15 May 2024

# THE CASE FOR A BUY EUROPEAN AND SUSTAINABLE ACT COMPATIBLE WITH EU AND WTO LAW

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# INTRODUCTION AND EXECUTIVE SUMMARY

**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"*[1]. The Council explicitly endorsed the report,[2] 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".[3]

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'*".[4]

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 4[5] 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 [6]– 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.

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1. E. Letta, **Much more than a market – Speed, Security, Solidarity** (March 2024), p. 44.

2. See Council Conclusions of 18 April 2024, **https://www.consilium.europa.eu/media/m5jlwe0p/euco-conclusions-20240417-18-en.pdf**, para. 14: *"The European Council welcomes Enrico Letta's presentation of his 'Much More Than A Market' High-Level Report, and invites the current and future Council Presidencies to take work forward on the recommendations therein by the end of the year."*

3. Ibid., para. 16.

4. see Politico, "Germany rebuffs French call to back 'buy European' agenda", 8 April 2024. President Macron's electoral manifesto in 2017 also advocated in favour of a "Buy European Act" (see Les Echos, "Protectionnisme : ce que propose Emmanuel Macron", 27 April 2017).

5. Carbone 4 "Buy European and Sustainable Act: Accelerating the low-carbon transition in the European Union", 15 May 2024.

6. The analysis focuses on the **public procurement of goods.** Public procurement of services would be subject to the GATS rules on trade in services.

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.[7] As regards the 22 Members (including the EU) to the **Plurilateral Agreement on Government Procurement (GPA),**[8] 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.[9]

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."**[10]

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,**[11] **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.**

7. The GATS (Article XIII:1) sets out a similar derogation for the procurement of services.

8. The full list of GPA members (available at: **https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm**): Armenia, Australia, Canada, the EU, Hong Kong, Iceland, Israel, Japan, South Korea, Liechtenstein, Moldova, Montenegro, Netherlands (with respect to Aruba), New Zealand, North Macedonia, Norway, Singapore, Switzerland, Taiwan, Ukraine, United Kingdom, United States.

9. See below n 36 and 37.

10. See WTO Secretariat, **Trade Policy Tools for Climate Action (2023),** ch 2 (Government Procurement), p. 18.

11. As regards local content requirements, some Member States' law explicitly provide that third country bidders may (e.g. Denmark, Netherlands, and France) or should (e.g. Belgium) be excluded in the absence of any relevant international commitments, whereas others such as Poland and Germany extend national treatment to all foreign operators.

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 re-assess the scope of its commitments and seek to open discussions in this respect with its trade partners.

# 1. LOCAL CONTENT REQUIREMENTS AND CLIMATE CRITERIA IN PUBLIC PROCUREMENT UNDER WTO LAW

The EU should finally **carefully assess the opportunity of new commitments** in relation to the opening of public procurement which tend to be automatically included **in the negotiation of new FTAs, especially if it hampers its ability to harness public procurement for its low-carbon transition.**

Measures imposing local contents requirements ("LCRs") and/or climate criteria in public procurements are mainly subject to the disciplines of the General Agreement on Tariffs and Trade ("GATT") and of the Agreement on Government Procurement ("GPA").[12]

## 1.1. ASSESSMENT UNDER THE GATT

The GATT is applicable to measures setting LCRs in public procurement affecting imports of goods. In principle, those measures would be subject to the GATT's national treatment rules **(1.1.1)** but may be exempted therefrom by Article III:8(a) **(1.1.2).**[13]

### 1.1.1. NON-DISCRIMINATION OBLIGATIONS UNDER ARTICLE III GATT

Article III:1 GATT enshrines a general national treatment obligation whereby internal measures[14] should not "be applied to imported or domestic products so as to afford protection to domestic production".

More specifically, Article III:4 provides:

> *"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. [...]"*

In addition, Article III:5 provides that:

> *"No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. [...]"*

Measures setting LCRs are likely to breach these provisions as they would – by construction – favour domestic products over imported products. However, Article III8:(a) provides for a derogation exempting public procurement measures from the obligations of Article III if certain conditions are met.

