

Subject: Call for evidence – Revision of EU rules on public procurement

Finnwatch welcomes the revision of public procurement directives and this opportunity to provide feedback for it.

The EU has in recent years introduced new sustainability rules for companies, such as the Corporate Sustainability Due Diligence Directive and the Corporate Sustainability Reporting Directive, which introduce sustainability due diligence obligations and related reporting duties for in-scope companies. The objectives of these regulatory instruments include making sure that companies active in the internal market contribute to sustainable development and the sustainability transition of economies and societies. Other laws, such as the Forced Labour Regulation and the Regulation on Deforestation-Free Products, also advance protection of human rights and the environment in global supply chains.

The current public procurement directives, which leave e.g. the use of sustainability related award criteria and contract terms optional for public procurers, is out of sync with these legal developments. The revision of the public procurement directives, however, provides an opportunity to ensure that the public procurement also contributes to sustainable development and the sustainability transition. **In particular, we recommend that any revision:**

- takes fully into account States' human rights obligations
- makes it mandatory for public procurers to conduct human rights and environmental due diligence and include related, risk-based criteria to tenders
- ensures policy coherence with the EU's sustainability rules
- requires public procurers to set climate criteria as a default
- encourages use of environmental footprints to support procurement decisions.

The State-Business Nexus

According to the so-called State-Business Nexus of e.g. the UN Guiding Principles on Business and Human Rights (UNGP), States should exercise adequate oversight in order to meet their international human rights obligations when they contract with (or legislate for) business enterprises to provide services that may impact upon the enjoyment of human rights (UNGP 5).

States should also promote respect for human rights by business enterprises with which they conduct commercial transactions (UNGP 6). Public procurement provides States a unique opportunity to do just so.

These imperatives are echoed in the 2023 OECD Recommendation on the Role of Government in Promoting Responsible Business Conduct which “recommends that adherents lead by example and take measures to promote and exemplify responsible business conduct (RBC) in their role as economic actors and in their commercial activities, particularly by using public procurement as a strategic tool for RBC and including RBC in procurement policies as well as promoting due diligence for RBC in public procurement.”

The revision of the public procurement directives must take the “State-Business Nexus” of the international sustainable business conduct standards fully into account by

- including explicit references to e.g. the UNGPs and the OECD responsible business conduct guidelines as well as due diligence measures described in Corporate Sustainability Due Diligence Directive.
- requiring public procurers to conduct human rights and environmental due diligence with a view to identifying, preventing, mitigating, ceasing and remedying adverse human rights and environmental impacts in the procurement of goods and services.

Mandatory sustainability criteria

The current public procurement directives do not require public procurers to make use of e.g. award criteria or contract terms to make sure that the economic operators that they contract with respect human rights and the environment. This is possible for the public procurers but not mandatory, and sometimes technically difficult. On a voluntary basis, the take up of especially human rights criteria has been relatively low. When public procurers are not appropriately managing the adverse human rights and environmental impacts in their supply chains, they expose States to risk of litigation for not meeting their international obligations. They also hinder the sustainability transition, which the EU has been trying to advance elsewhere by adopting sustainability rules on companies.

Due diligence would enable public procurers to set-risk based criteria to address the most severe and the most likely adverse impacts in their supply chains, and to design contract terms to effectively manage those impacts. Mandatory human rights and environmental criteria would improve the competitiveness of European companies that are committed to responsible business conduct and that cannot compete on price alone.

The revision of the public procurement directives must

- make it mandatory for public procurers to conduct environmental and human rights due diligence and use human rights and environmental criteria to address adverse sustainability impacts in their supply chains based on severity of the impact.

Ensuring policy coherence

The Corporate Sustainability Due Diligence Directive (CSDDD), which obligates large companies to conduct human rights and environmental due diligence requires Member States to ensure that the CSDDD obligations “qualify as an environmental or social aspect that contracting authorities may take into account as part of the award criteria of public

contacts and as an environmental or social condition that contracting authorities may lay down in relation to the performance of public contracts”. However, the current public procurement directives require that award criteria are linked to the subject-matter of the contract. This excludes general company policy which means that designing award criteria around CSDDD compliance can be technically difficult without changes.

Furthermore, the CSDDD also applies only to very large companies. As such, it is unclear how companies smaller than those in the scope of CSDDD can demonstrate that they meet any criteria based on CSDDD obligations, and thus participate in tenders.

Requiring public procurers and tenderers to undertake human rights due diligence would also help implement the Forced Labour Regulation which prohibits placing goods made with forced labour on the EU market. This prohibition applies to all kinds of operators, including public procurers.

Ensuring coherence between the public procurement directives and sustainability rules such as those mentioned above would also support simplification as human rights and environmental due diligence could be used to demonstrate compliance in several contexts. Simplification could also be supported by drawing from the European Sustainability Reporting Standards when designing information requests around due diligence.

The revision of the public procurement directives must ensure policy coherence by

- making sure that public buyers can request information on how suppliers respect human rights and conduct their own human rights and environmental due diligence covering the full scope of their operation from companies of all sizes.

Climate requirements should be included by default

Public procurement holds potential to steer supply towards more sustainable business models. This potential remains under-utilized as climate requirements on procurements are not universally required. Compulsory requirement to use climate requirements or “comply-or-explain” approach that directs procurers to set environmental requirements or explain their omission could drive down the climate impacts of public procurement.

At minimum, the “comply-or-explain” requirement should cover the carbon emissions of all procurements over the predefined threshold.

The revision of the public procurement directives should:

- set climate criteria as a default requirement included in all public procurements, which can be left out only with proper explanation.

Environmental footprints should be used to support decisions

In order to take into account the environmental impacts of procurement decisions, the public procurers need and should require information on the environmental footprint of procured goods. Reliable information on, for example, product specific carbon emissions can help

public procurers to make informed decisions not only between options in different product categories (e.g. whether to procure animal- or plant-based foods) but also between the products of one specific category.

While the current practices on carbon accounting for example have variation in their quality, leading to low comparability especially within products in the same category, the wider adoption of best practices could solve this issue. To this end, public procurement could and should drive forward the development and adoption of product environmental footprint category rules (PEFCRs). These standardised calculating methods for carbon footprint and other environmental impacts improve the comparability between products and can thus support informed procurement decisions.

The revision of the public procurement directives must

- enable and incentivise public procurers to require information on the environmental footprint of the products.

The recommendations listed above draw from Finnwatch's past work on sustainability in public procurement. We have for example, provided advice to Finnish public procurers on how they could take climate, environmental and human rights criteria into account in their tenders. This cooperation has led, for example, to the development of a common code of conduct which public procurers can use as a baseline for sustainability. It has also shown that although there is often appetite for the use of sustainability-related criteria in tenders and for monitoring compliance during the contract term, there is a lack of practical know-how that prevents public procurers from doing so effectively. This lack of expertise (together with the overall complexity of the public procurement directives) is something that the revision should seek to address, too.