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# POLICY BRIEF ON Unleashing the potential of sustainable procurement

*How new sustainability reporting frameworks and  
choice editing strategies can help to make public  
and private procurement more sustainable*

## Our key recommendations

The EU Sustainable Products Initiative (SPI) should prepare the ground for the following concrete first steps to make public and private procurement more sustainable:

- The current EU Green Public Procurement framework should move from a voluntary to a mandatory instrument, by **amending the EU public procurement directives**.
- The **range of sustainability matters** covered in the Procurement Directives should be extended beyond the current environmental (green) focus and integrate a wider concept of sustainability, notably social and work conditions related criteria.
- The EU needs to ensure a **level playing field** between publicly and privately provided services of general interest, by proposing rules that make such **privately provided services subject to the same sustainability** requirements that the Sustainable Product policy and sectoral policy on energy and climate will impose on public procurement.
- To ensure continued pressure to move towards more sustainable procurement becoming the norm, any transitional measures should come with strong **reporting requirements**, in line with the European Commission's Circular Economy Action Plan. This reporting **should align with the Corporate Sustainability Reporting Directive** in terms of scope, and include indicators that allow assessing the sustainable proportion of products and services that are purchased and provided.

## Introduction

In the Circular Economy Action Plan adopted in March 2020, the European Commission announced that it is preparing a Sustainable Products Initiative, to make goods and services “*fit for a climate neutral, resource efficient and circular economy, reduce waste and ensure that the performance of frontrunners in sustainability progressively becomes the norm.*”<sup>1</sup> According to the Commission’s Inception Impact Assessment<sup>2</sup>, the Sustainable Products Initiative is likely to include measures aimed at greening public procurement, a potential steppingstone to make all forms of procurement, including private procurement, more sustainable.

This brief takes a look at how recent and potential future sustainability reporting frameworks being implemented and negotiated in the EU can help to achieve better reporting on the sustainability profile of supply chains and procurement processes, and how these transparency measures could be complemented by behavioural measures directly impacting public and private procurement.

<sup>1</sup> European Commission, A new Circular Economy Action Plan For a cleaner and more competitive Europe, 11 March 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1583933814386&uri=COM:2020:98:FIN>

<sup>2</sup> European Commission, Inception Impact Assessment – Sustainable Products Initiative, 14 September 2021, [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative_en)

## 1. Sustainable procurement – why does it matter?

“Sustainable procurement is a process by which public authorities or private corporations seek to achieve the appropriate balance between financial, environmental and social considerations when procuring goods, services or works at all stages of the value transformation cycle, while considering their costs through the entire life cycle”.<sup>3</sup>

With the growing momentum for sustainable business and products, the topic of sustainable purchasing becomes increasingly relevant from a European policy perspective. While the enormous purchasing power of *public* procurement has been acknowledged, with an approximate value estimated at up to 14% of the EU’s GDP,<sup>4</sup> sustainability considerations in corporate (*private*) procurement have been less in the limelight of EU decision-makers.<sup>5</sup>

Compared to public procurement, regulating private purchasing could have an even larger potential of driving suppliers towards more sustainable production patterns. When a private buyer integrates sustainability requirements and metrics in the purchasing processes, this positively impacts the quality of the products as well as the company’s suppliers. Such processes not only lead to products in line with environmental and social standards and evolving expectations, but they can also deliver cost efficiencies and value improvements.<sup>6</sup>

More and more businesses are recognising the advantages of adopting and implementing a strategic sustainable purchasing strategy,<sup>7</sup> which is partly influenced by an increasing demand for sustainable goods from consumers and investors.<sup>8</sup> Even major online marketplaces for private procurement, have recently started to respond to these changing purchasing strategies by facilitating sustainable private procurement for certain goods.<sup>9</sup> The momentum is there to shift corporate behaviour towards sustainable purchasing, and contribute to one of the EU’s Green Deal objectives of “*mobilising the industry for a clean and circular economy*”.

In the following sections we will examine the current challenges in the field of private procurement and where the opportunities lie to unlock the full potential of sustainable private procurement.

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<sup>3</sup> Sustainable Procurement - Minimal common sustainability criteria for Sustainable Procurement processes to select Micro, Small and Medium sized Enterprise suppliers, United Nations Centre for Trade Facilitation and Electronic Business, 2019, available at [https://unece.org/DAM/trade/Publications/ECE\\_TRADE\\_451E\\_CF-Rec43.pdf](https://unece.org/DAM/trade/Publications/ECE_TRADE_451E_CF-Rec43.pdf)

<sup>4</sup> Ranging from 6.1% in Cyprus to 19.5% in the Netherlands. See Kutlina-Dimitrova, Z. (2018), “Government Procurement: Data, Trends and Protectionist Tendencies”, DG TRADE Chief Economist Notes 2018-3, DG TRADE, European Commission, available at [https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157319.pdf](https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157319.pdf)

<sup>5</sup> However, there have been positive examples in the area, such as the development and adoption of the EMAS: [https://ec.europa.eu/environment/emas/emas\\_publications/policy\\_en.htm](https://ec.europa.eu/environment/emas/emas_publications/policy_en.htm)

<sup>6</sup> World Economic Forum, Beyond Supply Chains: Empowering Responsible Value Chains, January 2015, p. 4 [https://www3.weforum.org/docs/WEFUSA\\_BeyondSupplyChains\\_Report2015.pdf](https://www3.weforum.org/docs/WEFUSA_BeyondSupplyChains_Report2015.pdf)

