

# Revisiting non-discrimination: prioritizing sustainability in public procurement law

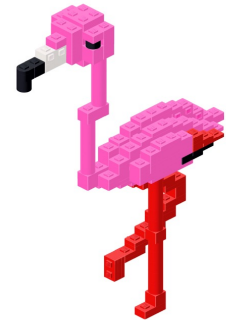
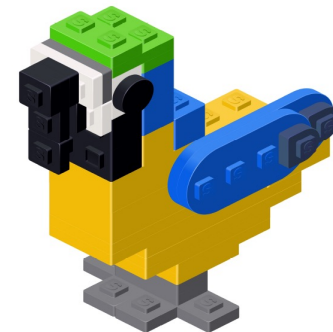
*prof. dr. Willem Janssen*

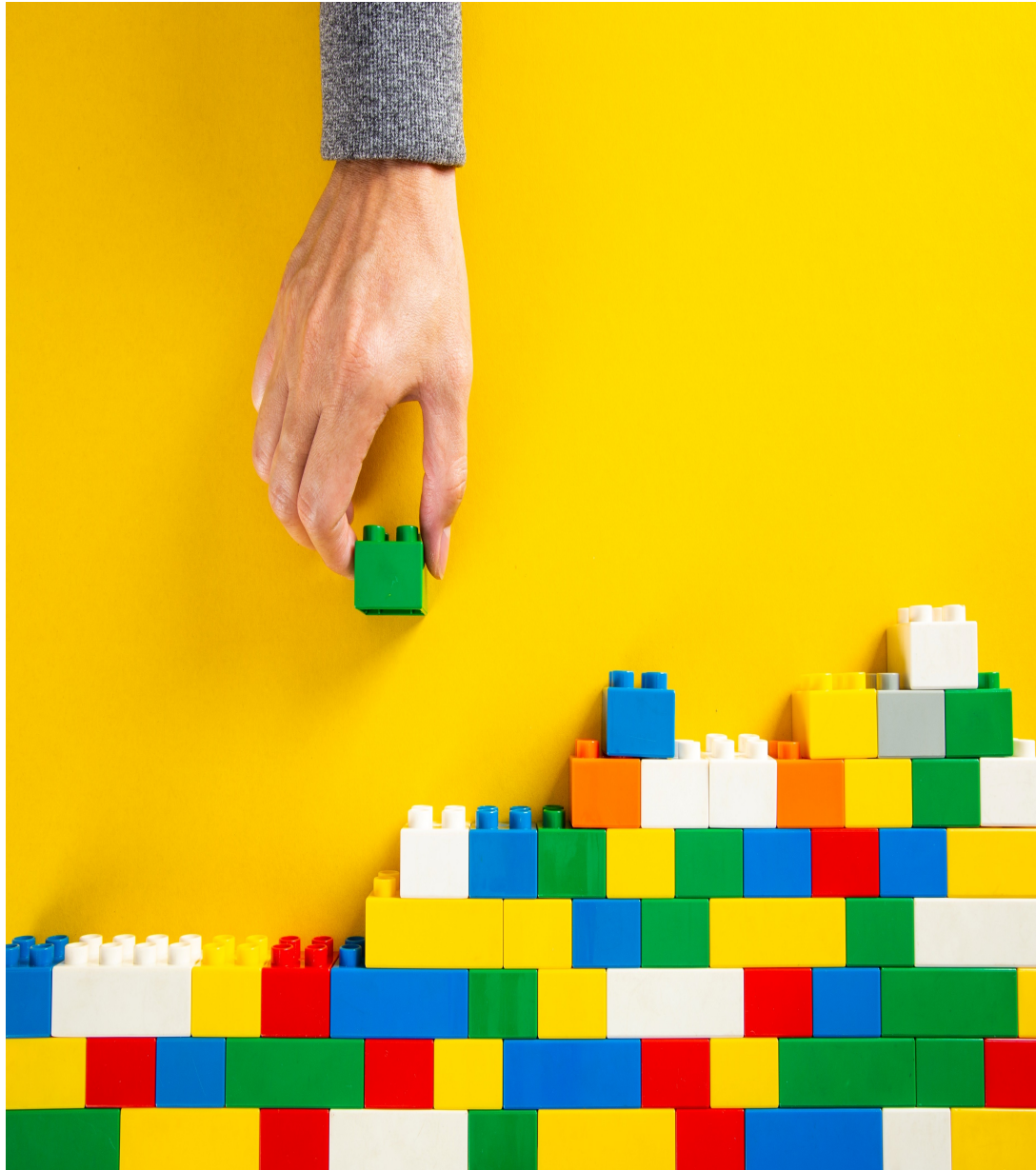
Endowed professor of Public Procurement Law - Groningen University  
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## Starting points for a renewed discussion on EU public procurement law & Sustainability

- A public secret: the internal market for public procurement does not exist  
What does it mean for *non-discrimination*?
- A public debate: SPP is not – or not sufficiently – happening in the Member States, even though objectives are unmet  
What does it mean for *public procurement*?