12. They may also fall within the scope of other WTO agreements such as the Trade-Related Investment Measures Agreement (TRIMs Agreement). However, the derogation under Article III:8(a) GATT also applies with respect of the national treatment rules under the TRIMs Agreement (Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program, para. 5.26.*

13. Measures that are nevertheless found to fall outside the scope of this derogation and to breach national treatment obligations may still be justified under Article XX GATT, subject to a case-by-case assessment, (i) if they fall under a legitimate objective (e.g. the protection of human health or the preservation of exhaustible resources) and (ii) to the extent that they are not applied in a way that constitutes arbitrary discrimination or a disguised restriction on trade. Measures based on local content criteria are unlikely to benefit from this exception as they may difficultly be reconciled with one of these objectives. By contrast, non-discriminatory binding climate criteria would be more likely to be considered to contribute to an environmental objective.

14. Internal measures are defined as *"internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions".*

### 1.1.2. DEROGATION FOR PUBLIC PROCUREMENT UNDER ARTICLE III:8(A) GATT

Pursuant to Article III:8(a) GATT, certain measures relating to public procurement are exempted from national treatment rules:

> "The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial use."[15]

In other words, Article III.8(a) gives WTO members a *"right to discriminate"* in favour of domestic products in public procurement,[16] insofar as the following conditions are met:

1. *LCRs must apply to procurement by "governmental agencies"*

The term "governmental agencies" refer to any *"entity acting for or on behalf of government and performing governmental functions within the competences conferred on it".*[17] It is irrelevant whether the entity is state-owned. This term also covers local public entities.

2. *The procurement should be made "for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial use"*

The first part of this condition – i.e. that the products are procured "for governmental purposes" – refers to *"what is consumed by government or what is provided by government to recipients in the discharge of its public functions".*[18] The Appellate Body noted that Article III:8 requires a *"rational relationship between the product and the governmental function being discharged"* but does not provide any further guidance as to the scope of public functions, which are *"to be determined on a case by case basis".*[19]

The second part requires that public procurement is not made with a view to commercial resale or with a view to use in the production of goods for commercial use. The term "commercial" broadly refer to profit-orientation.[20]

3. *The LCRs must qualify as "laws, regulations or requirements governing the procurement by governmental agencies of products purchased"*

This requirement is understood to strictly refer to rules governing the procurement of "products purchased", as opposed to those setting LCRs in relation to the inputs thereof. The WTO Appellate Body requires that the products procured and the product being discriminated be in a "competitive relationship".[21] It follows that, in theory, **origin requirements can only be imposed on end or unmanufactured products.** LCRs formally discriminating between the inputs of the products purchased are excluded from the scope of the derogation contained in Article III:8(a).

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15. Article XIII:I of the GATS contains a similar derogation, which should be interpreted and applied in a manner consistent with the WTO Appellate Body's interpretation of Article III:8(a).

16. Appellate Body (AB) Reports, *Canada – Renewable Energy / Canada – Feed-in Tariffs,* WT/DS412/AB/R, WT/DS426/AB/R (adopted 24 May 2013), para. 5.27. This derogation also applies with respect of the national treatment rules under the Trade-Related Investment Measures (TRIMs) Agreement (para. 5.26).

17. Ibid., para. 5.61

18. Ibid., para. 5.68 and 5.74.

19. Ibid.

20. AB Reports, *Canada – Renewable Energy / Canada – Feed-in Tariffs,* para. 5.71.

21. Ibid., paras 5.63, 5.76-5-79. In this case, the Appellate Body concluded that Article III:8(a) was not applicable because the product purchased by the government (electricity) and the product that was being discriminated by LCRs (generating equipment) were not in a competitive relationship. This approach was confirmed in AB Report, *India – Solar Cells,* WT/DS456/AB/R (16 September 2016).

As an illustration, this means that WTO members are allowed to require governments or local authorities to purchase domestic electric cars only, but could not require that the procured cars' batteries are manufactured locally – as cars cannot be in a competitive relationship with batteries.[22] They could also require the procurement of heavy materials, such as cement or steel, or food used in public catering to be conditional on domestic origin.

However, it may be possible to circumvent the narrow scope of the derogation through specific **rules of origin.** Rules of origin designate rules adopted by States to determine in what circumstances an end product can be considered domestic. Under such rules, a State can determine that domestic products are those containing a minimum given share of domestically produced inputs. Turning back to the example of electric cars, this means that cars may only qualify as domestic where a given share of its components are domestically produced. The adoption of such rules permits to impose origin requirements applying not only on the end product but also indirectly on its inputs. The Appellate Body left open the question of whether Article III:8(a) insulates these measures from review under the GATT's national treatment obligations,[23] but WTO members have largely interpreted this provision as permitting them to proceed in this manner.