<sup>7</sup> CSR Europe, European Sustainable Industry Barometer 2021, p. 12 [https://www.eticanews.it/wp-content/uploads/2021/10/EuropeanSustainableIndustryBarometer\\_2021.pdf](https://www.eticanews.it/wp-content/uploads/2021/10/EuropeanSustainableIndustryBarometer_2021.pdf)

<sup>8</sup> 2019 AFLAC CSR Survey, <https://www.aflac.com/docs/about-aflac/csr-survey-assets/2019-aflac-csr-infographic-and-survey.pdf>

<sup>9</sup> Such as Unite Mercateo: Sustainable Choice, <https://sustainable-choice.unite.eu/>

## 2. Problem analysis

Whereas the role of sustainability criteria in the field of public procurement has been at the centre of debates between policymakers, public authorities and academics,<sup>10</sup> private purchasing has received little attention from EU policy-makers so far. This is partly due to the differing legal frameworks between the two spheres.

Traditionally, public procurement refers to the purchase of goods, services and work through the allocation of public resources.<sup>11</sup> Since it involves the spending of taxpayer money, it needs to deliver high-quality services and ultimately **serve the protection of the public interest**. In this sense, the public sector expects procurement to go beyond the simple value for money or basic supply, but also needs to address other concerns and public policy goals such as social value, environmental objectives, creating employment or supporting equality.<sup>12</sup> Although private undertakings in their procurement process do not usually pursue the same horizontal policy objectives as public purchasers, they share a set of policy goals, such as public visibility, consumer trust, worker safety and welfare as well as cost and material medium-term efficiency.<sup>13</sup>

Given that they are spending public resources, public authorities have an important responsibility to carry out procurement efficiently and are therefore subject to specific standards and procedures.

On the other side, the private sector is not bound by the same rules as it is governed by the principle of contractual freedom, being subject to a very limited number of mandatory provisions<sup>14</sup>. Hence, it is left to corporate buyers whether or not to include sustainability requirements in their procurement process. The contractual freedom principle makes a change to this behaviour through legal avenues challenging, although additional alternative ways can be found to direct companies towards sustainable purchasing options.

## 3. Elaboration of effective measures to address the issue

One possible measure to direct companies towards sustainable purchasing options is the introduction of minimum sustainability requirements in public procurement<sup>15</sup>, which could positively impact private procurement standards. So far, the field of public procurement at EU level is regulated by the EU Public Procurement Directives<sup>16</sup> and complemented by the Green Public Procurement (GPP) criteria.<sup>17</sup>

<sup>10</sup> Sustainability requirements in EU public and private procurement – a right or an obligation? Marta Andhov and Katerina Peterkova Mitkidis, SSRN, 2017.

<sup>11</sup> OECD Definition

<sup>12</sup> The OECD Public Procurement Principles

<sup>13</sup> Public procurement and horizontal policies in EC law: general principles, Sue Arrowsmith and Peter Kunzlik, in *Social and Environmental Policies in EC Procurement Law*, Cambridge University Press, 2009.

<sup>14</sup> These are for example the agreement between the parties or the subject matter of the contract, depending on the national private *law acquis* of the EU Member State.

<sup>15</sup> Towards mandatory Green Public Procurement (GPP) requirements under the EU Green Deal: reconsidering the role of public procurement as an environmental policy tool, Kleoniki Pouikli, ERA Forum, 2021.

<sup>16</sup> Directive 2014/23/EU of the European Parliament and of the Council on the award of concession contracts ('the Concessions Directive'); Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC ('the Public Sector Directive'); and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sector and repealing Directive 2004/17/EC ('the Utilities Directive').

<sup>17</sup> [https://ec.europa.eu/environment/gpp/index\\_en.htm](https://ec.europa.eu/environment/gpp/index_en.htm)



The GPP process requires the inclusion of clear and verifiable environmental criteria for products and services in the public procurement process.<sup>18</sup> While these criteria are still a voluntary instrument, there are increased calls for the inclusion of mandatory green or broader sustainability requirements in public procurement processes, e.g., in the Energy Efficiency Directive and the proposed Batteries Regulation. The establishment of minimum sustainability requirements would not only considerably advance the public sector by making sustainable procurement the norm, but it would also heavily influence private purchasing.

Such a mandatory introduction would have a double effect: It would, first of all, create a necessary and strong impetus to oblige public authorities to integrate green or sustainability requirements in procurement processes. It would also incentivize further market developments to provide sustainable goods and services.<sup>19</sup> Since public authorities spend large sums to purchase goods and services from private suppliers, companies would be required to adapt to such sustainability requirements in order to bid for a public tender.<sup>20</sup> Because of this link, public procurement can act as a natural driver for the development of private procurement, as private contractors must live up to public procurement rules and requirements if they want to supply to public institutions.<sup>21</sup> Consequently, businesses selling goods and services to public authorities would need to adapt their production processes and translate these enhanced standards into their supply chains.

Minimum sustainability requirements should also be equally integrated into concession contracts of the provision of services of general interest to private entities (e.g., water and waste management) as well as in contracts of public private partnerships (PPPs). The GPP can provide a strong stimulus for sustainable innovation, as it gives the industry and private sector concrete incentives for advancing their technologies and developing more sustainable products.

