

The eForms Regulation and Sustainable Public Procurement Data Collection

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As of October 2023, the eForms Regulation will become the mandatory standard for public procurement data collection above the thresholds, including data on sustainability. The eForms have the potential to collect sustainable public procurement data and kickstart the process of monitoring green and social public procurement in all Member States. Nevertheless, in their current form, it is improbable that eForms can achieve this goal, because the Regulation makes all sustainable data collection fields optional. Member States can decide to collect sustainable public procurement data, but they lack proper incentives to do so. Both the European Union and Member States should take on the goal of creating a sustainable public procurement data infrastructure, with each its roles and obligations.

Keywords: sustainable public procurement, eForms Regulation, data collection, digitalising public procurement, monitoring.

I. Introduction

This paper describes the articulation of roles between the European Union and the Member States concerning the regulation and management of sustainable public procurement data collection. As of October 2023, the eForms Regulation will become the mandatory standard for public procurement data collection above the thresholds, including data on sustainability.¹ This is a promising step towards monitoring green and social public procurement in all Member States. Nevertheless, in their current form, it is improbable that eForms can achieve this goal.

The creation of a sustainable public procurement data infrastructure should be a goal shared by both the European Union and the Member States. Each should play its role and have its responsibilities to reach this objective. However, none of them is assuming this role and both are winners in a game of eluding responsibility.²

The European Union plays the role of a standard-setter that acts in a top-down manner: it created the eForms, and holds the power to update this standard. For now, all sustainability data fields in the eForms are optional, meaning that Member States can decide if they collect this information or not.³ Member

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1 Commission Implementing Regulation (EU) 2019/1780 of 23 September 2019 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation 2015/1986 (eForms) [2019] OJ L272/7; Commission Implementing Regulation (EU) 2022/2303 of 24 November 2022 Amending Implementing Regulation (EU) 2019/1780 Establishing Standard Forms for the Publication of Notices in the Field of Public Procurement' [2022] OJ L305/12.

2 Some Member States are more ambitious in building a sustainable public procurement data infrastructure.

3 European Commission, Directorate General for Internal Market, Industry, Entrepreneurship and SMEs, *eForms: Policy Implementation Handbook* (Publications Office, 2020) 26.

States hold an equally important position. They are in charge of implementing the eForms – they can decide to make sustainable public procurement data collection mandatory. Ideally, Member States should collect sustainable procurement data, even if it is not mandatory in the eForms, yet they lack the incentives to do so.⁴

This article is structured in four parts: an introduction (I); a critical comment on the new eForms Regulation (II); a discussion on the articulation of roles that the European Union and the Member States play in collecting sustainable public procurement data (III); and a conclusion (IV).

The rest of this introduction explores the current state of sustainable public procurement data collection in the European Union and the potential that the new eForms have to improve this *status quo*.

1. The Current State of Sustainable Public Procurement Data

Data are “an abstraction of a real-world entity (person, object or event)”.⁵ In public procurement, data can refer to any information concerning the procurement process, such as the entity that bought a product, the product that was purchased, the economic operator that provided it, etc. Data play an essential role in the process of digitalising public procurement.

Data are the fundamental element for implementing any emerging technology. The success of digitalising public procurement is dependent on a quality data infrastructure.⁶ If e-procurement is a precondition for data collection, data infrastructure is needed to apply digital technologies.⁷ Other authors have tackled the relationship between data and sustainable public procurement,⁸ as well as the recent legal and policy initiatives from the European Union on public procurement data.⁹

Currently, in the European Union, there is a shortage of quality public procurement data and a dearth of sustainable public procurement data. Until now, there has been no European Union standard for sustainable public procurement data collection, which resulted in a general lack of such data at the Member State level.¹⁰ In the European Union, Tenders Electronic Daily (hereinafter, TED) is the main source of public procurement data. TED is ‘an online portal’,¹¹ in which contracting authorities must publish all the public procurement contract notices and contract award notices that exceed the thresholds set in the Public Procurement Directive.¹²

TED offers open data that can be further used for various analysis, such as the Single Market Scoreboard.¹³ However, in practice, TED has multiple data quality issues that limit its usability – the data lack accuracy, are incomplete and redundant and thus is very complicated to use.¹⁴

4 See also: Albert Sanchez-Graells, ‘Urgent: “no EForms, No Fun” -- Getting Serious about Building a Procurement Data Architecture in the EU’ (*How to Crack a Nut*, 28 September 2022) <<https://www.howtocrackanut.com/blog/2022/9/28/>> accessed 11 October 2023.