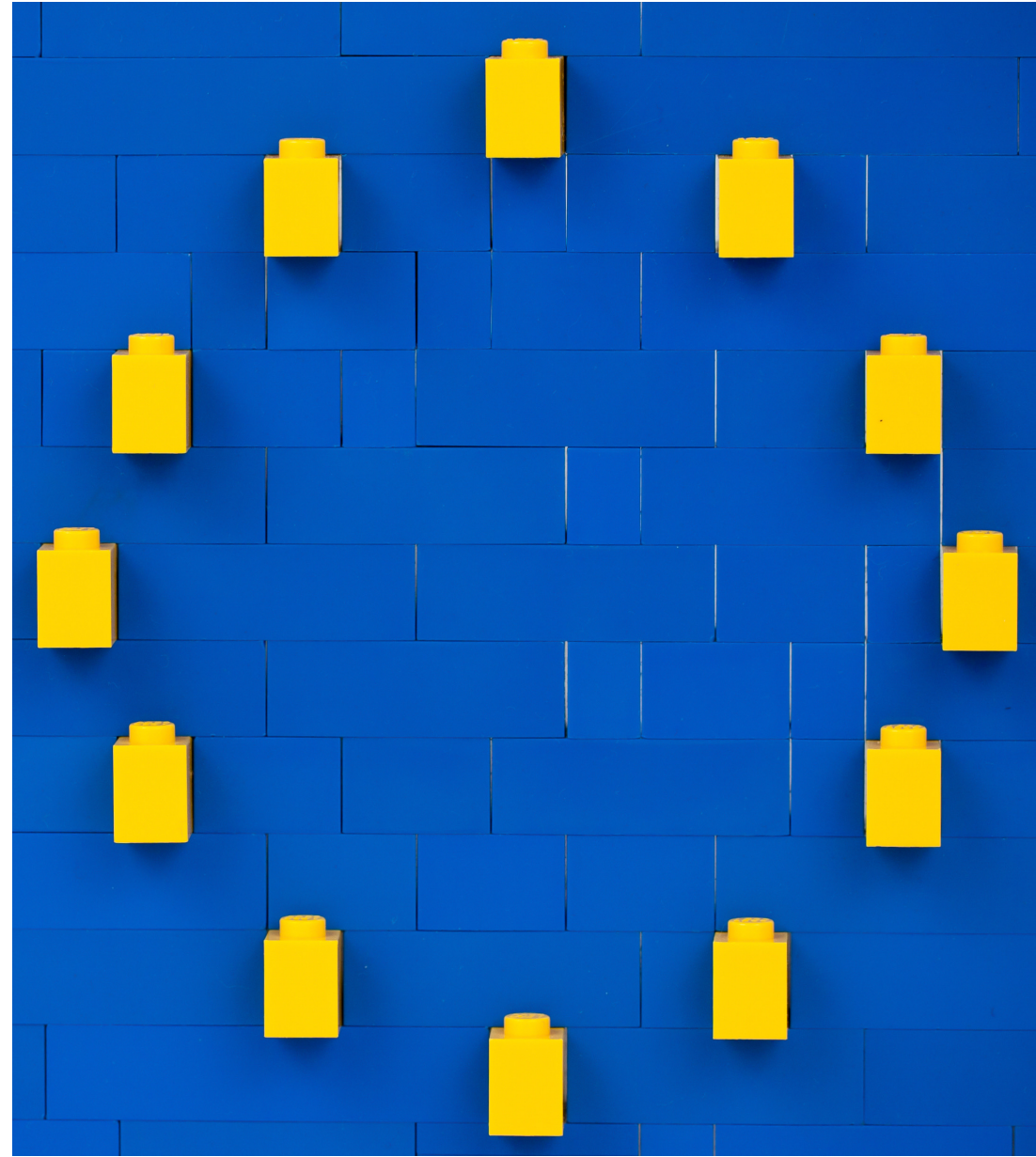
## Where does sustainability block fit in the LEGO building?