Some WTO members, such as the United States, have introduced such rules of origin, which apply in combination with *"buy national"* policies restricting the public purchase of products that are not *"domestic end products"*.[24] The Buy American Act does not set any tender requirements or evaluation criteria relating to the origin of the components of the product. Instead, it defines "domestic end products" through a two-part test: (i) the product must be manufactured in the United States (i.e. *"substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed"*); and (ii) the cost of domestic components[25] must exceed 65% of the cost of all the components.[26]

Beyond the example of the Buy American Act, it should also be noted that **despite the GATT's national treatment rule and the narrow scope of the derogation, a very large number of WTO members continue to apply far-reaching local content criteria.[27]** For instance, Indonesian law mandates the use of domestic products in public procurement – in addition to other significant restrictions origin-based restrictions – and defines local goods and services as those where at least 40% of the total value is comprised of local components or inputs.[28] Brazil has likewise introduced a US-style "Buy Brazil Act" granting price preferences to domestic products and services.[29]

In contrast, **the EU does not currently grant preference to domestic products** (see below section 2.2). It **does not apply specific rules of origin in public procurement either.** Instead, Article 60(2) of the Union Customs Code (UCC) indiscriminately applies to all imported goods, including for the purposes of public procurement.[30] This article provides that when two or more countries are involved in the manufacture of a

22. H. Hestermeyer and L. Nielsen, "The Legality of Local Content Measures under WTO Law" (2014) *Journal of World Trade* 48(3), p. 578.

23. AB Reports, *Canada – Renewable Energy / Canada* – Feed-in Tariffs, para. 5.63. See A. Yanovich, *"Canada – Renewable Energy and Canada – FIT Program – Debunking the Myth that the GATT 1994 Provides Carte Blanche to Discriminate in Government Procurement"* (2013) 8 Global Trade and Customs Journal, p. 432.

24. 41 USC Ch. 83 – Buy American; US Federal Acquisitions Regulations (FAR), Section 25.101(a). Under this regime, a price evaluation penalty is applied to competing offers of foreign end products (Other than those covered by a trade agreement, which are granted national treatment – see below). These are eligible for public procurement only where domestic production is deemed inadequate – e.g. unreasonable cost, non-availability, public interest (FAR, Section 25.103.)

25. This threshold will be set at 75% as of 2029. See, FAR, Sections 25.102 and 25.106 and 25.5.

26. FAR, Section 25.101(a). This test applies to manufactured products.

27. See the European Commission's page referencing trade barriers in third countries, including in relation to public procurement at: **https://trade.ec.europa.eu/access-to-markets/en/barriers?isSps=false&table=countrymeasure.**

28. European Commission, **Trade Barriers – Local content requirements (Indonesia)** (12 December 2023).

29. European Commission, **Trade Barriers – Buy Brazil Act** (26 July 2021).

30. Ibid., see p. 5. **https://taxation-customs.ec.europa.eu/system/files/2022-03/Guidance%20on%20non- preferential%20rules%20of%20origin.pdf.**

product, the product *"shall be deemed to originate in the country or territory where they underwent their last, substantial, economically justified processing or working, in an undertaking equipped for that purpose, resulting in the manufacture of a new product or representing an important stage of manufacture".*

Thus, to have the flexibility to impose LCRs in public procurement not only on goods but also on their components in a way that complies with the GATT, **the EU would have to determine specific rules of origin for public procurement, in the same way as the United States does.** This is notwithstanding the applicability of the GPA.

## 1.2. ASSESSMENT UNDER THE GPA

The EUis a party to the Agreement on Government Procurement (GPA), a specific WTOagreement governing public procurement, revised in 2012.[31] Public procurements falling within the scope of the GPA **(1.2.1)** may not include origin requirements discriminating against other GPA[32] parties **(1.2.2).**

These rules also apply to most FTAs concluded by the EU as they contain provisions which largely mirror the legal regime set forth in the GPA. This justifie s joint cons ideration.

### 1.2.1. SCOPE OF THE GPA

The GPA has limited and selective coverage as the rules it sets out only apply between GPA parties and to a restricted set of public procurements.

In 2024, only 22 WTO members are parties to the GPA, including the EU, the United States, Canada and Japan.[33] India, China, Brazil and other large economies have not acceded to the agreement yet.