A mandatory minimum framework of sustainable public procurement would act as a steppingstone for integrating sustainability considerations in commercial practices, where the scope for setting legal obligations might appear limited. At the same time, the institutional debate around the Commission's announced Sustainable Corporate Governance initiative shows there is room to seek a fair balance between the contractual freedom of companies and the urgent need of improving product sustainability.

In addition, there are other measures for channelling private contractors towards sustainable purchasing choices. Transparency requirements, peer and customer pressure can form a powerful tool to prompt companies to upgrade their procurement processes. This brief therefore explores a set of policy and regulatory options which have the potential to make corporate buying more sustainable.

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<sup>18</sup> Arrowsmith and Kunzlik, op. cit.

<sup>19</sup> More than a nudge? Arguments and tools for mandating green public procurement in the EU, Lela Mélon, Sustainability 12, 2020.

<sup>20</sup> Public Private Partnerships in the EU: Widespread shortcomings and limited benefits, European Court of Auditors, Special Report, No. 9, 2018.

<sup>21</sup> Andhov and Peterkova Mitkidis, op. cit.

#### 4. Inspiring policy initiatives and possible existing instruments to leverage progress

On a side note – the effectiveness of any procurement policy will to a certain extent be determined by the **enforcement provisions and capacity**. In the context of this paper, we will not go into further detail on enforcement, but we do note that any proposed policy measure should come with clear recommendations vis-à-vis the enforcement of the measures. Such a system should in any case most likely have to rely on ex-post checks with a sufficient deterrent for non-compliance, as it will be difficult to find political support for ex-ante approval of all products to meet certain minimum sustainability criteria (as is the case with e.g. medication and certain chemicals). It would also be important to audit any reporting obligations, including to verifying whether (online) retail platforms fairly implement any choice editing requirement.

In this chapter, we build on the problem analysis and consider measures and inspiring policy initiatives that could help promote more sustainable procurement. The initiatives described in detail below can be split into two groups: those that create and improve transparency and disclosure of the sustainability of products and services, and those that build on transparency with rules aiming to change corporate and consumer behaviour. There is a clear separation in EU policy between these two policy objectives – although transparency in itself can encourage market participants to change their product offer, it is not the direct purpose of transparency legislation.

In this chapter, we will discuss the following frameworks and their potential effects on private procurement processes, four of which focus on increased transparency:

- The **Corporate Sustainability Reporting Directive (CSRD)**. Through the enhanced disclosure obligations on sustainability issues, companies will have a clearer overview of the impacts of the products and services they purchase. In this context, we will further look into the possibility of including relevant indicators in the CSRD legal text, demanding companies to report on sustainability requirements in procurement processes.
- The **EU taxonomy for sustainable activities (Taxonomy Regulation)** will serve to establish whether an economic activity contributes to six pre-defined environmental objectives and will thus play an important role in directing companies towards products and services resulting from Taxonomy-aligned activities. The taxonomy might be extended to additional environmental and to social objectives.
- The **Sustainable Finance Disclosure Regulation (SFDR)** requires issuers of financial investment products to justify and disclose any sustainability claims related to those investments. The legislation comes with technical standards to define a set of detailed sustainability indicators.
- In connection to this, emphasis will be given to the role and effectiveness of labels by looking particularly at the example of the **EU Ecolabel**, including the recent expansion to services, in the field of retail finance.

And two measures which relate to behavioural rules:

- The announced **Sustainable Corporate Governance** initiative: mandatory due diligence obligations might form an important driver for implementing sustainability concerns in commercial practices. Due to the increasing pressure on companies to provide products and services which are not harmful to the planet and the people, more and more attention will be paid to their due diligence strategies and assessments.
- Building on the disclosure frameworks, we will examine **choice-editing strategies** and their potential of limiting the purchasing choices available to corporate buyers or even the general public (e.g., in line with legislation phasing out certain forms of light bulbs, restrictions on emissions of new passenger cars, and on electric appliances).

#### 4.1. Transparency: Corporate Sustainability Reporting Directive (CSRD)

The reform of the Non-Financial Reporting Directive (NFRD)<sup>22</sup> with the Corporate Sustainability Reporting Directive proposal<sup>23</sup> will significantly change the field of corporate reporting at EU level. The introduction of mandatory European reporting standards will bring long-awaited improvements to clarity, consistency, and quality of sustainability data. This should in turn help make the corporate impact on sustainability indicators and the impact of sustainability risks on companies more visible.

The CSRD is designed as a transparency tool to adequately disclose the corporate impact on people and planet. Based on the annual management reports and the proposed European Single Access Point, companies will be able to examine the sustainability data of their suppliers. Companies are encouraged to make use of their suppliers' sustainability disclosures in their procurement processes, to adequately pick the companies which are doing best in terms of environmental, social and governance standards. Moreover, there is widespread recognition that corporate sustainability leads to better risk management by integrating sustainability in the assessment of financial risk and to an increased attention for corporate reputation, which would stimulate corporate purchasers to choose contracting partners with sustainable production chains. By implementing sustainability requirements into procurement processes and reporting on this, companies are boosting their image as ethical and sustainable companies.<sup>24</sup>

The development of the European reporting standards will play a key role in sustainable private procurement. In this regard, it will be of crucial importance whether the European Financial Reporting Advisory Group (EFRAG), tasked with the standard-setting process of the said standards, will include specific key performance indicators (KPIs) on procurement processes.<sup>25</sup> The standard-setter could

<sup>22</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095&from=EN>

<sup>23</sup> [https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting\\_en](https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en)

<sup>24</sup> 'Reputation, Relationships and Risk: A CSR Primer for Ethics Officers', Mark Rowe, Business and Society Review, 2011.