- Pre-2014: discussions about how much discretion existed (non-economic)
- 2004-2014: more clarity and discretion for SPP (horizontal)
- 2019 - now: regulating 'what to buy' in addition to 'how to buy' (priority with *coherence* questions)



## The momentum to reshape the relationship between SPP and the Directives is now, but not *really*..

- Letta, Draghi & Competitive Compass:
  - Sustainability has left the Building?  
(Janssen, *European Law Blog*, April 2024)
- Sustainability is not a prime focus at all  
(or perhaps a small one?)
- Positive effects could still emerge from:
  - Buy European
  - Critical resources if not only security of supply





***Overlooked so far: non-discrimination concerns the core of EU public procurement law, but is also an *obstacle* for SPP***

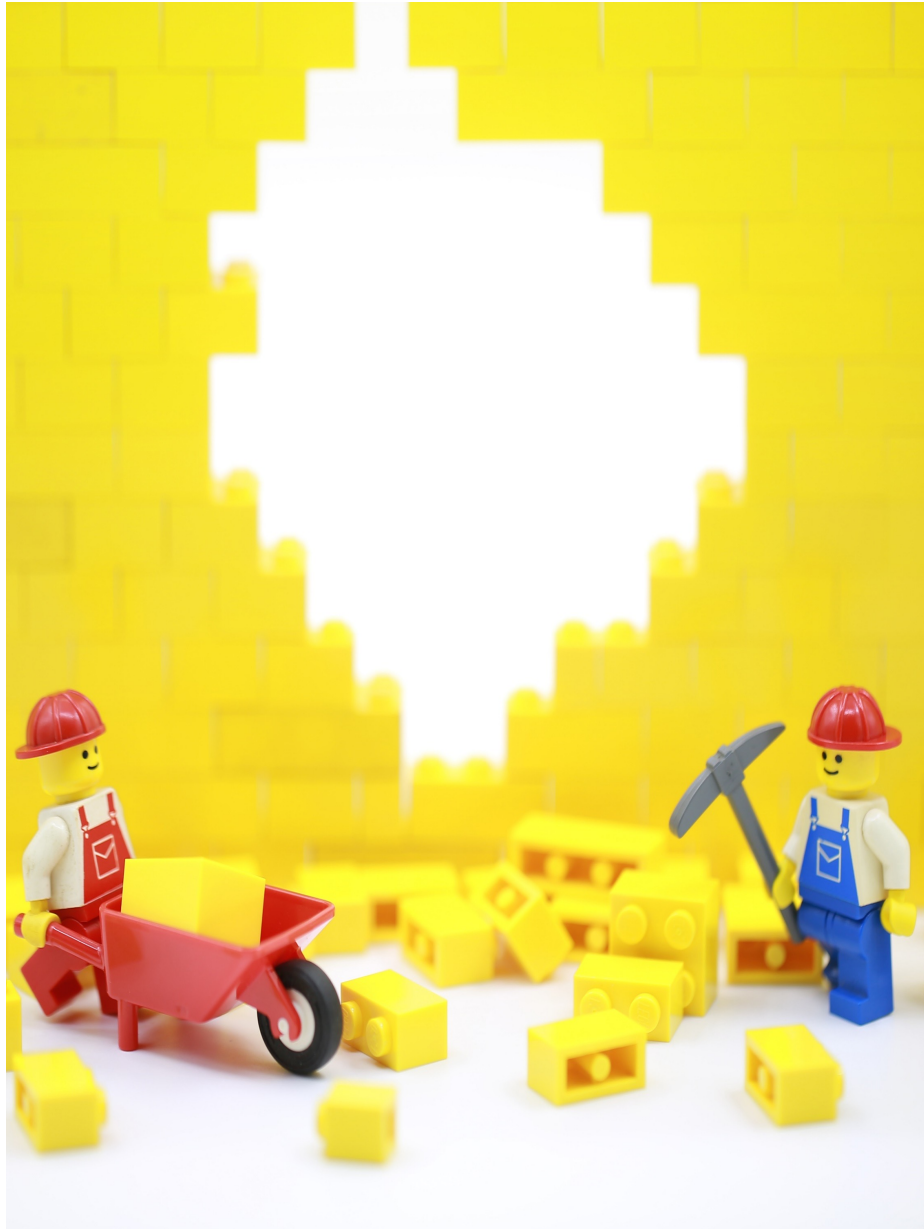
- Category 1: Public procurement principles as a limitation to current possibilities to procure sustainable outcome (i.e. labels, lifecycle costing, reserved procedures)
- Category 2: Non-discrimination as a ban on types of SPP (i.e. local procurement, CSR policies via proportionality)
- Category 3: The general voluntary nature as an avoiding factor of non-discrimination discussions





## ***Example:* Circular Public Procurement vs Public Procurement Principles**

- **Uncertainty of outcomes** vs. the need to evaluate all bids equally
- **Length of cooperation** vs. the need to define the scope clearly
- **Transfer of ownership** vs the need for all market participants to start on equal footing in a procedure
- **Unclear life-cycle costs** vs. the need to compare bids
- **Enforcement and delivery** vs. the need to achieve circular objectives in contract management



## Future: *Prioritizing* sustainability, *not* non-discrimination(?)

### A new objective

- *‘This directive establishes a regulatory framework that ensures the consumption patterns of contracting authorities in the areas of works, supply, and services contribute to achieving the sustainability goals at both the Union and Member State levels, including objectives related to climate, environment, energy, resource use, and biodiversity, while respecting planetary boundaries and social justice.’*

### A new legal basis

- Move to article 192-193 TFEU?

