lots, is a strategic measure that, in principle, was intended to improve the accessibility of SMEs to public procurement. Another of the indirect objectives of this possibility is the definition of one of the lots with a marked ecological character so that the market or economic sector affected would have to bet on more ecological options in its offer and allow the contracting authorities a gradual greening of these goods, works and services through these green lots. Incorporating this possibility as an obligation so that, for those harmonised contracts, at least one lot must be divided and that this lot has a more ecological purpose than the rest would allow a gradual modification of the economic operators themselves and improve public service with a lower environmental impact

1.10. Definition of the terms of abnormality of the offers taking into account environmental vectors

In contracts where ecological award criteria are defined under Article 67, the assessment of abnormally low tenders should also take into consideration environmental performance factors, ensuring that the proposed level of ecological commitment is realistic and feasible within the contract's execution. The evaluation of abnormality should therefore not rely solely on price or other cost-related elements but also on the viability of meeting the stipulated environmental requirements.

Although current directives allow for such assessments, introducing a structured and harmonised methodology would help evaluation bodies apply consistent criteria that integrate ecological feasibility. This would strengthen the environmental dimension of tender assessments and exclude bids that cannot realistically achieve the required ecological performance standards.

2. COHERENCE

2.1. Urging for clear and mandatory sustainable public procurement

While eliminating it would be unreasonable, Article 18(2), in its current formulation, is ineffective. Its wording is unclear, and the legislator itself did not seriously consider rigorous enforcement during the scrutiny of the Directive's implementation as demonstrated by the very uneven transposition of the latter across the Member States (MS). Indeed, if the ultimate goal is to ensure *environmental protection* through public procurement, MSRs already possess considerable potential, provided they are correctly leveraged. As stated above, a more direct approach to environmental goals could be achieved by introducing mandatory green procurement in the procurement directives, percolating the MS procurement systems.

The EU legislator should clarify whether the Sustainability Principle applies to the procedure – and in that case, modify provisions of the Directives accordingly – or the execution of the contract, ensuring that, in case of considerable violations of such obligations, the contract is concluded.

2.2. Constitutional issues

While legislative coherence is important, in practice the main challenge does not only lie in the formal location of “how and what to buy” provisions, but in their accessibility and usability by contracting authorities. Maintaining sector-specific rules while ensuring the removal of inconsistencies could be an effective approach, provided it is complemented by a comprehensive, regularly updated Commission guidance that consolidates all relevant ‘how’ and ‘what’ procurement requirements across sectors in a single operational framework.

Decisions on integrating “how and what to buy” requirements also depend on the value attributed to their location in environmental legislation, often adopted under Articles 191–193 TFEU. Their inclusion reflects a policy choice treating procurement as an environmental instrument, which may be weakened if absorbed into a general market-based framework, unless the legal base of the revised Directive(s) is also going to change.

In addition, future sector-specific sustainability requirements should be drafted in full coherence with the terminology, structure and core principles of the Public Procurement Directives to prevent interpretative inconsistencies.

2.3. Coherency issues with secondary legislation

Among the issues to be addressed in terms of consistency between the Procurement Directives and secondary legislation containing Mandatory Sustainability Requirements, two seems particularly urgent.

First, the EU Deforestation Regulation (EUDR) – and, similarly, the Proposal for a Green Claims Directive – establishes in Article 25 that failure to comply with EUDR obligations must result in the exclusion, for a maximum period of a year from procurement procedures. Nonetheless, it does not specify whether the exclusion is to be intended from all procedures or rather only from those whose estimated value is equal or higher to those established in the procurement directives and that imply the application of those rules as well. Furthermore, Article 25 ultimately creates a new exclusion ground for violation of an environmental obligations which clashes with the fact that, within Directive 2014/24 exclusion for such reasons is not mandatory. Is therefore the time to perhaps render Article 57(4) mandatory, also considering a revision of Article 18(2) (see below)?

Second, the EED also contains procurement-related provisions that require clarification. In particular, the joint interpretation of Article 7(1) and Annex IV(a) EED, read together with Article 7(2) of the Energy Labelling Regulation (ELR), raises concerns. A literal reading may suggest that contracting authorities are allowed to purchase only products that both fall within the scope of a delegated act under the ELR and benefit from national incentives. Such an interpretation would be unduly restrictive, and it remains unclear whether “incentives” refer exclusively to financial support schemes or whether the strategic use of public procurement may itself qualify as an incentive. Conversely, a broader interpretation—more consistent with the overarching objective of promoting energy efficiency—would decouple the purchase obligation from the actual existence of incentives and focus instead on the product’s energy class. This approach would better reflect the environmental purpose of the provision and allow for a broader and more effective application of energy efficiency criteria in public contracts.