<sup>25</sup> [http://irep.ntu.ac.uk/id/eprint/411/1/202834\\_measuring\\_sustainable\\_procurements\\_scoping\\_study\\_2009.pdf](http://irep.ntu.ac.uk/id/eprint/411/1/202834_measuring_sustainable_procurements_scoping_study_2009.pdf)

find inspiration in other international reporting frameworks such as the Global Reporting Initiative (GRI) which has developed a specific reporting standard on procurement practices (GRI 204).<sup>26</sup> Another inspirational framework is the CDP supply chain programme, which encourages companies to leverage their purchasing power in order to drive environmental action.<sup>27</sup> This example of a disclosure system shows how buyers can collect environmental data about their supply chains and effectively engage with their suppliers to meet certain sustainability goals. EFRAG's Technical Expert Group tasked with the elaboration of the reporting standards should develop detailed KPIs on procurement processes, requiring companies to disclose the sustainability requirements in their procurement practices.

#### 4.2. Transparency: Taxonomy Regulation

Any measure to make public or private procurement more sustainable will require a definition of what is "sustainable". The EU has put a lot of effort into the development of a "taxonomy" for the purpose of making finance more sustainable, which could be a building block for sustainable procurement too.

The "framework to facilitate sustainable investment" ("Taxonomy Regulation"<sup>28</sup>) is an EU Regulation proposed in May 2018 and politically agreed a year later, just ahead of the European Parliament elections in 2019. It defines six environmental objectives and "establishes the criteria for determining whether an economic activity qualifies as environmentally sustainable for the purposes of establishing the degree to which an investment is environmentally sustainable". Although the Regulation itself was published in the Official Journal in June 2020 and already applies, the transparency framework is not producing its full effects yet due to a delayed delegated legislation process, in which the activities that contribute to one of six environmental "objectives" have to be further defined. A significant driver for this delay to the delegated legislation is that individual sectors are concerned about their inclusion in the taxonomy as a "sustainable" activity, now that the framework evolved beyond its initial purpose as a targeted piece of financial sector legislation to encourage a shift of financial investments to more sustainable companies. The inclusion or not in the taxonomy of individual sectors could have major consequences for those sectors as the use of the Taxonomy is expanded in the coming years to new legislation.

The evolution of the Taxonomy from a reporting framework to be used in the financial sector towards a standard that is referred to other fields of EU legislation is a very relevant change for the Sustainable Products Initiative. In fact, only a few potential applications of the Taxonomy were announced together with the Commission proposal for the Taxonomy itself: the EU Green Bond framework, and the EU Ecolabel for retail finance. Since then, other legislative initiatives have started referring to the Taxonomy, such as the Sustainable Finance Disclosure Regulation (see below) and the Recovery and Resilience Facility, and it is likely that new uses

<sup>26</sup> <https://www.globalreporting.org/standards/media/1005/gri-204-procurement-practices-2016.pdf>.

<sup>27</sup> <https://www.cdp.net/en/research/global-reports/changing-the-chain>

<sup>28</sup> <https://eur-lex.europa.eu/eli/reg/2020/852/oj>



of the Taxonomy will be proposed in the coming years, e.g., the introduction of sustainability-risk sensitive capital requirements.

Another interesting feature of the Taxonomy Regulation is that it is evolving towards a double-sided framework<sup>29</sup>. Instead of only defining what is "good" and should be stimulated, the framework is being expanded and might over time define what is "bad" and should be avoided. The current Taxonomy Regulation only foresees very minimal "minimum safeguards" that refer to international ESG standards, and a "do no significant harm" provision that avoids that an activity that contributes to one laudable objective, doesn't harm another objective. However, discussions are ongoing inside the Sustainable Finance Platform to further put flesh on the bone on this part of the taxonomy and develop a true taxonomy of "harmful" activities in the coming years. **Despite this potential extension, the Taxonomy should be seen as an absolute minimum standard for sustainable products and any sustainable procurement policy should introduce measures that go beyond Taxonomy compliance.**

Finally, the Taxonomy Regulation has a rather robust governance structure, as it prescribes in detail who is expected to advise the European Commission on the detailed standards. This role is taken up by the Sustainable Finance Platform, created through the Regulation. Any sustainable public and private procurement measures proposed in the Sustainable Products Initiative could come with measures to ensure that the definition of "sustainability" relies on an appropriate governance structure. This would help to ensure that all stakeholders with expertise in the various aspects of sustainability, such as environmental, human rights and trade union experts, are involved in a balanced way in the expert groups that draft the "technical" definitions of what "sustainable" means.

#### 4.3. Transparency: Sustainable Finance Disclosure Regulation (SFDR)

The Sustainable Finance Disclosure Regulation imposes sustainability impact transparency rules on the issuers of financial investment products. It does so using more than 30 mandatory Key Performance Indicators<sup>30</sup> that Financial Market Participants must disclose when putting a financial investment product on the EU's internal market. Unlike the Taxonomy Regulation which defines whether certain corporate activities are sustainable, the SFDR identifies whether certain investment products (e.g., those that focus on specific projects or sectors) are sustainable.