W.A. Janssen, *Sustainable Public Procurement Law: Reassessing the internal market for public procurement*, Inaugural lecture, Groningen University Press 2025.



## Reshaping the relationship between SPP and the Public Procurement Directives

- Pathway 1: Explicit *carve-outs* in the Public Procurement Directive for SPP, such as local procurement  
*Why not if it's more sustainable?*
- Pathway 2: Sustainability as an *exemption* in the Public Procurement Directives  
*Why not? We have many!*
- Pathway 3: Mandate Sustainable Public Procurement Coherently  
*Why not? It's about how we regulate it!*



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# The EU Public Procurement anno 2025

*Are the rules fit for purpose?*



# THE RELATIONSHIP BETWEEN PUBLIC PROCUREMENT LAW, CLIMATE, AND THE ENVIRONMENT



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## **THE GROWING IMPORTANCE OF CLIMATE CONSIDERATIONS IN LEGAL AND ECONOMIC FRAMEWORKS**

**KEY QUESTION:  
HOW DOES (OR DOESN'T) THE EU PROCUREMENT DIRECTIVE  
ADDRESS CLIMATE ISSUES?**

# THE EU PROCUREMENT DIRECTIVE AND CLIMATE

Existing Legal Framework

Directive 2014/24/EU governs public procurement in the EU.

Focus on ensuring fair competition, transparency, and efficiency.

Contains provisions on environmental considerations but limited explicit mention of climate change.



# WHY IS CLIMATE NOT A MAJOR FOCUS?

Climate change was not a central policy concern when the directive was approved.

Emphasis on environmental criteria rather than climate-specific objectives.

Lack of clear legal obligation for contracting authorities to prioritize climate goals.

# The relationship between public procurement law, climate, and the environment

Public procurement law rarely refers explicitly to “climate”, relying instead on “environment.”

The distinction between “environment” and “climate” carries legal significance:

- “Environment” encompasses a wide range of local and regional issues such as pollution control and biodiversity protection.
- “Climate” specifically concerns greenhouse gas emissions and the mitigation and mitigation of global warming.

# ENVIRONMENTAL VS. CLIMATE CONSIDERATIONS IN PROCUREMENT

Overlap and Differences:

Environment: Broad concept covering pollution, biodiversity, resource management, etc.

Climate: Specifically relates to greenhouse gas (GHG) emissions, adaptation, and mitigation.

Procurement policies used to often focus on “green” solutions but lack explicit mechanisms for decarbonization.



# ENVIRONMENTAL VS. CLIMATE CONSIDERATIONS IN PROCUREMENT

Existing environmental provisions and their  
climate relevance

Green procurement and life-cycle assessment  
(LCA)

Energy efficiency and sustainable materials

Circular economy considerations

However, no mandatory GHG reduction  
targets in procurement processes

# SHOULD CLIMATE BE A PART OF A NEW PROCUREMENT DIRECTIVE?

## **Arguments in Favor:**

Public procurement as a key driver of demand for low-carbon solutions.

-Legal certainty: Clear obligations for climate action would prevent fragmented national approaches.

Alignment with EU Green Deal and Fit for 55.

Better integration of science-based targets into procurement criteria.

# SHOULD CLIMATE BE A PART OF A NEW PROCUREMENT DIRECTIVE?

## **Challenges and Counterarguments:**

Risk of overburdening contracting authorities  
with complex compliance requirements

Difficulties in defining measurable climate  
criteria for diverse procurement needs.

Potential trade-offs between cost-effectiveness  
and climate goals.

# SHOULD CLIMATE BE A PART OF A NEW PROCUREMENT DIRECTIVE?

The current directive allows for green and social considerations, but does not mandate climate-related requirements.

A revision could enhance legal clarity and create stronger incentives for public buyers to prioritise climate action.

It would also help promote a more consistent application of climate considerations across the EU, aligning public procurement with the goals of the Green Deal and the Paris Agreement.