In addition, the GPA only provides partial coverage over its parties' public procurement market. Pursuant its Article II:2, the GPA indeed applies to "covered procurement", which is defined as follows:

> *"2. For the purposes of this Agreement, covered procurement means procurement for governmental purposes:*
>
> *a) of goods, services, or any combination thereof:*
>
> *I) as specified in each Party's annexes to Appendix I; and*
>
> *II). not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale;*
>
> *b) by any contractual means, including: purchase; lease; and rental or hire purchase, with or without an option to buy;*
>
> *c) for which the value, as estimated in accordance with paragraph 6 through 8, equals or exceeds the relevant threshold specified in a Party's annexes to Appendix I, at the time of publication of a notice in accordance with Article VII;*
>
> *d) by a procuring entity; and*
>
> *e) that is not otherwise excluded from coverage in paragraph 3 or a Party's annexes to Appendix I."*

31. The amended text is commonly referred to as the "revised GPA", but will hereinafter be designated as the "GPA".

32. European Commission, Guidance on the participation of third country bidders and goods in the EU procurement market, 13 August 2019, **OJ C 271/43**, p. 47.

33. See the full list of GPA members, above n 8.

It follows that the scope of GPA-eligible procurement varies according to each party's selection made in a separate set of schedules in relation to (i) procuring government agencies (i.e. central, subcentral and other government authorities), (ii) goods and services procured,[34] (iii) minimum monetary thresholds,[35] and (iv) exceptions. GPA obligations do not apply beyond these specific commitments.

This can result in uneven coverage between GPA parties. In particular, at the subcentral level, the **EU largely extended its coverage** on Member States' national, regional and local levels through a clause ensuring that *"all current and potentially created future procuring entities in the EU, on all levels of government, are subject to the GPA".*[36] In contrast, the United States only listed 37 out of its 50 states as covered entities with a varying degree of openness at state level,[37] and did not include procurements at the municipal level. This led the author of a comprehensive study on GPA coverage to oppose the EU's *"high openness"* in comparison to the relative *"low openness"* in the US.[38]

Accordingly, the relative size of GPA-eligible procurement markets varies between State Parties. For instance, in 2020, **covered procurement in the EU amounted to €529 billion,[39]** a quarter of the 2-trillion EU procurement market.[40] In contrast, in 2013-2015, the annual value of US GPA-eligible federal procurement amounted to **$155 billion,[41]** while no reliable data exists with respect to public procurement at State and municipal level.[42] According to the European Commission, the size of the Japanese procurement market open to GPA countries was just €27 billion in 2016 – even though public procurement expenditure averages 16% of the country's GDP.[43]

34. For instance, the EU's commitments cover (i) "all goods" procured by listed entities, subject to some exceptions (for defence procurement in particular) and (ii) a closed list of services (e.g. telecommunications and financial services).

35. See the **table** of thresholds indicated in the GPA parties' annexes 1-3. The EU applies the thresholds applied by most parties: €143,000 (Annex 1 on procurement by central government authorities), €221,000 (Annex 2 on procurement by subcentral government entities) and €443,000 (Annex 3 on procurement by other entities) for goods and services, and €5,538,000 for construction services.

36. C. Freudlsperger, *Trade Policy in Multilevel Government: Organizing Openness* (OUP 2020), p. 85.

37. In response, the EU decided to include in its annex 2 a reciprocity clause granting the US lower subcentral access than to other countries (see the EU's **annex** 2 on subcentral government entities).

38. C. Freudlsperger, above n 36; F. Hoffmeister, "The EU public procurement regime on third-country bidders – setting the cursor between openness and reciprocity" in H. Kalimo and M. S. Jansson, EU Economic Law in a Time of Crisis (Edward Elgar 2016), p. 78.

39. This is based on official **data** notified by the EU to the WTO.

40. See European Parliament, Briefing note: **"EU international procurement instrument"** (November 2022), p. 2.

41. US Secretary of Commerce, USTR and US Office of Management and Budget, **Report on the Impact of Free Trade Agreements on Buy American Laws** (February 2024), p. 8.

42. Both sides appear to rely on differing data. See e.g. US Government Accountability Office, **"United States Reported Opening More Opportunities to Foreign Firms Than Other Countries, but Better Data Are Needed"** (February 2017), p. 13, stating that the US reported *"more than twice as much covered government procurement as the EU—$837";* but see, C. Freudlsperger, above n 36, p. 66, highlighting the limitations of this "inflated" data – in particular, the US does not report to the WTO an estimate of GPA-covered subcentral procurement, but only the value of estimated total state procurement.

