

The case for a Buy European and Sustainable Act

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Public procurement, which is responsible for 10% of the EU's total carbon footprint and represents 15% of EU's GDP, **can be a powerful lever to achieve policy goals.**

This explains why the idea of using public procurement as a strategic tool is once again gaining momentum at the dawn of a new EU cycle. Enrico Letta's recent report presented in March 2024 largely insists on the fact that **public procurement "is crucial for realising the strategic goals of the European Union"** and *"instrumental in enhancing the productivity, resilience, and sustainability of the EU economy"*. The Council explicitly endorsed the report, stressing that **"all relevant tools, including public procurement, should be leveraged"** to *"creat[e] the conditions to allow European operators to seize the opportunities of a climate-neutral, digital and circular economy"* and *"help the Union deliver sustainable solutions that work for all"*.

In parallel, at Member States' level, France, Germany and Italy recently discussed the French call to adopt "buy European" rules in response to *"American 'protectionism' and Chinese 'interventionism'"*.

Indeed, in a context where major trade partners such as the United States and China actively favour domestic suppliers over foreign companies in public procurement policies, **the EU has not yet made full use of this tool** to increase green demand, support domestic producers, foster innovation in low-carbon transition solutions, or even simply maintain equal competition.

In this respect, a recent study by Carbone 45 has modelled the impacts of a hypothetical "Buy European and Sustainable Act" that would prescribe a minimum threshold of EU content and a maximum threshold of greenhouse gas (GHG) emissions of products purchased through public procurement. Carbone 4's study concludes that combining such "local content" and climate criteria could substantially accelerate the low carbon transition and resilience of some EU economic sectors and would lead to a significant reduction in GHG emissions.

Beyond the desirability of a Buy European and Sustainable Act, some have raised the question of the legality of this kind of instrument in the light of the EU's international trade commitments.

This is the focus of this study which shows that **a Buy European and Sustainable Act for public procurement- if carefully crafted - would be feasible under both World Trade Organization**

(WTO) law and EU law.

As a matter of fact, numerous States have already adopted “buy national” schemes or similar measures discriminating against foreign products in public procurement, which have not been challenged at the WTO. This is the case of the Buy American Act but also of various national measures adopted notably by Asian countries and even by EU Member States, such as Belgium. Likewise, measures setting mandatory environmental criteria in public procurements are already commonplace and – to our knowledge – have never raised any formal WTO dispute.

This is because **the WTO law permits to a certain extent this type of measures.**

As regards schemes favouring national products over imported ones in public procurements, even if they do not comply with the “national treatment” obligation under the General Agreement on Tariffs and Trade (GATT), **they may benefit from a derogation designed for public procurement** under Article III:8 GATT if they meet certain conditions. As regards the 22 Members (including the EU) to the **Plurilateral Agreement on Government Procurement (GPA)**, it is true that they have accepted to open their public procurements to the other GPA parties. However, they may still implement “buy national” measures towards States which are not parties to the GPA (such as Brazil, China, India, Indonesia, Mexico, South Africa and Turkey) **and/or in relation to procurements which are not covered by their specific commitments**, such as those falling below the monetary thresholds determined by each party or outside the covered sectors.

Measures imposing sustainability criteria in public procurement may equally fall under the GATT’s derogation for public procurement. In addition, while origin-based requirements are precluded under the GPA, States may impose evaluation criteria differentiating products based on considerations relating to the protection of the environment (e.g. carbon footprint), provided such criteria are applied in a non-discriminatory manner. In this respect, in a report published last year on “trade policy tools for climate action”, the WTO Secretariat stated:

“In line with their domestic climate goals, governments could revise their domestic government procurement policies to include climate-sensitive criteria, such as science-based, low-carbon requirements in tenders. They could make such criteria not just optional but mandatory.”

As of today, **the EU lacks a clear and harmonised policy** in this respect leaving it upon Member States to decide whether to impose origin requirements in public procurement or to grant equal treatment to foreign products and services originating from countries that do not even share any preferential arrangement with the EU on public procurement. Likewise, **EU law explicitly provides for the**

inclusion of climate criteria, but only on an optional basis, and allows Member States to decide that price should be the sole criterion; in practice, most public buyers still choose the lowest bid. This results in **disparate implementation across Member States, which may harm the EU's approach to reciprocity in public procurement liberalisation and the use of public procurements as a tool to favour sustainable products.**

Therefore, to be consistent with the Commission's recent calls for a harder stance on reciprocity towards foreign bidders and willingness to use all tools including public procurement to deploy the green deal, **the EU should at least optimise the policy space it enjoys under its international commitments to provide for mandatory award criteria to incentivise the use of EU and sustainable products.**

Technically, this would imply to **review the EU directives on public procurement** to:

1. Make the use of climate criteria widespread and mandatory in all EU public procurements;
2. Introduce a generalised system granting preference (e.g. through price evaluation) to EU products in public procurement contracts falling outside the scope of the GPA and other international trade arrangements;
3. Extend preference to bidders originating from other GPA parties or States with which the EU has concluded preferential Free Trade Agreements (FTAs), in GPA- and FTA-covered public procurement, and/or restrict or exclude the right of bidders originating from other third countries to compete for these contracts;
4. Defining specific rules of origin to apply to public procurement falling outside the scope of the GPA to give the EU flexibility to favour not only EU products but also their components, in line with the GATT derogation.

Overall, the "local content" requirements of such scheme would closely resemble the United States' Buy American Act.

Finally, it should be stressed that **the EU has conceded a high level of openness under the GPA in comparison to its trade partners.** As an illustration, the EU included a clause in its GPA schedules ensuring that all existing and future subcentral procuring entities (e.g. cities and subnational governments) are subject to the GPA. In contrast, the United States only listed 37 out of its 50 states with a varying degree of openness at state level. In addition, the US' GPA commitments do not apply to procurements at the municipal level. Thus, the EU could reassess the scope of its commitments and seek to open discussions in this respect with its trade partners.

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