5 John D Kelleher and Brendan Tierney, *Data Science* (Illustrated edition, The MIT Press 2018) 39.

6 Albert Sanchez-Graells, ‘Revisiting the Promise: A Feasibility Boundary for Digital Procurement Governance’ [2022] SSRN Electronic Journal 20–24 <<https://www.ssrn.com/abstract=4232973>> accessed 11 October 2023.

7 *ibid* 20–24; Albert Sanchez-Graells, ‘The Technological Promise of Digital Governance: Procurement as a Case Study of “Policy Irresistibility”’ [2022] SSRN Electronic Journal 4 <<https://www.ssrn.com/abstract=4216825>> accessed 11 October 2023.

8 Raphael Duguay, Thomas Rauter and Delphine Samuels, ‘The Impact of Open Data on Public Procurement’ [2019] SSRN Electronic Journal; Marius Langseth and Moutaz Haddara, ‘Exploring Data Analytics Adoption in Public Procurement: The Case of Norway’ in Marius Langseth and Jan Ole Similä (eds) *Å kjøpe for Norge* (Cappelen Damm Akademisk/NOASP 2021); Albert Sanchez-Graells, ‘Digital Technologies, Public Procurement and Sustainability: Some Exploratory Thoughts’ [2019] SSRN Electronic Journal <<https://www.ssrn.com/abstract=3482341>> accessed 11 October 2023.

9 Sanchez-Graells, ‘Digital Technologies’ (n 8); Sanchez-Graells, ‘Urgent’ (n 4); Pedro Telles, ‘EForms Are More of the Same’

(*Telles.eu*, 24 March 2023) <<http://www.telles.eu/blog/2023/3/23/eforms-are-more-of-the-same>> accessed 11 October 2023; Pedro Telles, ‘Some Reflections on the Commission’s Communication on the Public Procurement Data Space’ (*Telles.eu*, 18 April 2023) <<http://www.telles.eu/blog/2023/4/18/some-reflections-on-the-commissions-communication-on-the-public-procurement-data-space>> accessed 11 October 2023.

10 Even if some Member States are exceptions to this rule.

11 European Commission, ‘Tenders Electronic Daily’ (Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs) <https://single-market-economy.ec.europa.eu/single-market/public-procurement/digital-procurement/tenders-electronic-daily_en> accessed 11 October 2023.

12 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94.

13 Commission, ‘Tenders Electronic Daily’ (n 11).

14 Sebastian Halsbenning and Marco Niemann, ‘The European Procurement Dilemma-First Steps to Introduce Data-Driven Policy-Making in Public Procurement’ (2019 IEEE 21st Conference on Business Informatics); Eric Prier, Palina Prysmakova and Clifford P McCue, ‘Analysing the European Union’s Tenders Electronic Daily: Possibilities and Pitfalls’ (2018) 11 *International Journal of Procurement Management* 722; Ahmet Soyulu and others, ‘Data Quality Barriers for Transparency in Public Procurement’ (2022) 13 *Information art* 99.

2. The Potential of eForms to Improve the Status Quo

The European Commission advances a very ambitious agenda on data for sustainable public procurement. Sustainable public procurement data could be used for benchmarking and reporting compliance, identity tracking of subcontractors, identifying and enhancing sustainable considerations, and, more generally, for data-based policy-making.¹⁵

In other words, ‘what gets measured, gets managed’.¹⁶ If Member States had reliable data on sustainable public procurement, they could manage it better and contribute to its uptake. Data could be used to monitor sustainable public procurement, even if the “eForms are not designed as a (fine-grained) tool of market intelligence”¹⁷ – this could be done without artificial intelligence, using, for example, data visualisation tools. Data visualisation means to present “data in a graphical format”,¹⁸ such as charts, tables,¹⁹ or dashboards.²⁰ Later, data visualisation can be integrated into more complex processes, such as data science.²¹ With data, Member States could “track, analyse, and display key procurement indicators through customisable and user-friendly visualisations”.²²

For example, Member States could set sustainable public procurement indicators and, using data visualisation tools, verify if these indicators are achieved in practice – they could identify the contracting authorities, the regions, or the sectors that have lower levels of sustainable public procurement uptake and nudge contracting authorities to improve.²³ This would also

enhance the transparency and accountability in public procurement.²⁴ The decisions taken by Member States or contracting authorities would be informed, based on empirical evidence and objective facts.²⁵ In turn, contracting authorities could learn to use the collected sustainable public procurement data ‘internally’.²⁶ This would determine a familiarisation with data usage at a micro level and reduce errors upstream.