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<sup>29</sup> As developed by the Platform on Sustainable Finance's subgroup on a "harmful" taxonomy, see [https://ec.europa.eu/info/publications/210712-sustainable-finance-platform-draft-reports\\_en](https://ec.europa.eu/info/publications/210712-sustainable-finance-platform-draft-reports_en)

<sup>30</sup> The exact number of mandatory KPIs varies between different financial products, as a few indicators cannot be calculated for certain asset classes. There are also additional voluntary KPIs, bringing the total to 50.

Although originally conceived by the European Commission as legislation to reduce "greenwashing"<sup>31</sup>, changes in the legislative process have resulted in a Regulation that actually distinguishes and ranks products in three categories with a varying degree of "sustainability":

- "Article 6" products that do not integrate any sustainability considerations, often described as "non-sustainable funds"
- "Article 8" products that claim a form of sustainability integration (even if very minimal) and therefore have to justify their claim, often referred to as "light green products"
- "Article 9" products that specifically target sustainability investments (typically, "impact investing" products), often referred to as "dark green products"

The SFDR model with an intermediate light green category as described above is not without greenwashing risk either. Initial market developments<sup>32</sup> show that a big number of products are likely to fall into the "light green" category, creating significant marketing opportunities for these products that are perhaps only marginally better than Article 6 products. Consumers could be tempted to purchase "light green" products instead of asking for "dark green" products. However, a multi-step model avoids the cliff effect that the Taxonomy Regulation creates due to its binary nature: either an activity is Taxonomy-eligible, or it is not. **While it is important to avoid cliff effects, the focus of sustainable procurement policy should be to make sustainable products the norm.**

#### 4.4. Transparency: EU Ecolabel

The final inspiring transparency initiative discussed in this paper is the EU Ecolabel. Created in 1992, the EU Ecolabel has been gradually expanded to cover an increasing number of "product groups" and its link to green (public) procurement has been explicitly made since the EU's 2008 Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan<sup>33</sup>. The Ecolabel covers mostly physical products but also increasingly services, such as hotel services and, in the near future, retail financial investment products. While designed for retail consumers, there is nothing stopping private procurers from using the EU Ecolabel or a similar private or public label as a criterion in their product selection (e.g., when purchasing office cleaning products or hotel services for staff travel).

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<sup>31</sup> According to the Commission's Renewed Sustainable Finance Strategy "greenwashing" is "[t]he use of marketing to portray an organisation's products, activities or policies as environmentally friendly when they are not." (see [https://ec.europa.eu/info/publications/210706-sustainable-finance-strategy\\_en](https://ec.europa.eu/info/publications/210706-sustainable-finance-strategy_en))

<sup>32</sup> In Belgium, 25% of financial investment products fall under article 8, 3% fall under article 9 and 68% under article 6. In the Netherlands, these shares are respectively 35%, 8% and 57%. In Sweden, they are respectively 77%, 2% and 21%. In France, 850 products fall under article 8 and 250 under article 9.

BE: <https://www.fsma.be/en/news/belgian-investment-funds-evolve-toward-sustainability>

FR: <https://www.novethic.fr/finance-durable/publications/etude/market-data-fonds-durables-france-mars-2021.html>

NL: <https://www.afm.nl/nl-nl/nieuws/2021/september/beleggers-beter-informereren-duurzaamheid>

SE: <https://www.fondbolagen.se/aktuellt/pressrum/pressmeddelanden/nastan-atta-av-tio-svenska-fonder-ar-ljusgrona/>

<sup>33</sup> <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0397:FIN:EN:HTML>

The same applies to public procurement, subject to a few set criteria to protect the other objectives of EU procurement rules<sup>34</sup>. As with all other labels, in the specific context of public procurement care must be taken not to demand one specific label and unfairly exclude suppliers offering products with a similar label, or equivalent unlabeled products<sup>35</sup>.

**The Sustainable Product Initiative could explicitly endorse certain labels such as the EU Ecolabel in the environmental field and other labels on other social and governance sustainability dimensions for the purpose of sustainable procurement. It could also include transparency initiatives to provide a mapping of labels across sectors to make it easier for corporate purchasers to identify sustainability labels for relevant product groups.**

Like other transparency measures, the EU Ecolabel does not directly aim to improve corporate sustainability, but aims to do so indirectly, by encouraging consumers and corporates to make more sustainable consumption (and investment) choices. As a binary label (applied or not), it is harmonized across product groups, easy to market and easily recognizable to consumers and corporate purchases. One of the disadvantages of a binary label is however that it cannot distinguish different degrees of sustainability, and that manufacturers might be encouraged to just meet the requirements of the label and not go beyond. **However, as one of the potential initial objectives of the Sustainable Products Initiative would be to take the most damaging products off the market, it is important to create incentives for unsustainable services to become more sustainable.**

#### **4.5. Behaviour: Sustainable Corporate Governance initiative**

Closely linked to the Corporate Sustainability Reporting Directive is an announced European Commission legislative proposal on Sustainable Corporate Governance and Corporate Due Diligence.