43. European Commission, Amended Proposal for the EU international procurement instrument, **COM(2016) 34 final**, p. 2.

### 1.2.2. GPA SUBSTANTIVE RULES AS REGARDS LOCAL CONTENT AND CLIMATE CRITERIA

One of the GPA's fundamental rules[44] is the non-discrimination principle enshrined in Article IV:

> *"1. With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to:*
>
> *a) domestic goods, services and suppliers; and*
>
> *b) goods, services and suppliers of any other Party.*
>
> *2. With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not:*
>
> *a) treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or*
>
> *b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of any other Party."*

Thus, insofar as the GPA applies, parties should grant free access and equal treatment to bids of eligible foreign products.[45] For instance, the United States has waived the Buy American Act restrictions with respect to GPA-covered procurement – after other GPA parties criticised the restrictions for violating GPA non-discrimination obligations.[46]

Local content requirements are also expressly prohibited under Article IV.6 GPA.[47]

Furthermore, under Article X GPA, parties should prescribe technical specifications *"in terms of performance and functional requirements, rather than design or descriptive characteristics"* and, where relevant, have such specifications based on international standards. Articles X.6 and X.9 clarify that technical specifications and evaluation criteria may include environmental characteristics e.g. to "promote the conservation of natural resources or protect the environment".

This suggests that **GPA parties may introduce – either optional or mandatory – climate-sensitive criteria such as carbon footprint requirements, even where these ultimately relate to methods of production.** In this respect, in a report published in 2023 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.**

44. The fundamental rules set out in the GPA also include transparency and judicial protection.

45. Article V lays out a number of exceptions for the least developed countries and developing countries.

46. FAR, Section 25.001: *"(b) The restrictions in the Buy American statute are not applicable in acquisitions subject to certain trade agreements (see subpart 25.4). In these acquisitions, end products and construction materials from certain countries receive nondiscriminatory treatment in evaluation with domestic offers".* See also, European Commission, **Trade Barriers – Procurement: Buy American** (1 March 2024).

47. Article IV.6 provides that GPA parties cannot *"seek, take account of, impose or enforce any offset"* with regard to covered procurement. Offsets are defined in Article I as *"any condition or undertaking that encourages local development or improves a Party's balance-of-payments accounts, such as the use of domestic content".*

> […] WTO rules – including its Government Procurement Agreement (GPA 2012) – can play an important role in ensuring that open government procurement markets are leveraged to support climate objectives. […] Moreover, the GPA 2012 already has features that facilitate climate change mitigation through government procurement. For instance, it allows the application of technical specifications aimed at the protection of the environment and the evaluation of tenders using the environmental implications of a good or service as a criterion."[48]

### 1.2.3. LIMITED OPTION FOR AMENDING EU COMMITMENTS UNDER THE GPA

In view of the high level of coverage conceded by the EU under its schedules of the GPA compared to its trade partners and the far-reaching consequences in terms if policy space, the EU could re-assess the scope of its commitments and seek to open discussions in this respect with its trade partners.

However, the process for GPA members to amend their schedules in a way that would reduce the scope of public procurements covered by the GPA is complex and restricted.

> Indeed, in case of substantial change, Article XIX of the GPA outlines a process allowing aggrieved parties to raise objections to the proposed changes, which should be resolved through consultations or, ultimately, arbitration. Aggrieved parties may withdraw *"substantially equivalent coverage"* with respect to the modifying party if the modification becomes effective.

In practice, most of the proposed modifications to date merely reflect naming rectifications and administrative reorganisations for covered entities[49]. Notifying GPA parties systematically justify these changes and clarify that the proposed modifications *"do not affect the mutually agreed coverage*" under the GPA.

To our knowledge, only once a GPA party appears to have delisted a covered entity with the foreseeable effect of reducing GPA coverage. In 2016, Japan proposed to remove a sizable railway company arguing it was no longer under government control[50], which was disputed by other members (i.e. the EU, Canada and the United States)[51].

Also, multiple objections were reportedly made by a large number of GPA parties (including the EU, Canada, Japan, Korea, Australia and Switzerland) in relation to a Trump-era proposal – which the Biden administration maintained – that sought to remove a broad list of medicines and related products from US commitments under Annex 1[52]. This was the first use of the modification process to substantially reduce the scope of covered goods.