Several projects have been implemented by different organisations with this intention. For example, with the collaboration of the Open Contracting Partnership, the Lithuanian public administration created a public open data dashboard that monitors multiple indicators, including green public procurement.²⁷ The Ukrainian Prozzoro Project uses open data to monitor public procurement in their electronic procurement system, developed with the European Bank for Reconstruction and Development.²⁸

Therefore, collecting sustainable public procurement data would play a double role. On the one hand, it would allow for data to accumulate and form the needed infrastructure for digitalisation. On the other hand, it would allow the monitoring of different public procurement indicators without using artificial intelligence.

II. A Critical Analysis of the eForms Regulation

This section will present the main provisions regarding sustainable public procurement data collection

15 European Commission, ‘Communication from the Commission, Public Procurement: A Data Space to Improve Public Spending, Boost Data-Driven Policy-Making and Improve Access to Tenders for SMEs’ (2023) C 98 I/01 2.

16 A famous quote states: ‘What gets measured, gets managed’ (attributed to Peter Drucker). Of course, this saying is not universally true and has its fallacies, however, in the context of this paper, serves to make a point.

17 Albert Sanchez-Graells, ‘Competition Implications of Procurement Digitalisation and the Procurement of Digital Technologies by Central Purchasing Bodies’ [2023] SSRN Electronic Journal 5 <<https://www.ssrn.com/abstract=4376037>> accessed 11 October 2023.

18 Kelleher and Tierney (n 5) 23.

19 ‘What Is Data Visualization?’ (IBM) <<https://www.ibm.com/topics/data-visualization>> accessed 11 October 2023.

20 ‘Using Data Analytics in Public Procurement Operational Options and a Guiding Framework’ (World Bank, 2022) <<https://elibrary.worldbank.org/doi/abs/10.1596/37467>> accessed 11 October 2023.

21 Kelleher and Tierney (n 5) 23.

22 World Bank (n 20) 28.

23 This idea was inspired by the system put in place by the Lithuanian Public Procurement Office, with the help of the Open Contracting Partnership, see Karolis Granickas, ‘Going 100% Green in Lithuania’ (Open Contracting Partnership, 17 October 2022) <<https://www.open-contracting.org/2022/10/17/going-100-green-in-lithuania>> accessed 11 October 2023; Kestutis Kazulis, ‘Launch: Implementing Open and Sustainable Public Procurement - YouTube’ (23 June 2022) <https://www.youtube.com/watch?v=_rU_qUkIpyU&t=2432s> accessed 11 October 2023.

24 Soylu and others (n 14).

25 World Bank (n 20) 11.

26 Soylu and others (n 14).

27 Granickas (n 23); Kazulis (n 23). This project created a public dashboard using open data. The dashboard monitors live the use of green public procurement among the Lithuanian contracting authorities.

28 ‘Prozzoro Project Implementation Support – Monitoring and Analytical Tool’ (European Bank 2016) <<https://www.ebrd.com/work-with-us/projects/tcpsd/prozzoro-project-implementation-support-monitoring-and-analytical-tool.html>> accessed 11 October 2023.

from the eForms Regulation and will highlight the limits of this data collection standard.

1. Sustainable Public Procurement and the eForms

As of October 2023, eForms will become the mandatory standard for reporting on public procurement data above the thresholds, including sustainable public procurement.²⁹ One of the main aims of eForms is to collect data “in a more structured way”.³⁰ This represents an ‘incremental improvement’ to the previous database.³¹ The Regulation on eForms establishes six forms that refer to all the stages of the procurement process:³²

1. Planning;
2. Competition;
3. Direct award prenotification;
4. Result;
5. Contract modification; and
6. Change.

Each form contains multiple fields, and each field refers to a certain piece of information, such as the nature of the procedure (product, works, services), the name or contact information of the buyer, the duration of the contract, etc.³³