The EED also extended the application of the Energy Efficiency First principle to public procurement. However, significant uncertainty remains regarding its practical implementation and legal implications. In particular, it would be useful for the EU legislator to clarify whether the principle applies to the pre-procurement phase, the award phase, or both. Further clarification is also needed on whether the reference to cost-benefit analyses implies that Member States may require the use of life-cycle costing as an award criterion for contracts with an EED-relevant subject matter.

3. CONCESSIONS

Firstly, the regulatory framework of the Concessions Directive must be reviewed due to the insufficient clarity of the concept of operational risk. The ambiguity in its definition and the criteria for correctly identifying and distributing it has led to significant practical difficulties, which has limited its widespread use. Experience has shown a particular tendency to avoid effectively transferring demand risk, instead opting for contractual arrangements that reduce or neutralise this risk. However, the determining factor should be the need to ensure that a real and effective risk is transferred to the concessionaire, to the necessary extent and in line with the project's reality, rather than the specific nature of the risk — demand or supply. Without this substantial transfer, the concession is meaningless and cannot be properly distinguished

from other contractual modalities. This justifies regulatory clarification to reinforce legal certainty and encourage its use.

Secondly, it is essential to expressly incorporate the obligation to integrate sustainability as a structural element in large public-private partnership projects. Such contracts are typically associated with vital public infrastructure and services and have a significant environmental impact, directly affecting areas such as waste management, public asset protection, transport and mobility, and the environment in general. Furthermore, these are long-term contracts in which decisions made in the initial phase have a significant impact on the project's medium- and long-term outcomes. In this context, it is entirely reasonable to require these projects to incorporate environmental, social and economic sustainability criteria, thereby promoting efficient and responsible investment in line with the objectives of ecological transition and sustainable development.

4. DIGITALISATION

Currently, even at the national level, national procurement platforms present barriers to accessing tenders and procedural data. In the era of Big Data and AI, it is essential to have reliable economic, technical, and legal data on tenders, and this data must be available to bidders and citizens; not only to guarantee transparency, but also as a solid foundation for developing IT tools that optimize and facilitate public procurement processes. Regulation should advance towards an integrated and unique European procurement platform to ease and simplify market operation and administrative interoperability across MS.

One potential impact to consider is the need for training and adaptation of public managers to the new platform. Delays and complications in its implementation are very likely, especially initially, so a phased rollout should be considered.

The use of cross-border procurement platforms may impact the common use of language, since technical and legal translations require robustness. Therefore, common coding systems across EU countries should be implemented to define legal aspects.

5. MADE IN EUROPE

5.1. Pleading for a mandatory European preference applicable in strategic sectors

Main remarks:

- A generalised European preference in public procurement would be ineffective given current market realities, which are shaped by technological constraints, limited EU production capacity, and strong existing national preferences among Member States.

- A mandatory European preference is nonetheless justified in clearly defined strategic sectors—such as defence, energy, healthcare, cybersecurity and pharmaceuticals—where procurement decisions directly affect the EU’s strategic autonomy, security, and resilience, and where reliance on non-European suppliers remains high.
- This mandatory preference should be strictly limited to strategic sectors, embedded in EU procurement legislation through targeted amendments, and complemented by escape clauses allowing exceptions where EU production is unavailable or technologically inferior, while remaining voluntary in all other sectors.

Made in Europe should be a targeted tool to strengthen the EU industrial base, economic security and strategic autonomy, not a blanket origin-based preference. Prioritisation should rely on qualitative, non-price criteria (resilience, security of supply, innovation, environmental and social performance, due diligence) and proportionate value-added-in-Europe thresholds, rather than strict local-content quotas, in order to limit trade retaliation risks and preserve competition and value for money.

5.2. The need to articulate European preference with international trade

Key challenges include possible price increases, fewer bids, administrative burdens and tensions with WTO GPA/FTAs; these call for narrow exemptions (no EU supply, insufficient competition, disproportionate price gaps or technical incompatibility). To ease the work of contracting authorities and reduce compliance costs, EU law should promote a digital European product passport aggregating origin, value-added, sustainability and due-diligence data, enabling fast, harmonised verification in public procurement, and reducing public buyer’s burden.

First, it must be acknowledged that current public procurement outside the EU is largely driven by technological constraints or by the absence of sufficient production capacity within the Union. As a result, introducing a generalised European preference would be ineffective and misaligned with actual market conditions. This reality is further compounded by the strong national preference already observed in public procurement, which correlates positively with the size of the Member State and continues to shape purchasing decisions.