48. See WTO Secretariat, **Trade Policy Tools for Climate Action** (2023), ch 2 (Government Procurement), p. 18.

49. See the notifications on modifications under the GPA at: **https://notifications.wto.org/en/notification-status/government-procurement/245.**

50. See: **https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/PLURI/GPA/MODJPN82.pdf&Open=True.**

51. See: **https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/PLURI/GPA/MODJPN88.pdf&Open=True.** The modification ultimately took effect as the company was fully privatised (see Japanese MFA **Press Release,** 7 November 2016 and Japan's updated **list** of covered entities under annex 3)

52. See WITA, **"Biden Team Supports US Proposal to Withdraw Medicines from GPA"** (16 February 2021), reporting that in its GPA notification, the US proposed to remove coverage for all Annex 1 (federal government) entities of "*any goods that are deemed necessary for responding to threats arising from chemical, biological, radiological, and nuclear (CBRN) threats and public health emergencies, including emerging infectious diseases such as COVID-19*".

# 2. LOCAL CONTENT REQUIREMENTS AND CLIMATE CRITERIA UNDER EU PUBLIC PROCUREMENT LAW

The EU public procurement legal framework is composed of various instruments[53], among which Directive 2014/24/EU (the "Public Procurement Directive") sets out minimum harmonised rules governing the way public authorities and certain public utility operators purchase goods, works and services. These rules only apply to public procurement of higher value[54].

It follows from the analysis of EU public procurement law and Member States policies as regards origin-based requirements **(2.1)** and climate criteria **(2.2)** that the EU lacks a harmonised policy, leaving it upon Member States to decide whether to impose origin or sustainability requirements in public procurement giving rise to disparate implementation across Member States.

## 2.1. LOCAL CONTENT REQUIREMENTS IN PUBLIC PROCUREMENT IN THE EU

### 2.1.1. LACK OF MANDATORY LOCAL CONTENT REQUIREMENTS IN EU PUBLIC PROCUREMENT LAW

The core principles of EU directives on public procurement are transparency, equal treatment, non-discrimination, and openness to competition. In particular, the "*design of the procurement shall not be made with the intention [...] of artificially narrowing competition [...] with the intention of unduly favouring or disadvantaging certain economic operators*"[55].

These principles are operationalised through provisions on technical specifications and award criteria[56], essentially incorporating the GPA into EU law. For instance, Article 42 of the Public Procurement Directive states that technical specifications must afford "*equal access of economic operators to the procurement procedure*" and should not refer to "*a specific origin*". Also, as a matter of principle, contracts are awarded based on the "*most economically advantageous tender*", which is determined through weighing all criteria chosen by the public buyer[57].

Therefore, EU public procurement law **does not currently discriminate between products based on origin to favour domestic (EU) products, as would be accepted pursuant to Article III:8 GATT.** This does not mean, however, that the EU procurement market is *de jure* open towards all third countries; rather, the EU is not equipped with a harmonised system generally granting preference to certain bidders based on origin. This explains why the EU procurement market is sometimes referred to as open de facto.

### 2.1.2. POSSIBILITY TO DISCRIMINATE NON-GPA STATES IN EU PUBLIC PROCUREMENT LAW

Article 25 of the Public Procurement Directive provides that:

> **"In so far as they are covered by Annexes 1, 2, 4 and 5 and the General Notes to the European Union's Appendix I to the GPA and by the other international agreements by which the Union is bound,** contracting authorities shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union.[58]"

53. **Directive 2014/24/EU** of the European Parliament and of the Council of 26 February 2014 on public procurement; **Directive 2014/25/EU** of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors (Utilities Directive); **Directive 2014/23/EU** of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (Concessions Directive); **Directive 2009/81/EC** of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security (Defence and sensitive security procurement).

54. Directive 2014/24/EU, Article 6; Directive 2014/23/EU, Article 9; Directive 2014/25/EU, Article 17. Those articles set monetary thresholds corresponding to those set in the GPA.

55. Directive 2014/24/EU, Article 18.

56. Ibid., Articles 42 and 67-69.

57. Ibid., Article 67.

58. Ibid., Article 43.

The implications of Article 25 are currently being examined by the CJEU in a pending case. In this case, a Chinese railway company is claiming to be entitled under the Public Procurement Directive's equal treatment rules to access to public procurement markets, which Romanian law – transposing Article 25 – denies. The matter was referred to the CJEU and is still pending. However, Advocate General Rantos has already handed down his opinion in which he considers that economic operators from third countries which are not signatories to the GPA and bilateral FTAs do not enjoy the rights provided for by the Public Procurement Directive and cannot therefore validly invoke an infringement of the principles of equality and non-discrimination[59].