In the new eForms, several fields are dedicated to sustainable public procurement.³⁴ It is important to note that filling in these fields can be mandatory or optional, an essential factor that can further impact data use. Data could be missing because it was not mandatory to provide it.³⁵ Ideally, all of the fields referring to sustainable public procurement should be mandatory. However, in the current eForms Regulation, they are all optional. This means that Member States have to tailor them and choose between making them “mandatory, leaving them optional, or not using them at all”.³⁶

2. Limits of the eForms

The main criticism that can be addressed to the eForms Regulation is that all of the sustainable public procurement fields are optional and not mandatory. Member States will decide whether they will collect this information or not. Thus, sustainable public procurement data might not be collected at

all. As Sanchez-Graells explains, the division between optional and mandatory fields will lead to the creation of two ‘tiers’ of corresponding data: Tier 1 would recoup the mandatory data, which will have to be collected by each contracting authority from all Member States, while Tier 2 will contain all the optional or voluntary information.³⁷ He critically argues that the mandatory information in the eForms (Tier 1) overlaps the information that was already collected in TED but in a better, more structured, digital format.³⁸ If one compares the contents of the previous Standard notices³⁹ with the fields set out in the eForms, the overlap between them is not perfect. Rather, the content of the mandatory eForms fields exceeds in detail the content of the previous Standard notices.⁴⁰ However, even if they are more detailed, the eForms do not bring significant changes.⁴¹

Sanchez-Graells continues with the argument that, even if the Tier 2 data (the optional fields) were to be made mandatory, they would not be necessarily open data, due to contrary legal obligations set out in the Open Data Directive, to protect commercial and com-

29 Commission Implementing Regulation (EU) 2019/1780 (n 1); Commission Implementing Regulation (EU) 2022/2303 (n 1).

30 Commission (n 15) 3.

31 Telles (n 9).

32 Commission Implementing Regulation (EU) 2019/1780 (n 1) art 1(1).

33 Annex to the Commission Implementing Regulation (EU) 2022/2303 (n 1).

34 The main fields that refer to sustainable public procurement in the eForms are: ‘Strategic Procurement, Strategic Procurement Description, Green Procurement Criteria, Green Procurement, Social Procurement, Procurement of Innovation, Accessibility, Accessibility Justification, Clean Vehicles Directive, (...) CVD Contract Type, Vehicle Category, Vehicles, Zero Emission Vehicles’, according to the Annex to the Commission Implementing Regulation (EU) 2022/2303 (n 1).

35 Halsbenning and Niemann (n 14) 309.

36 Commission (n 3) 26.

37 Sanchez-Graells, ‘Revisiting the Promise’ (n 6) 23; Sanchez-Graells, ‘Urgent’ (n 4).

38 Sanchez-Graells, ‘Competition Implications’ (n 17) 5.

39 Standard forms for public procurement (*SIMAP*)<<https://simap.ted.europa.eu/standard-forms-for-public-procurement>> accessed 11 October 2023.

40 There are several aspects that are more detailed in the eForms. Here are some examples, with the corresponding lines in the Annex to the eForms Regulation. There is more information related to: the notice (lines 5-9), the previous planning (lines 16-19), the organization (lines 20-38), place of performance and duration (lines 73-90), selection criteria (lines 132-142), award criteria (lines 165-177), subcontracting (lines 267-273) and so on.

41 See also: Telles (n 9).

petition confidential information.⁴² There is an important problem of balancing open data and the protection of commercial and competition interests. In the area of sustainable public procurement, I believe this will not generally be an issue. Rather, the problem would be that the sustainability data fields are optional and Member States will decide if they collect this information.

The eForms Policy Implementation Handbook presents, for each optional field, reasons for making it mandatory, leaving it optional, or not using it at all.⁴³ The ‘strategic procurement’ and ‘green, social and innovative’ procurement fields would bring core and more detailed information on sustainable public procurement respectively, while both would require a ‘minimal administrative effort’.⁴⁴ When it comes to reporting on clean vehicles, this is a mandatory obligation for Member States,⁴⁵ and the Handbook identifies no reason for leaving the data collection field optional.⁴⁶ Finally, the ‘accessibility’ field would ensure compliance with the European Accessibility Act and Art. 42(1) of Directive 2014/24/EU, whilst also requiring ‘minimal administrative effort’.⁴⁷