The role of Corporate Social Responsibility (CSR) in the field of procurement practices has been acknowledged by academics.<sup>36</sup> Sustainability requirements come into private procurement processes under peer and customer pressure. Purchasers are becoming increasingly aware of the sustainability performance of companies selling goods and services, and this could positively impact their purchasing choices. Corporations could come under increasing pressure “to use their procurement

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<sup>34</sup> <https://ec.europa.eu/environment/ecolabel/ecolabel-and-green-public-procurement.html>

<sup>35</sup> E.g., when requiring a certain label of certified coffee instead of also allowing labels with a similar sustainability objective though with a different ambition level.

<sup>36</sup> The Link Between Competitive Advantage and Corporate Social Responsibility, Michael E. Porter and Mark R. Kramer, Harvard Business Review, 2006.

processes in the quest for global sustainability”<sup>37</sup>. It could help to make companies more attentive to the selection of their contractual partners, not to incur any reputational risks.

The concept of leverage is therefore an important one. It refers to the ability of a business “to effect change in the wrongful practices of the party that is causing or contributing to the impact”<sup>38</sup>. The upcoming initiative on Sustainable Corporate Governance and Corporate Due Diligence will go one step further and leave the voluntary CSR schemes behind.

The announced law is expected to introduce a legal obligation requiring companies to implement due diligence processes. Based on this, companies will be required to inspect their global value chains for environmental harm and human rights violations, and will be held accountable and liable for corporate abuses. The introduction of this long-awaited due diligence legislation at EU level could constitute a watershed moment for private procurement: if it includes meaningful and well-enforced measures, corporates will have to carefully assess their purchasing partners and sub-suppliers as regards potential or actual risks in their production and supply chains. This could in turn lead private buyers to purchase products or services abiding by higher standards and to gradually integrate sustainability considerations in their purchasing decisions.

#### 4.6 Behaviour: Choice-editing strategies

The disclosure frameworks described above provide a form of categorization of services and investments in varying degrees of “sustainability”. Once a similar ranking system for physical products is developed, legislation can build on the disclosure framework to progressively push certain products off the market. Before moving towards formally restricting market access for certain products, more subtle forms of encouraging sustainable consumption can be tried, such as marketing restrictions (e.g., tobacco advertisement ban), consumer comparison tools (websites) and nudging (Ecolabel, Nutri-Score).

This can accelerate a process where manufacturers or retailers choose to stop offering certain products, generally described as “choice-editing”<sup>39</sup>.

A decision to “edit choice” can be voluntary but it could also be encouraged through subsidies or other forms of coercion. This might seem controversial and in contradiction to free enterprise, but is not a revolutionary concept: EU legislation has already phased out certain products from the EU single market, such as passenger cars with high tailpipe emissions (CO<sub>2</sub> emission performance standards<sup>40</sup>, and certain light bulbs<sup>41</sup> and other electric appliances with high electricity consumption

<sup>37</sup> Andhov and Peterkova Mitkidis, op. cit.

<sup>38</sup> UN Guiding Principle on Business and Human Rights 19, Commentary, 21.

<sup>39</sup> UK Sustainable Development Commission, 2006.

<https://research-repository.st-andrews.ac.uk/bitstream/handle/10023/2314/sdc-2006-looking-back-forward.pdf?sequence=1&isAllowed=y>

<sup>40</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0631&from=EN>

<sup>41</sup> <https://www.euractiv.com/section/energy/news/lights-out-for-inefficient-bulbs-under-new-eu-standards>

(Ecodesign requirements<sup>42</sup>). This is a form of government-driven choice editing. On the business side, voluntary choice editing could come on top of Ecodesign, in the shape of individual corporate decisions refusing to do business with certain clients or suppliers and use the related publicity to gain a competitive advantage over less sustainable competitors.

We see two key steps to implement choice-editing in the context of the Sustainable Products Initiative:

- Public procurement rules are amended to ban or discourage the public procurement of certain non-sustainable products (mandatory choice-editing), and
- companies supplying to public entities are encouraged to adopt additional voluntary choice-editing measures.

Both options could have a significant impact on the procurement choices that public and private buyers make. If companies are unable to sell certain products to a part of the market (public buyers), they might be tempted to edit their value chain to remove the non-sustainable supplier or component, or to stop offering certain products. This in turn might possibly limit the choice available to private buyers as there is simply no point for certain companies to put two products on the market, one with a lower sustainability standard – a process known as the California<sup>43</sup> or Brussels effect<sup>44</sup>. Alternatively, encouraging suppliers to remove certain choices from the market, e.g. for reputational reasons<sup>45</sup>, could help to relatively quickly take the least sustainable products off the market.

**In addition to mandatory choice-editing measures based on Ecodesign, the Sustainable Products Initiative should be complemented with a strong encouragement for retailers and public sector suppliers to start limiting or editing choice, beyond the minimum requirement set in the SPI.**

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<sup>42</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0125&from=EN>

<sup>43</sup> Trading Up: Consumer and Environmental regulation in a global economy, David Vogel, Harvard University Press 1995

<sup>44</sup> The Brussels Effect: How the European Union Rules the World, Anu Bradford, Oxford University Press 2020

<sup>45</sup> See for examples of existing choice editing decisions:

<https://eng.mst.dk/media/mst/68957/1.%20choice%20editing.pdf>



## 5. Concrete recommendations

Making sustainable private procurement the norm should be seen as an end-point on a challenging journey; the current proposals as part of the Sustainable Products Initiative can contribute a few steps on the way to the destination but are unlikely to take us there completely. As the analysis in this paper shows, the political barrier to intervening in free enterprise is relatively high and needs to be justified. That being said, some unsustainable products have been banned from the EU single market, such as vehicles with high emissions, inefficient light bulbs and electric appliances with high electricity consumption. While these products have been banned because they are manifestly unsustainable, it does not mean that products allowed on the market are all sustainable.