Second, notwithstanding the above, the new directives reveal a clear need for a European preference in specific strategic sectors. Paradoxically, these are precisely the areas in which a high volume of non-European products and services are procured, including defence, energy, healthcare, and pharmaceutical services. In these sectors, procurement choices have direct implications for the Union’s strategic autonomy, resilience, and long-term security.

Third, in our view, a targeted European preference should therefore be introduced in the new legislation in line with the EU’s strategic security objectives. This could be achieved through a revision of Article 18 of the general public procurement directive, while carefully limiting its mandatory application to clearly defined strategic sectors and maintaining its voluntary nature

for other activities. Such an approach should also incorporate explicit escape clauses, allowing derogations in cases where production is not available within the EU or where non-European solutions offer demonstrable technological advantages.

Fourth, this framework would enable the operationalisation of European preference through the use of favourable award criteria and, where appropriate, minimum technical requirements in strategic sectors requiring a certain level of European value added. Importantly, these measures could be justified under the national interest exception, thereby allowing Member States to navigate World Trade Organization non-discrimination rules while remaining within the boundaries of EU and international law.

Such rules should be accompanied by clear, clear framed exemptions, to avoid procurement deadlocks and excessive price inflation for public buyers. Their design must also reflect the limited administrative capacity of many contracting authorities and SMEs; reliance on standardised documentation, risk-based verification and existing EU compliance systems (for example, under sustainability and product regulations) is essential to prevent Made in Europe from becoming an additional, stand-alone bureaucratic layer. Finally, Made in Europe criteria must be articulated coherently with sectoral instruments on foreign subsidies, strategic raw materials, energy security and industrial policy, and critical infrastructure definition and needs, so that contracting authorities can apply a consistent set of obligations when planning, tendering and awarding contracts.

6. BPQR

Best price quality ratio (BPQR) implementation must prioritise three key elements for effectiveness: mandatory minimum quality weights calibrated by sector/contract type (e.g. 30-60% non-price criteria), ensuring strategic goals systematically trump pure price competition while preserving value-for-money; standardised model criteria/templates with digital data reuse to slash administrative burden and litigation risk for contracting authorities and SMEs in the hole market; and a minimum mandatory BPQR requirements approach defined in the new public procurement legislation.

Regarding this final element, we do not support allowing Member States to apply divergent approaches under the current framework. The existing model has led to asymmetric regulation of national BPQR targets. Spain, for example, shows an important uptake of green criteria, yet continues to face significant simplification challenges, particularly in avoiding administrative overload while ensuring consistent progress on green, social, and innovation objectives. A shift to a common, mandatory BPQR implementation across the entire market would help address these issues by fostering more uniform practices among economic actors and facilitating the achievement of sustainability, innovation, and social goals throughout the EU.

The potential of the 2014 Directives to promote green, social, and innovation-oriented public procurement has so far been only partially realised. In practice, contracting authorities continue to rely heavily on price-only award criteria, while the uptake of strategic procurement

instruments remains uneven across Member States. Establishing BPQR as the presumptive or default award criterion, subject to a structured “comply or explain” mechanism, would better align the general procurement framework with the EU’s strategic objectives under the Green Deal, social inclusion policies, innovation agendas, and resilience strategies, without formally excluding price-only awards in duly justified and exceptional cases. For BPQR to be both effective and enforceable, the framework would need clearer minimum quality requirements and more detailed guidance on how environmental, social, and innovation objectives can be operationalised through award criteria, technical specifications, and contract performance conditions, while respecting the link to the subject matter or, where appropriate, allowing for a carefully calibrated relaxation of that link.

Introducing BPQR criteria as a mandatory element in the new public procurement legislation would also generate tangible economic and administrative benefits. In particular, it would encourage contracting authorities to assess offers based on total cost rather than lowest price, by systematically integrating life-cycle costing approaches that capture long-term environmental, social, and operational costs. This shift has the potential to reduce overall public expenditure over time while improving value for money. Moreover, mandatory BPQR application is essential to achieve genuine market transformation: without a binding framework, economic operators lack sufficient incentives to adapt their business models, invest in sustainable innovation, or internalise social and environmental standards. Finally, the consistent inclusion of at least one qualitative criterion would ensure that procurement decisions reflect broader public policy objectives and do not default to purely quantitative price competition. To support implementation, the framework should be complemented by simplification and standardisation measures—such as model criteria, templates, recognised labels, data reuse, and digital tools—to minimise administrative burdens and litigation risks, which are widely regarded as key weaknesses of the current regime.