The European Commission argues that collecting these data would represent a ‘minimal administrative effort’. In my opinion, filling in these fields re-

quires minimal administrative effort if they are automatically filled in by the eProcurement system. When they are manually filled in, there is an additional workload for public servants. The Handbook might frame it as involving minimal effort to incentivise reporting on sustainable public procurement. However, this presents some issues: when contracting authorities have to make a self-declaration, there is the risk of “under-inclusiveness, definitional fuzziness and a lack of filtering of errors”.⁴⁸ Another risk of a manual self-declaration by public servants, is that it becomes a box-ticking exercise that annoys the public official. To counteract this, public servants should be trained to understand the uses and importance of data for public procurement. A better countermeasure would be automatic data collection: “the eForms should be implemented in such a way that they can be automatically filled in with data from previous notices, tenders, contracts, databases, registries and other relevant IT systems”.⁴⁹ However, for now, this is a complicated task that would probably not be quickly integrated by all Member States.⁵⁰

Another important issue is the fact that contracting authorities have to publish TED data for procedures above the thresholds.⁵¹ Therefore, it is up to the Member States to decide whether they collect data below the thresholds. It would be highly beneficial to collect both the data below and above the thresholds.⁵² The procedures above the thresholds account for around 20% of all public procurement, while the rest of 80% is found “in different formats, at a national or regional level”, making it virtually useless for analysis and further usage.⁵³ Data above the thresholds do not render a complete image of the entirety of public procurement procedures that contracting authorities carry out. Only complying with this above-threshold rule, Member States are missing out on an opportunity to create a complete database that could serve in monitoring and decision-making.

Besides these potential problems, there is also an important part of the public procurement process missing from the data collection standard set out in the eForms: the execution of the contract. The execution of the contract plays an important role in sustainable public procurement. At this stage, the contracting authority can tip the scale towards a truly virtuous procedure. For example, the contracting authority could verify if the products delivered correspond to the sustainability criteria set out in the contract, or make sure that the works are carried out ac-

42 Sanchez-Graells, ‘Competition Implications’ (n 17) 6. This is one of the risks of public procurement data management. Due to length limitation concerns, this paper does not focus on the risks of data management. For an in-depth analysis on the topic, see: Albert Sanchez-Graells, ‘Identifying Emerging Risks in Digital Procurement Governance’ [2022] SSRN Electronic Journal <<https://www.ssrn.com/abstract=4254931>> accessed 11 October 2023.

43 Commission (n 3) 69 and next.

44 *ibid* 71.

45 Directive (EU) 2019/1161 of the European Parliament and of the Council of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles [2022] OJ L188.

46 Commission (n 3) 71–72.

47 *ibid* 72.

48 Albert Sanchez-Graells, ‘Data-Driven and Digital Procurement Governance: Revisiting Two Well-Known Elephant Tales’ [2019] SSRN Electronic Journal 8–9 <<https://www.ssrn.com/abstract=3440552>> accessed 28 February 2022; Albert Sanchez-Graells, ‘How to Crack a Nut’ (*How to Crack a Nut*, 5 December 2019) <<https://www.howtocrackanut.com/blog/tag/Duguay>> accessed 16 June 2023.

49 Commission (n 3) 6.

50 See also: Telles (n 9).

51 Directive 2014/24/EU (n 12) art 51.

52 Commission (n 15) 9–10.

53 *ibid* 1.

cordingly. However, there is currently no legal basis in Directive 2014/24/EU that could justify a data collection standard for execution.

III. A Game of Responsibility Between the European Union and the Member States

The creation of a sustainable public procurement data infrastructure should be a goal shared by both the European Union and the Member States, each with its role and responsibilities. However, for now, both are winners in a game of eluding responsibility. The European Union acts in a top-down manner, with the power to create and update the data collection standard. Member States still have a bottom-up approach and can decide to collect sustainable public procurement data, but they lack proper incentives to do so.

1. The Role of the European Union

To create a sustainable public procurement database that would serve for monitoring and decision-making, the eForms should make sustainable public procurement data fields mandatory. Does the European Commission have the competence to make these fields mandatory? Directive 2014/24, as a legal basis for the eForms Regulation, delineates the role and the competence of the European Commission in developing this standard.