# SHOULD CLIMATE BE A PART OF A ALTERNATIVE APPROACHES: IS THE CURRENT FRAMEWORK ENOUGH?

## Soft Law & Guidance Documents

- EU's guidance on Green Public Procurement (GPP)
- Voluntary climate-friendly procurement policies in member states

## Sector-Specific Climate Procurement Policies

- E.g., transport, construction, and energy contracts incorporating carbon neutrality clauses.
- The role of innovation partnerships and pre-commercial procurement



# POSSIBLE INSPIRATION FROM THE CSRD

(CORPORATE SUSTAINABILITY  
REPORTING DIRECTIVE)

The (CSRD) requires companies to disclose climate-related risks and impacts, including how climate considerations influence their strategic decisions.

Environmental, Social, and Governance (ESG) frameworks promote a comprehensive and forward-looking approach, where climate is treated as an integral part of decision-making processes.

A similar integration in public procurement law could imply that:

- Climate becomes a mandatory consideration in all relevant tender procedures.
- Contracting authorities are obliged to document and justify their treatment (or non treatment) of climate-related aspects.

# ESRS E1 CLIMATE CHANGE

Purpose: To ensure that organisations identify, assess and report their climate impact and how climate change affects them - both risks and opportunities.

# ESRS E1 CLIMATE CHANGE

A similar integration in public procurement law could imply that:

- Climate becomes a mandatory consideration in all relevant tender procedures.
- Contracting authorities are obliged to document and justify their treatment (or non treatment) of climate-related aspects.
- This would foster increased transparency, consistency, and accountability in public procurement practices (Transition plan towards a climate-neutral economy)

# DISCUSSION POINTS

Is it feasible and appropriate to draw inspiration from the CSRD and ESG frameworks, or should public procurement law develop its own distinct approach to climate integration?

Should the next procurement directive explicitly include climate considerations?

How can legal frameworks balance climate ambition with procurement efficiency?

How can climate considerations be effectively integrated into award criteria to ensure they carry real weight, rather than serving as symbolic gestures?

To what extent might climate-related requirements restrict competition or result in increased procurement costs?

**THANK YOU**

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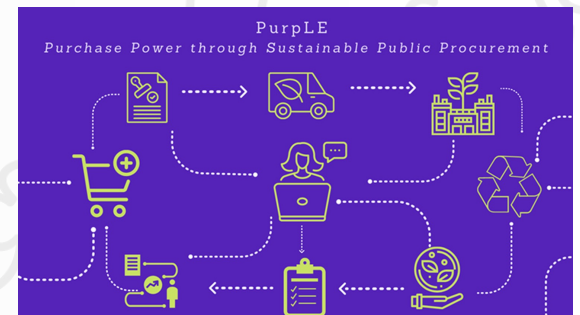
# CSDDD and Public Procurement

**Ezgi Uysal**

CEPRI, Faculty of Law

April 24, 2025

UNIVERSITY OF COPENHAGEN



# Responsible Business Conduct and Due Diligence

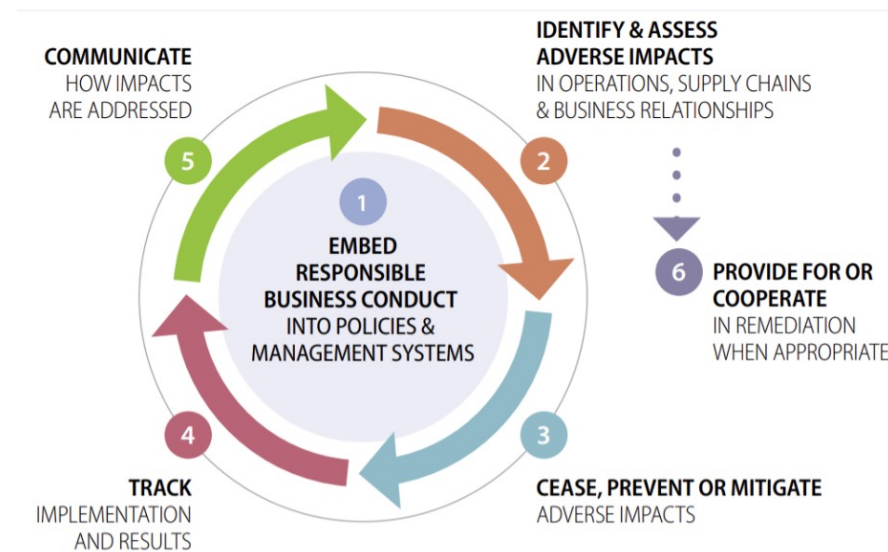
Due Diligence → manage company's risks

UNGPs on Business and Human Rights - Protect-Respect-Remedy → Human Rights Due Diligence (HRDD)

OECD Guidelines for MNEs on Responsible Business Conduct → Human Rights and Environmental Due Diligence (HREDD)

