

Due Diligence in EU Institutions' Own-Account Procurement: Rules and Practices

Abstract

This study, commissioned by the European Parliament's Committee on Budgetary Control (CONT), investigates whether EU institutions implement human rights and sustainability due diligence when they purchase goods and services. Based on documentary analysis and interviews, this study finds that sustainability due diligence is lacking in procurement carried out by the European Parliament, the European Commission and the EU agencies. Accordingly, it makes recommendations to promote better integration of due diligence into the procurement of goods and services by the EU institutions.

Background

Public procurement is the acquisition by public bodies of the goods and services they need to accomplish their government mission, in a timely and efficient manner. Across the EU, public procurement accounts for 13.3% of Gross Domestic Product (GDP) (EC 2019b). Given this economic significance, the EU legislators have for decades sought to regulate public procurement as a mechanism for realising the EU internal market.

More recently, the EU has also recognised public procurement's potential to contribute to other EU strategic goals. In particular, a wave of recent EU policy instruments has sought to harness public procurement as a driver for sustainable production and consumption, in line with the EU Green Deal and other EU sustainability commitments. On the other hand, aspects of the current legal regime present challenges for public buyers seeking to engage in green or socially sustainable procurement. Specifically, EU procurement rules can make it difficult for government buyers to exclude companies responsible for harms to human rights or the environment from access to public contracts. They can also impede the preferential selection by public buyers of more sustainable products and services, and the allocation of public contracts to companies that produce them.

This is important because, in the EU and internationally, companies are increasingly expected to act responsibly and sustainably. According to UN and OECD standards, for example, companies have a responsibility to respect human rights and the environment. Further, they are expected to operationalise that responsibility by implementing due diligence processes. Due diligence processes, in this context, are means by which businesses should identify, assess, prevent, cease or mitigate and remediate harms to human rights and the environment which are the result of their own activities or to which they are directly linked through the activities of business partners.

Under UN and OECD standards, moreover, governments should take appropriate steps to control business-related human rights abuses through effective policies, legislation, regulations and penalties, including where they engage businesses in commercial transactions. In line with this duty, the EU and national legislators have recently enacted new laws establishing statutory requirements for large businesses to perform human rights and environmental due diligence, with various penalties in default. In some national laws, such penalties include measures to exclude companies from access to public contracts.

EU institutions, including the European Parliament, European Commission and EU agencies, undertake procurement to fulfil their statutory missions. In aggregate, this procurement is financially significant. Consequently, if it respects human rights, labour and environmental goals, EU institutions' procurement has the potential to contribute to achieving EU sustainable production and consumption goals and targets in practice. Given their public profile and political prominence, EU institutions may also 'lead by example' by adopting good procurement practices. Equally, sustainable procurement by EU institutions may play a role in advancing EU strategic autonomy, supply chain resilience and effective legal, reputational and operational risk management. A further advantage of incorporating sustainability measures into EU institutions' procurement is the promotion of policy coherence, and hence the efficiency and effectiveness of EU expenditure in areas including international development assistance.

The legal framework for EU institutions' procurement includes the EU Financial Regulation, as well as the EU Procurement Directives that regulate the acquisition of goods and services amongst public authorities in EU Member States. As noted, however, that framework has not yet been fully aligned with EU sustainability goals and commitments, nor with current or envisaged EU regulatory requirements regarding the performance of due diligence by businesses.

Aims

In this context, at the request of the EP CONT Committee, this study aims to investigate if EU institutions' rules and practices for the procurement of goods and services on their own account currently integrate corporate due diligence requirements. It further aims to identify gaps, challenges and best practices regarding the integration of due diligence into EU institutions' procurement, in line with UN and OECD standards, taking account of the possibilities and constraints entailed by the existing legal framework. Besides, this study aims to establish what data on EU institutions' procurement due diligence is presently collected and available, publicly as well as internally. A further focus is to contextualise EU institutions' approaches with reference to 'best practices' from EU Member States and OECD countries, whether driven by mandatory minimum standards or a motivation to 'lead by example'. Finally, the study analyses the potential impacts of envisaged regulatory developments, such as the European Commission's proposals for a Directive on corporate sustainability due diligence and for a Regulation on the placing on the market of products made using forced labour.

To address these questions, this study has undertaken desktop legal and policy analysis, as well as a range of interviews with EU officials. In particular, this study has considered own-account procurement by the European Parliament, European Commission and three selected EU decentralised agencies, namely, the EU Fundamental Rights Agency (FRA), the European Border and Coast Guard Agency (FRONTEX) and the EU Agency for the Space Programme (EUSPA).

Based on these data, the study finds that sustainability due diligence, as defined by international and EU instruments adopted since 2011, is presently lacking across EU bodies' procurement rules and practices. EU bodies appear generally to carefully adhere to the EU Financial Regulation¹ and 2014 Procurement Directives in their procurements. However, these rules do not require public buyers to engage in human rights or environmental due diligence themselves. Neither do they require public buyers' consideration of prospective or contracted suppliers' due diligence during the procurement process. Indeed, aspects of the current EU procurement regime, such as the requirement for a 'link to the subject matter', rather tend to constrain public buyers' from considering suppliers' due diligence processes during the tender process. Due diligence practices are not currently integrated into EU institutions' procurement frameworks or practices; it follows that data on sustainability risks in EU procurement are not gathered or reported, either.

¹ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (henceforth the 'Financial Regulation'). It should be noted that the Financial Regulation has recently been recast; relevant changes are discussed in Chapter 5. The political agreement reached on this text in December 2023 however remained subject to confirmation by the EU co-legislators at the time of this study's publication.

Against this baseline, and taking into account the role and competences of the European Parliament, this study presents recommendations intended to promote the achievement of more fully sustainable EU institution procurement, via the incorporation of due diligence practices.

- **Firstly, within the existing legal framework, such recommendations encompass EU institutions establishing their own supply chain sustainability due diligence processes** (section 5.1); measures to **secure compliance by EU institutions' suppliers with minimum legal obligations**, including via supplier exclusions (section 5.2.1); monitoring of suppliers during contract performance (section 5.2.2); accessible whistleblowing and remediation mechanisms (section 5.2.3); and SPP contract clauses (5.2.4).
- **Secondly, this study makes recommendations to revise the law applicable to EU institutions' own-account procurement so as to better align it with EU sustainability and due diligence standards.** In this connection, recommendations highlight the need to integrate due diligence and binding sustainable procurement goals into the EU Financial Regulation (5.3.1); to ensure that the Financial Regulation is continuously updated to articulate it with EU sustainable procurement requirements (5.3.2); to extend the basis for mandatory exclusions (5.3.3); to integrate sustainable procurement into general EU budgetary control mechanisms (5.3.4); to take measures to link EU institutions' own procurement with the anticipated adoption of the EU Corporate Sustainable Due Diligence Directive (CSDDD) (5.3.5); and finally, to revise the 2014 Procurement Directives (5.3.6).
- **A third set of recommendations aim to strengthen the efforts and capacity of EU institutions in the area of due diligence and sustainable procurement** (section 5.4). This is an immediate imperative, in terms of both securing compliance with existing law and supporting the effectiveness and impact of any future legislative or policy changes. While some horizontal initiatives to support sustainable procurement among EU bodies are already underway, a more coordinated effort is needed to secure cross-institutional policy coherence, capture synergies and boost cost-effectiveness, as well as sustainability impacts. Developing and rolling out guidance, training and the exchange of good practices figure amongst the requirements here.

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