To ensure the market as a whole moves towards more sustainable products, additional measures should be taken that indirectly make sustainable procurement more attractive, by increasing transparency so that consumers discipline companies, or by nudging them and editing choice. This is also why it would be a missed opportunity to insist on directly influencing private procurement only, and ignore the indirect influence that more sustainable public procurement policy could have on private procurement.

In this chapter, we list the recommendations that can be deduced from the examples described above.

On the *process* of moving towards more sustainable private procurement:

- Caution must be exercised to ensure that any **definition of what is sustainable** is supported by a wide range of stakeholders. Weaknesses in the governance process, by excluding or silencing certain stakeholders, can lead to external criticism<sup>46</sup> and erode confidence in the definitions of sustainability that the system needs to be successful. Any political decision to delegate the definition of what “sustainable” means to a “technical” body should be taken with caution and subject to an inclusive and balanced stakeholder process, and integrate best practices from more balanced governance processes<sup>47</sup>.
- There are many private and public definitions of sustainability out there, including some that focus on specific aspects of sustainability. The initiative should **build on these existing initiatives** rather than replacing them with a new framework drafted from scratch, to reduce transition costs, reduce the political capital needed and integrate dimensions of sustainability that are currently relevant in the market.

On the *substance* of a sustainable private procurement environment:

- In line with the Sustainable Products Initiative, the focus of procurement measures should be to reward the most sustainable products, A non-binary

<sup>46</sup> E.g., as seen with the public fights over the inclusion of certain controversial technologies in the EU Sustainable Finance Taxonomy; see letter from 150+ NGOs to the EU institutions urging them not to label fossil gas as a green investment, available at: [https://www.feu.awsassets.panda.org/downloads/cso\\_letter\\_to\\_eu\\_institutions\\_\\_\\_iea\\_net\\_zero\\_\\_taxonomy\\_.pdf](https://www.feu.awsassets.panda.org/downloads/cso_letter_to_eu_institutions___iea_net_zero__taxonomy_.pdf)

<sup>47</sup> Such as those in the field of Ecolabelling and Ecodesign, PEF/Life-Cycle Assessment and the Green Public Procurement criteria development.

system with various levels is welcome, as long as the system ensures that the most sustainable products are clearly labelled. Given that Ecodesign focuses on taking the least sustainable products off the market, the procurement rules should focus on promoting the good.

- Procurement measures should come with a **strong minimum safeguards** provision that should be respected in the procurement process and/or a list of “harmful” features that products should avoid. The Green Public Procurement criteria can be used as a basis here.
- Any sustainable procurement framework should be **dynamic over time** with an appropriate review process, allowing to “tighten the screws” as societal and technical norms evolve and products and services can be made and delivered in a more environmentally and socially sustainable way.
- More broadly, the EU Ecolabel example shows how a transparency **label can become a de facto standard**, as does the Taxonomy which is increasingly used as a condition in other legislation such as, the Recovery and Resilience fund. To encourage this, the Sustainable Products Initiative should introduce **measures to help corporate buyers to find and compare existing and new labels**, including a mapping across sectors to make it easier for corporate purchasers to identify sustainability labels for relevant product groups.
- **Choice editing should be stimulated beyond minimum requirements as set in Ecodesign and further developed as part of SPI**, as a supplementary voluntary yet powerful policy. To a certain extent, choice editing as a form of self-regulation can complement **potential legislative measures** including market bans.

The suggestions above define the end-point of a sustainable procurement framework. However, intermediate steps will be needed to get there, and the path chosen will depend on political feasibility.

To manage this process, we recommend the following **concrete first steps** as part of the Sustainable Products Initiative:

- Imposing green or sustainability requirements on private procurement would be hard to win politically if such requirements are not imposed on the public sector first. Therefore, the Green Public Procurement framework should move from a voluntary to a mandatory instrument, by **amending the EU public procurement directives** from 2014<sup>48</sup>, as considered in the Inception Impact Assessment of the Sustainable Products Initiative<sup>49</sup>, while in the meantime pursuing the setting of mandatory sustainable public procurement in sectoral legislation as seen in the Batteries Regulation as well as the proposed Energy Efficiency Directive.

<sup>48</sup> Kleoniki Pouikli, op. cit.

<sup>49</sup> [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative_en)

- The Procurement Directives should also be amended to **extend the range of sustainability matters** that must be taken into account, beyond the current environmental (green) focus, notably to impose more consideration to social and work conditions criteria. The introduction of mandatory sustainability requirements in public procurement processes would send a strong signal and entail significant effects also in the private sector. Corporates would aim to meet such thresholds and consequently elevate their sustainability standards, including vis-à-vis their suppliers, e.g. through the use of performance footprinting so that government suppliers better integrate the impact of their offer on the sustainability of their supply chain. This would act as a driver for sustainable conduct also in the private sphere, prompting companies to integrate sustainability requirements in their procurement processes.
- It is also important to create a **level playing field** between publicly provided services (subject to EU public procurement rules) and privately provided services that compete with them (e.g. private healthcare, education, and transport, which are all typically regulated at a national or European level already). As a stepping-stone towards mandatory sustainability rules in private procurement, the EU should therefore propose rules that make such **privately provided services subject to the same sustainability** requirements that the SPI would impose on public procurement. A starting point for such requirements could be a separate, new, legislative instrument based on the principles contained in the Commission's interpretative communication on public-private partnerships<sup>50</sup> but with a wider scope, including privately provided services that compete with public services.
- To ensure continued pressure to move towards more sustainable procurement becoming the norm, any transitional measures above should come with strong **reporting requirements on sustainable procurement and their ratio versus all procurement**. This would demonstrate that the procurement of products and services is indeed becoming more sustainable, or failing that, act as a stick to justify political intervention later. This reporting **should align with the Corporate Sustainability Reporting Directive** in terms of scope, and include indicators that allow assessing the sustainable proportion of products and services that are purchased and provided.