Contracting authorities have to publish contract notices and contract award notices above the thresholds in the Publications Office of the European Union.⁵⁴ Annex V of Directive 2014/24 lists the information to be featured in these contract notices and contract award notices.⁵⁵ The European Commission has to develop the forms *via* ‘implementing acts’,⁵⁶ have an “administrative purpose and serve to facilitate the application of the rules set out in this Directive”,⁵⁷ and cannot “have any impact (...) on the nature and scope of obligations stemming from this Directive”.⁵⁸ The Commission has to follow the information set out in Annex V to the Directive 2014/24. Annex V does not explicitly list sustainability in the information to be featured in the contract notices and contract award notices above the thresholds that are published in the Publications Office of the European Union.

This can be summed up as follows: the European Commission has to create the standard forms according to the information in Annex V of Directive 2014/24. Annex V of the Directive does not explicitly provide for sustainability information. Therefore, the European Commission cannot provide for mandatory sustainability fields in the standard forms. Thus, one might consider that sustainability considerations cannot be mandatory fields in the eForms Regulation – that the European Commission cannot make sustainable public procurement data collection mandatory.

I argue that this legal issue can be circumvented. It must be proven that Annex V already contains information on sustainability, so eForms could list sustainability fields as mandatory. Annex V already lists information such as selection criteria, award criteria, performance conditions, description of the procurement and additional information to be included in contract notices and contract award notices above the thresholds.⁵⁹ When it comes to sustainability considerations, they can be integrated throughout the entirety of the public procurement process: in the selection criteria, the technical specifications, the award criteria, and the performance conditions.⁶⁰ Therefore, one can interpret Annex V as implicitly referring to sustainability.

Currently, in the eForms, sustainable considerations form a separate section, entitled ‘Strategic Procurement’ with multiple sub-fields, for example, green procurement or social procurement. Instead of being a separate section, sustainability considerations could be attached to other mandatory categories, such as selection criteria or award criteria. For example, green and social criteria could be a subordinated field in the award criteria section. It is important to have sustainability in individual fields because that makes it easier to monitor and could lower the rate of omitting information.

In brief, the European Commission can make sustainable public procurement data collection manda-

54 Directive 2014/24/EU (n 12) art 51.

55 *ibid* Annex V.

56 *ibid* arts 51(1) and 75(3).

57 *ibid* recital (132).

58 *ibid*.

59 See Directive 2014/24/EU (n 12), Annex V Part C and Part D.

60 Roberto Caranta, ‘Sustainable Public Procurement in the EU’ in Roberto Caranta and Martin Trybus (eds), *The Law of Green and Social Procurement in Europe* (1st ed, DJØF Publishing 2010).

tory. For this, it should qualify sustainability considerations as an integral part of Annex V. Therefore, it can integrate green and social considerations as sub-fields of already mandatory categories. Another solution would be to integrate mandatory sustainable public procurement criteria in the Public Procurement Directive.⁶¹ Thus, Annex V and, implicitly, the eForms, would be updated.

The content of the eForms can be changed yearly, via a ‘legal and policy review’ led by DG GROW,⁶² in ‘cooperation with the relevant stakeholders’.⁶³ The European Commission can change the eForms in a relatively short period and include sustainable public procurement as mandatory data, so the European Union retains the power to impose the content at a later stage.

It is interesting to notice that the European Commission follows Annex V in a strict manner. For example, according to Directive (EU) 2019/1161,⁶⁴ Member States have to report certain information regarding clean vehicles. Consequently, eForms should integrate mandatory reporting on clean vehicles. However, this is not the case – in the eForms Regulation,⁶⁵ clean vehicle fields are still optional.⁶⁶ In other words, a reporting obligation mandated by another Directive than the Public Procurement Directive translates into an optional field in the eForms.

2. The Role of the Member States

Member States also play an important role in collecting data and monitoring sustainable public procure-

ment. Until the European Union makes sustainable public procurement data collection mandatory, Member States should collect this data. Member States should focus on building a reliable data infrastructure that integrates sustainable public procurement organically. I believe that the analysis should not focus yet on the European Union-level collected data, such as the Public Procurement Data Space,⁶⁷ because if there is no quality data collected at the contracting authority level, and, subsequently, at the Member State level, there is no European Union-level quality data.

Member States would have to define what qualifies as a sustainable public procurement so they can later collect data using this definition. The chosen criteria for sustainable public procurement play an essential role: a misrepresentation could easily lead to ‘greenwashing’ and jeopardise the entire process downstream.⁶⁸ Defining sustainable public procurement with criteria that is too relaxed would falsely increase the number of sustainable procedures. On the other hand, definitions that are too strict would artificially lower their number.