The Commission also interprets Article 25 a *contrario* as meaning that bidders from third countries that are not covered by the GPA or any other international trade arrangement on EU procurement market access "*do not have secured access to procurement procedures in the EU and may be excluded*"[60]. The Commission has also intervened in favour of Romania in the aforementioned case and thus shares the views expressed by the Advocate General[61].

Thus, subject to the CJEU forthcoming ruling, it appears that under EU public procurement law Member States may grant less favourable treatment to economic operators from certain third countries. This also suggests that the EU does not consider itself bound by the GATT's national treatment principle with regard to these economic operators in public procurement.

### 2.1.3. MEMBER STATES' DIVERSE POLICIES AS REGARDS LOCAL CONTENT REQUIREMENTS IN PUBLIC PROCUREMENT

The manner in which some Member States have transposed the EU directives on public procurement into national legislation suggests they interpret Article 25 of the Public Procurement Directive as allowing them to exclude third countries that are not covered by the GPA or an FTA from public procurement procedures, matching the Commission's calls for a stricter approach to reciprocity in recent years.[62]

In particular, in Denmark, Belgium, Netherlands, Romania, Italy and France, the non-discrimination principle is expressly referred only to operators from the EU and countries signatories to specific agreements, thereby allowing the exclusion of bidders originating from third countries[63].

Furthermore, Belgium, Italy and Romania[64] forbid third-country bids in the absence of international commitments at WTO or bilateral level[65]. Spain requires symmetric reciprocity, while Estonia, Hungary and Austria give discretion to procuring authorities[66]. To our knowledge, this has not been subject to any challenges by trading partners under WTO law.

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59. Case C-266/22, *CRRC Qingdao Sifang and Others*, Opinion of Advocate General M. A. Rantos (**EU:C:2023:399**), 11 May 2023, para. 45.

60. See, European Commission, Guidance on the participation of third country bidders and goods in the EU procurement market (above); **Regulation (EU) 2022/1031** of 23 June 2022 ("International Procurement Instrument – IPI"), Recital 10. This view finds further support in academic literature (A. La Chimia, "Article 25 – Conditions relating to the GPA and other international agreements", in R. Caranta and A. Sanchez-Graells, *European Public Procurement: Commentary on Directive 2014/24/EU* (Edward Elgar 2021), pp. 274-286)

61 Opinion of Advocate General M. A. Rantos, above n 59, para. 63.

62. The Commission's calls for a stricter approach to reciprocity are made with a view to gain leverage over third countries in negotiating for further liberalising their procurement market through FTAs or GPA accession.

63. See generally European Parliament, Briefing note: "EU international procurement instrument" (above n 40), p. 4. In France, Article L. 2153-1 of the Public Procurement Code ("*Code de la commande publique*"), provides that consultation documents may include criteria or restrictions based on the **origin of all or part of the works, supplies or services** making up the proposed bids, or the **nationality of the operators** authorised to submit a bid, provided that they are not covered by the GPA or any international agreement by which the EU is bound. Article L. 2153-2 states that the offer of a bidder that is not covered by an international agreement securing access to EU public procurement markets may be rejected when products originating in third countries represent the majority share of the total value of the products making up this offer.

64. Romanian Law No. 98/2016 on public procurement, Articles 3 and 53 (see also, Opinion of Advocate General M. A. Rantos, above n 59, paras 21-23).

65. See European Parliament, Briefing note: "EU international procurement instrument" (above n 40), p. 4.

66. Ibid.

Case-law may also further support this interpretation. For instance, an Italian administrative court held that excluding foreign suppliers based in countries with which the EU had no agreement (in this case China) was legitimate.

By contrast, other Member States such as Germany and Poland have explicitly granted national treatment to all foreign bidders, thus precluding discrimination based on origin.

It follows that discriminating against foreign bidders which are not covered by an international arrangement is already commonplace within the EU, but EU law leaves it upon Member States to decide whether to impose origin requirements in public procurement or to grant equal treatment to all foreign products and services. This results in disparate implementation across Member States, which is in turn likely to undermine the Commission's approach to reciprocity.