Soft law → Hard law

Corporate Sustainability Due Diligence Directive



OECD, Due diligence for responsible business conduct



## Corporate Sustainability Due Diligence Directive (CSDDD)

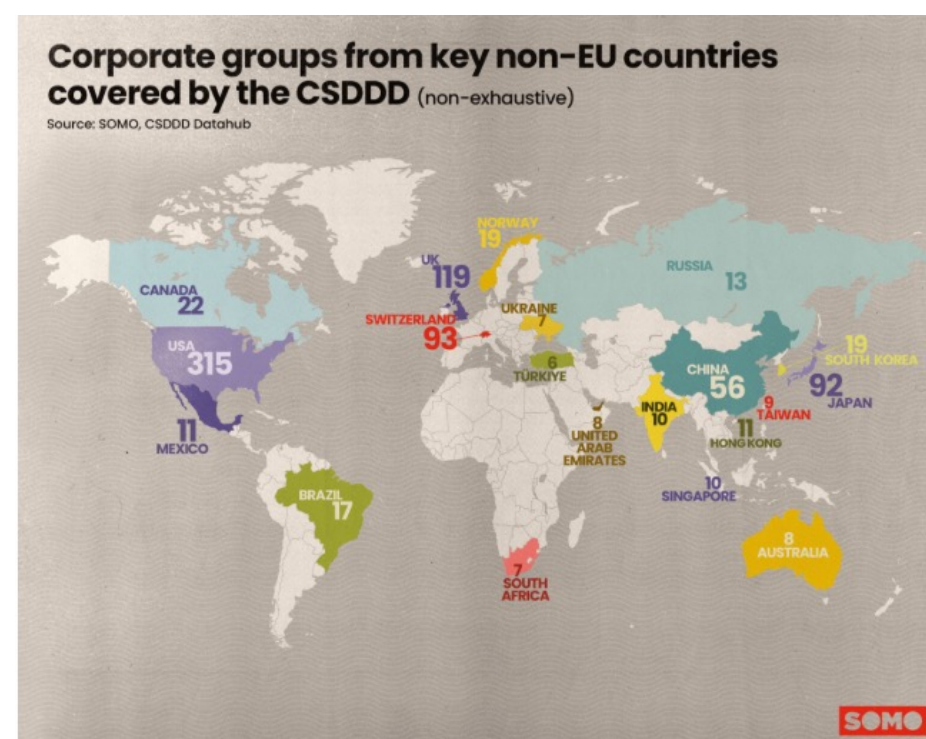
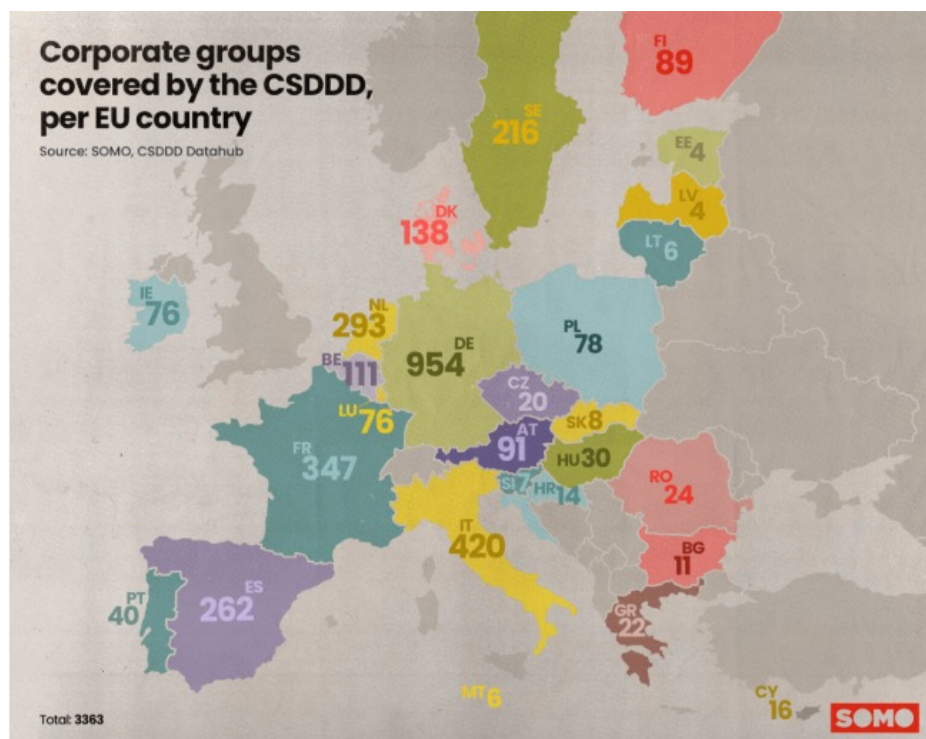
The obligation to carry out due diligence in their value chain with a risk-based approach