Each Member State might use different definitions and criteria to qualify a sustainable public procurement procedure. This would impact the benchmarking between Member States and the data collected at the European Union level: “Whenever open-ended concepts are used, the data may be a poor source for comparative and aggregate analysis”.⁶⁹ A solution to this might be standardising the criteria that are used.⁷⁰ Other relevant aspects are data skills, digital education, institutional organisation, or the

61 Marta Andhov and others, ‘Sustainability Through Public Procurement: The Way Forward – Reform Proposals’ (23 March 2020) 41 and subsequent <<https://papers.ssrn.com/abstract=3559393>> accessed 11 October 2023.

62 DG GROW is the Directorate General Internal Market, Industry, Entrepreneurship and SMEs of the European Union Commission. Find out more: ‘Internal Market, Industry, Entrepreneurship and SMEs’ <https://commission.europa.eu/about-european-commission/departments-and-executive-agencies/internal-market-industry-entrepreneurship-and-smes_en> accessed 19 June 2023.

63 European Commission, Directorate General for Internal Market, Industry, Entrepreneurship and SMEs., *EForms: Governance and Life Cycle Management* (Publications Office 2020) 7 <<https://data.europa.eu/doi/10.2873/185027>> accessed 19 June 2023.

64 Directive (EU) 2019/1161 (n 45).

65 Commission Implementing Regulation (EU) 2022/2303 (n 1).

66 *ibid* recital (2).

67 Commission (n 15).

68 World Bank (n 20) 9, commenting on a study from the Open Contracting Partnership, ‘Green Flags: How open data can throw light on sustainable procurement’ Guide [2021] <<https://www.open-contracting.org/resources/green-flags-how-open-data-can-throw-light-on-sustainable-procurement/>> accessed 11 October 2023.

69 Sanchez-Graells, ‘Revisiting the Promise’ (n 6) 24.

70 *ibid* 24. The author gives the example of the already existing European Union green public procurement criteria. Recently, several Member States have imposed some of these criteria as mandatory, for example in Italy: see Aura Iurascu, ‘How Will the Adoption of Mandatory GPP Criteria Change the Game?’ [2023] 18 European Procurement & Public Private Partnership Law Review 6. The Romanian legislation recently changed, imposing the use of the most economically advantageous tender award criteria in a weighting of 60% for the procurement of products that have a European Union green public procurement criteria methodology, see: *Hotărârea nr. 336/2023 Monitorul Oficial, Partea I nr. 328* 2023. Relevant work in this area has been developed by the Open Contracting Partnership (n 68); Open Contracting Partnership, ‘Open and Sustainable Public Procurement Toolkit’ <<https://sustainable.open-contracting.org/>> accessed 11 October 2023.

potential centralisation of data management – however, these are topics for another paper.⁷¹

IV. Conclusion

The eForms are a standard for public procurement data collection, including sustainability. This is a promising step towards a sustainable public procurement data infrastructure that would allow monitoring, decision-making and lead to the uptake of sustainability. The responsibility of developing a sustainable public procurement data infrastructure should be assumed by both the European Union and the Member States. Each should play its role and contribute to this common goal.

For now, none of them is taking on this goal.⁷² The European Commission did not include sustainable public procurement among the mandatory fields for data collection and there is no data below thresholds, nor on contract execution. Member States can still decide to collect this data and develop their infra-

structures and management to monitor sustainable public procurement. However, this will most likely not be done by all Member States. This delays the chances of creating a sustainable public procurement database that could serve for monitoring, decision-making, and enhancing the uptake of green and social considerations.

The European Commission and Member States should not be afraid to step up and play their part in creating a sustainable public procurement database. Sustainability and digitalisation should not be designed in silos,⁷³ but rather integrated holistically into the public procurement process.

71 See also: Sanchez-Graells, 'Revisiting the Promise' (n 6); Sanchez-Graells, 'Competition Implications' (n 17).

72 There are some exceptions among Member States.

73 Open Contracting Partnership, 'Open and Sustainable Procurement in Europe Conference', <https://www.linkedin.com/posts/opencontractingpartnership_oceu2023-opencontracting-sustainability-activity-7075301370697797632-2lx8?utm_source=share&utm_medium=member_desktop> (LinkedIn, 15 June 2023) accessed 11 October 2023.