## 2.2. CLIMATE CRITERIA IN PUBLIC PROCUREMENT UNDER EU LAW

EU public procurement law already provides that award criteria used to determine the "most economically advantageous tender" may comprise environmental characteristics (e.g. the products and services' environmental footprint[67]). Likewise, technical specifications and contract performance conditions[68] contained in the procurement documents may lay down performance or functional requirements relating to environmental characteristics, including "*environmental and climate performance levels*"[69]. In particular, Articles 42(1) and 67(3) of the Public Procurement Directive explicitly provide that these characteristics may relate to specific processes or methods of production (and the sustainability thereof) "*at any stage*" of the life cycle of the works, supplies or services to be provided, "*even where such factors do not form part of their material substance*". In accordance with Article 43, contracting authorities may also require a specific label – e.g. organic – to demonstrate that a bid meets the required environmental characteristics.

Thus, **Member States are already allowed under EU law to impose environmental conditions in public procurement** e.g. by requiring organic-labelled food for public catering or setting carbon footprint thresholds for heavy materials used in construction works.

However, **the dissemination of green public procurement in the EU is obstructed by the optional character** of environmental characteristics under EU law. Article 67(2) indeed only provides that Member States "*may*" decide that price should not be the sole award criterion[70]. As a result, Member States have so far made use of this possibility only to a very limited extent, and 80% of public procurement contracts are still awarded on the sole basis of the lowest price[71]. Nonetheless, in France, mandatory rules were introduced to develop green public procurement. For instance, Article L. 2112-4 of the French Public Procurement Code provides that the public buyer may require that the resources used to carry out a contract (or to maintain or modernise the products purchased) be located within the EU in order to take account of environmental considerations.

67. Directive 2014/24/EU, Article 67. In addition, price or cost may be obtained through a life-cycle costing approach covering "costs imputed to environmental externalities linked to the product, service or works during its life cycle" (as detailed in Article 68)

68. Technical specifications and performance conditions relate to the technical prescriptions defining the characteristics of the works, supplies or services required by the contracting authority.

69. Directive 2014/24/EU, Article 42, Article 70 and Annex VII.

70. Likewise, setting environmental characteristics in technical specifications is merely optional whereas required in other respects (e.g. accessibility for people with disabilities).

71. European Commission, Single Market Scoreboard: Access to public procurement (2022).

# 3. EVOLUTIONS NEEDED IN EU LAW FOR A BUY EUROPEAN AND SUSTAINABLE ACT

To fully leverage public procurements as a strategic public policy tool to accelerate the low carbon transition and favour EU development, the EU could modify the EU procurement directives to provide for "Buy European and Sustainability" provisions that would comply with its international commitments under WTO law.

1. In all public procurements, the EU could introduce **binding climate criteria** regardless of origin.

2. As regards local content requirements, the measure should be designed in a way to take full advantage of the exemption provided for in Article III:8 GATT **to favour domestic (EU) over foreign products by introducing mandatory origin-based technical specifications, exclusion grounds or award criteria[72].**

This could be done by amending existing EUpublic procurement law or enacting specific legislation on foreign acquisitions to introduce e.g. a US-style price evaluation penalty and exception-based system for competing offers of foreign end products or a straightforward exclusion of third country bidders for GPA-covered procurements[73].

3. The EU could design **specific rules of origin** in the context of public procurement. They may, inter alia, set minimum thresholds for the share of EU-origin content of products[74] as a criterion for qualifying as domestic (EU) products.

Such rules of origin may be applied either in combination with EU-wide origin requirements (as in the United States) or on a standalone basis – then leaving Member States with the choice to discriminate in favour of domestic (EU) products and services in public procurement.

4. To ensure compliance with the GPA and other international arrangements, any origin-based restrictions on the procurement of foreign goods and specific rules of origin **should not be applied to products subject to these agreements.**

72. Directive 2014/24/EU, Articles 42, 57 and 67.

73. Under the Trade Agreements Act (19 USC § 2512(a)), the United States blanketly prohibits the purchase of goods and services from bidders established in third countries other than "*designated countries*" for all GPA-covered procurements. Unlike the Buy American Act, the Trade Agreements Act does not provide a price-based exception allowing non-designated countries to compete on covered procurements. This prevents suppliers from non-eligible countries such as China from bidding on covered procurements. This is to "*encourage other countries to join the GPA or otherwise open their procurement markets to U.S. suppliers, goods, and services*" (see US Secretary of Commerce, USTR and US Office of Management and Budget, above n 41).

74. As explained above, the United States require that the cost of domestic components exceeds 65% of the cost of all components for a product to qualify as a domestic end product.

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*This study has been supported by the European Climate Foundation ("ECF"). It only reflects the views of her author and does not reflect those of the European Climate Foundation nor Europe Jacques Delors.*