- (a) **integrating** due diligence into their policies and risk management systems (Article 7);
- (b) **identifying and assessing** actual or potential adverse impacts (Article 8) and, where necessary, **prioritising** actual and potential adverse impacts (Article 9);
- (c) **preventing and mitigating** potential adverse impacts, and **bringing** actual adverse impacts **to an end** and **minimising** their extent (Articles 10 and 11);
- (d) providing **remediation** for actual adverse impacts (Article 12);
- (e) **carrying out meaningful engagement** with stakeholders (Article 13);
- (f) establishing and maintaining **a notification mechanism and a complaints procedure** (Article 14);
- (g) **monitoring** the effectiveness of their due diligence policy and measures (Article 15);
- (h) publicly **communicating** on due diligence (Article 16)

## Scope

- EU companies with over 1000 employees and a worldwide turnover of a minimum of 450 million euros (Art 2(1)(a));
- non-EU companies that operate in the EU and have an annual turnover in the EU of over 450 million euros (2(2)(a));
- companies which do not meet these thresholds, but are the ultimate parent company of a group which reaches these thresholds (Art 2(1)(b) and 2(2)(b)); and
- companies that have entered into franchising or licensing agreements in the EU in return for royalties amounting to more than 22.5 million euros in the EU, and a net turnover of more than 80 million euros (Art 2(1)(c) and 2(2)(c)).

## Coverage



Source: CSDDD Datahub - SOMO

## Adoption and Transposition

OJ Publication: 13 June 2024 → Directive 2024/1760

Transposition: 26 July 2026 → original deadline

- 2 years: Member States are required to transpose the requirements of the Directive.
- 3 years: Transposition laws should apply to companies with 5,000 employees and a turnover of EUR 1.5 billion.
- 4 years: Transposition laws should apply to companies with 3,000 employees and a turnover of EUR 900 million.
- 5 years: Transposition laws should apply to companies with 1,000 employees and a turnover of EUR 450 million.

(OECD Watch Alignment within Reach: Remaining opportunities to align the EU CSDDD with the OECD Guidelines)

# Competitiveness?

## **The Future of European Competitiveness (The Draghi Report)**

(September 2024)

need for a regulatory landscape which facilitates competitiveness and resilience

## **Budapest Declaration on the New European Competitiveness Deal**

(November 2024)

Launching a simplification revolution → allowing businesses to flourish without excessive regulation

## **A Competitiveness Compass for the EU**

(January 2025)

Regulatory burden detrimental to Europe's competitiveness

Simplification efforts → series of Simplification Omnibus packages

## **Commission Work Programme 2025: A Bolder, Simpler, Faster Union**

(February 2025)

Proposal for CSRD, CSDDD and Taxonomy → streamlining and simplification



## The First Omnibus Package – 26 February 2025

- STOP-THE-CLOCK Proposal: postpone the application of CSRD for some companies and postpone the transposition deadline for the first wave CSDDD companies ✓
  - Proposal for a directive amending CSRD and CSDDD
  - A draft delegated act amending Taxonomy Disclosures Delegated Act, Taxonomy Climate Delegated Act and the Taxonomy Environmental Delegated Act
  - Proposal for a Regulation amending Carbon Border Adjustment Mechanism Regulation
- Better alignment of the requirements
  - Proportionate timelines
  - Financial metrics that do not discourage investment in smaller companies in transition
  - Proportionate obligations
  - No excessive requirements on smaller companies



## Omnibus Changes to CSDDD (1)

- Postponing the transposition and application; accelerating the Commission guidelines
- Extending the scope of maximum harmonisation for CSDD steps
- Identifying and assessing actual and potential adverse impacts to tier 1 (direct business partners)
  - Exception: plausible information re adverse impacts concerning the operations of an indirect business partner
- SME shield: limiting information requests from business partners that are small businesses
  - Exception: additional information is needed to carry out mapping that cannot be obtained in any other reasonable way
- No last resort measure to terminate a business relationship
- Simplifying the notion of stakeholder and limiting the CSDD stages that require stakeholder engagement

## Omnibus Changes to CSDDD (2)

- Reducing frequency of assessment from annual to 5 year
- Obligation to adopt climate change mitigation transition plan, but no obligation to put into effect
- No minimum limit on financial penalties
- Deleting the harmonised conditions for EU level civil liability
- Deleting review clause re financial services and investment activities

### Expected Cost Savings for CSDDD Amendments

Direct incremental procedural compliance costs (in EUR)	under the CSDDD as in force	under the CSDDD if amended	Total costs savings
annual	400 million	80 million	320 million
one-off	115 million	55 million	60 million