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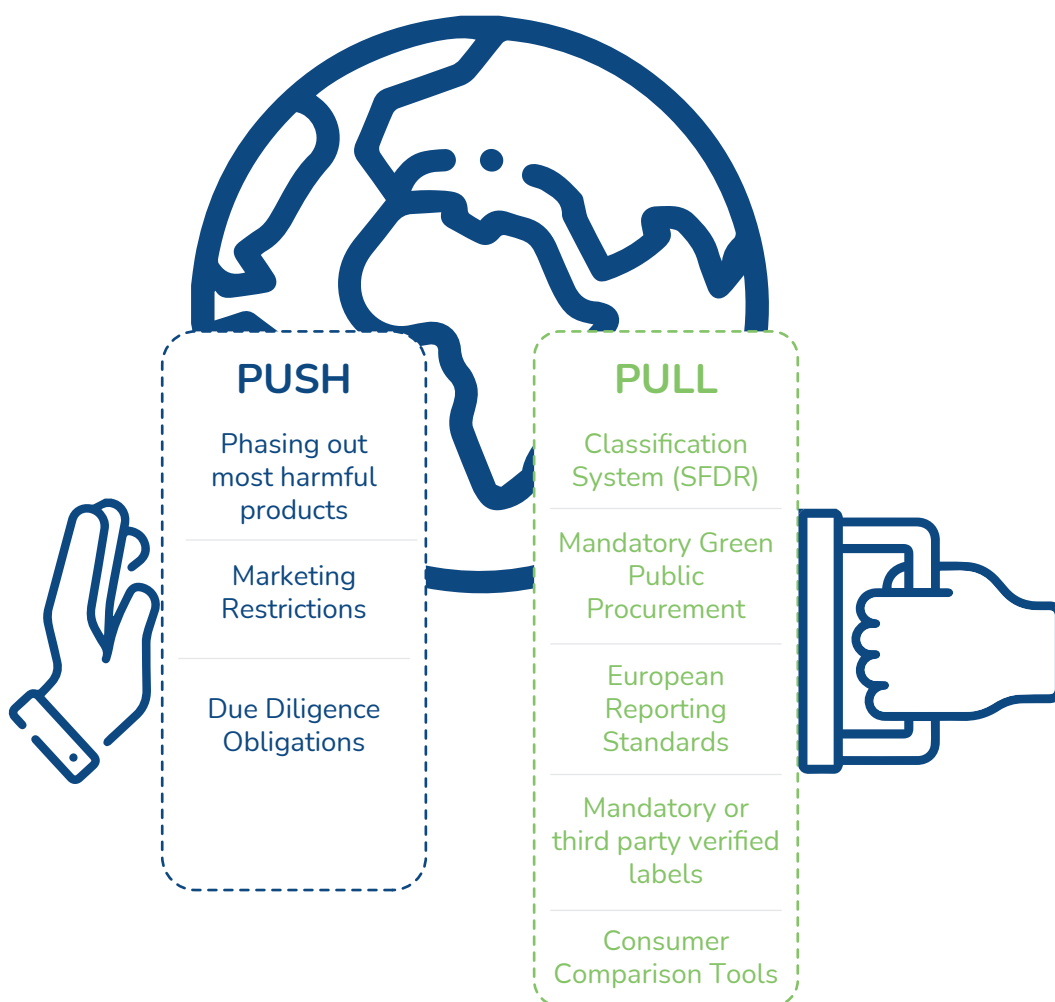
<sup>50</sup> <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:091:0004:0009:EN:PDF>

## Policy context and potential impact

EU policy to improve the sustainability of products and services procured so far has been focusing on public procurement and private consumption. While ultimately the biggest impact can be expected in the field of private procurement, politically this is the last step that is likely to be achieved. Policy should initially focus on mandatory sustainable public procurement, as well as voluntary supporting measures in the private sphere, such as choice editing.

The impact of mandatory sustainable public procurement will be further enhanced by companies deciding to no longer produce products and provide services of two different quality levels (one for public buyers, one for private buyers), and by voluntary measures such as choice editing.

The analysis in this report shows that many measures can be considered to stimulate sustainable public procurement, some of a “push” (enforcing behaviour) and some of a “pull” (encouraging behaviour) nature. Both forms of measures require a certain set of operational conditions to be met.



### CONDITIONS FOR AN OPERATIONAL FRAMEWORK

This framework should come with a **transparent and democratic governance structure** to ensure that **all stakeholders with expertise on sustainable products** are involved to **draft that “technical” features of “sustainability”**. It should also be supported by a **double-sided taxonomy** defining both green and harmful products.



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