## Due Diligence and Public Procurement

**International:** soft law → UNGPs on Business and Human Rights – State Business Nexus

*Guiding Principle 6: States should promote respect for human rights by business enterprises with which they conduct commercial transactions.*

**European:** in the context of Sustainable Public Procurement

Buying Social Guide, Making Socially Responsible Public Procurement Work: → HRDD in public procurement

**National:** hard law and practice

German Supply Chain Act → exclusion from public contracts due to breaches of the Act

Norwegian Public Procurement Act → suitable routines to promote respect for fundamental human rights

Good practices

## Public Procurement in CSDDD (1)

### *Article 31*

#### **Public support, public procurement and public concessions**

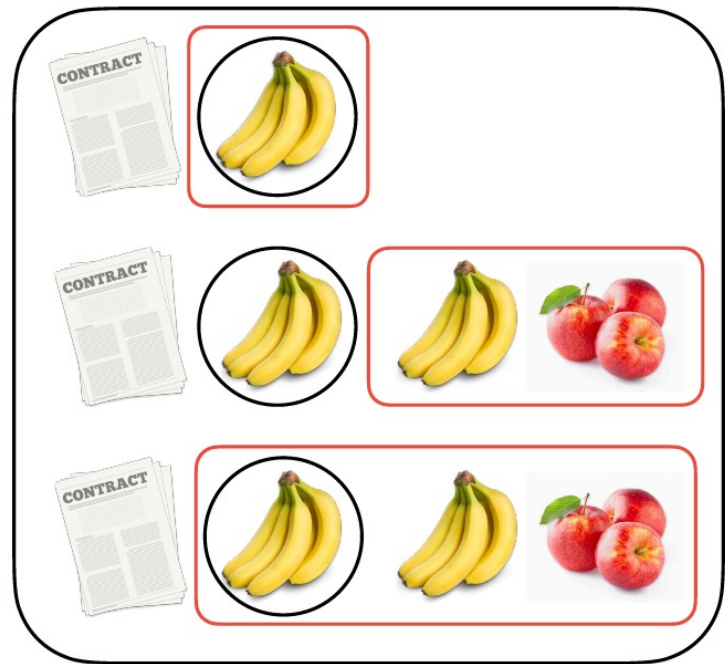
Member States shall ensure that compliance with the obligations resulting from the provisions of national law transposing this Directive, or their voluntary implementation, qualifies as an environmental or social aspect that contracting authorities may, in accordance with Directives 2014/23/EU, 2014/24/EU and 2014/25/EU, take into account as part of the award criteria for public and concession contracts, and as an environmental or social condition that contracting authorities may, in accordance with those Directives, lay down in relation to the performance of public and concession contracts.

## Public Procurement in CSDDD (2)

(92) Member States should ensure that compliance with the obligations resulting from the provisions of national law transposing this Directive, or their voluntary implementation, qualifies as an environmental and/or social aspect or element that contracting authorities may, in accordance with Directives 2014/23/EU <sup>(26)</sup>, 2014/24/EU <sup>(27)</sup> and 2014/25/EU <sup>(28)</sup> of the European Parliament and of the Council, take into account as part of the award criteria for public and concession contracts or lay down in relation to the performance of such contracts. Contracting authorities and contracting entities may exclude or may be required by Member States to exclude from participation in a procurement procedure, including a concession award procedure, where applicable, any economic operator, where they can demonstrate by any appropriate means a violation of applicable obligations in the fields of environmental, social and labour law, including those stemming from certain international agreements ratified by all Member States and listed in those Directives, or that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable. To ensure consistency of Union legislation and support implementation, the Commission should consider whether it is relevant to update any of those directives, in particular with regard to the requirements and measures Member States are to adopt to ensure compliance with the sustainability and due diligence obligations throughout procurement and concession processes.

# Review of Public Procurement Legislation (1)

## Understanding of the Link to the Subject Matter



**Linked to the subject matter**

**Not linked to the subject matter**



## Review of Public Procurement Legislation (2)

### Limits under the Current Legislation

- Integrating due diligence into company policies and risk management vs no corporate policy under Recital
- Identifying, assessing, ceasing, preventing and mitigating adverse impacts: prioritizing where there is risk vs prioritizing depending on the subject matter
- Off-the-shelf products: CSDD during the term of the contract vs CSDD over the subject matter of the contract
- What to buy vs whom to buy from

## The (Potential) Way Forward

- Abolishing/adjusting link to the subject matter
- Directly introducing a due diligence obligation on the public buyers
- Digital product passports for traceability of each unit
- Domestic supply chains

# Questions & comments?