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# Public Procurement in a Circular Economy

## An Overview of the EU and South African Models

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Work Package 1

Sustainable public procurement: from the international agenda to actual buying practice



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## I. INTRODUCTION TO THE CIRCULAR ECONOMY

International interest in the circular economy (CE) has grown exponentially during the past decade. A Resolution of the United Nations Environment Programme (UNEP)<sup>2</sup> highlighted that Member States were invited to foster the progress of sustainable consumption and production through various economic models, including the circular economy, as a vital component of sustainable development. The CE seems to be referred to as a primary tool to fight alarming global phenomena, from economic and social instability (unemployment, social vulnerability, supply shortages) to environmental problems (biodiversity loss, water, air, and soil pollution, and resource scarcity), which overall lead to climate change.<sup>3</sup>

The political agenda of the European Union (EU) considers the CE as a frontrunner tool to achieve sustainability goals and, ultimately, to fight climate change.<sup>4</sup> In the same vein, the government of South Africa (SA) is aware of the significance of the CE in establishing a resource-efficient, low-carbon, and internationally competitive economy.<sup>5</sup>

In a 2017 article, a group of scholars found that the CE concept is interpreted and implemented in various ways, gathering 114 definitions<sup>6</sup>. In a 2023 article, the same scholars have returned to the definition of CE by analysing the newest and most compelling conceptualisations, gathering 221 definitions of it this time. However, while these multiple interpretations of CE can enrich scholarly perspectives, differentiation and fragmentation impede the concept's consolidation.<sup>7</sup> As such, there is no universally accepted definition of CE,<sup>8</sup> and although more than 221 concepts are circulating, its potential still needs to be fully explored and researched through an in-depth analysis.

In general terms, a circular economy entails an economic model aimed at switching from the previous and dominant linear economy based on the so-called 'take-make-use-dispose' model of production and consumption. This circular switch allows the maintenance of the value of products, materials, and resources on the market for as long as possible while minimising or -if possible - eliminating waste production. To achieve that, the CE focuses on many activities

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<sup>2</sup> UNEP Res 1 "Innovative pathways to achieve sustainable consumption and production" (11–15 March 2019) UNEP/EA.4/Res.1.

<sup>3</sup> M Geissdoerfer et al., 'The Circular Economy – A New Sustainability Paradigm?' (2017) 143 *Journal of Cleaner Production* 757.

<sup>4</sup> European Commission, 'Circular Economy Action Plan For a cleaner and more competitive Europe', COM (2020) 98 final; and 'The European Green Deal', COM (2019) 640 final.

<sup>5</sup> L Richards, 'Circular economy South Africa', Department of Environmental Affairs, Republic of South Africa, 2020.

<sup>6</sup> J Kirchherr et al., 'Conceptualizing the Circular Economy: An Analysis of 114 Definitions', 127 *Resources, Conservation and Recycling* 221, 2017.

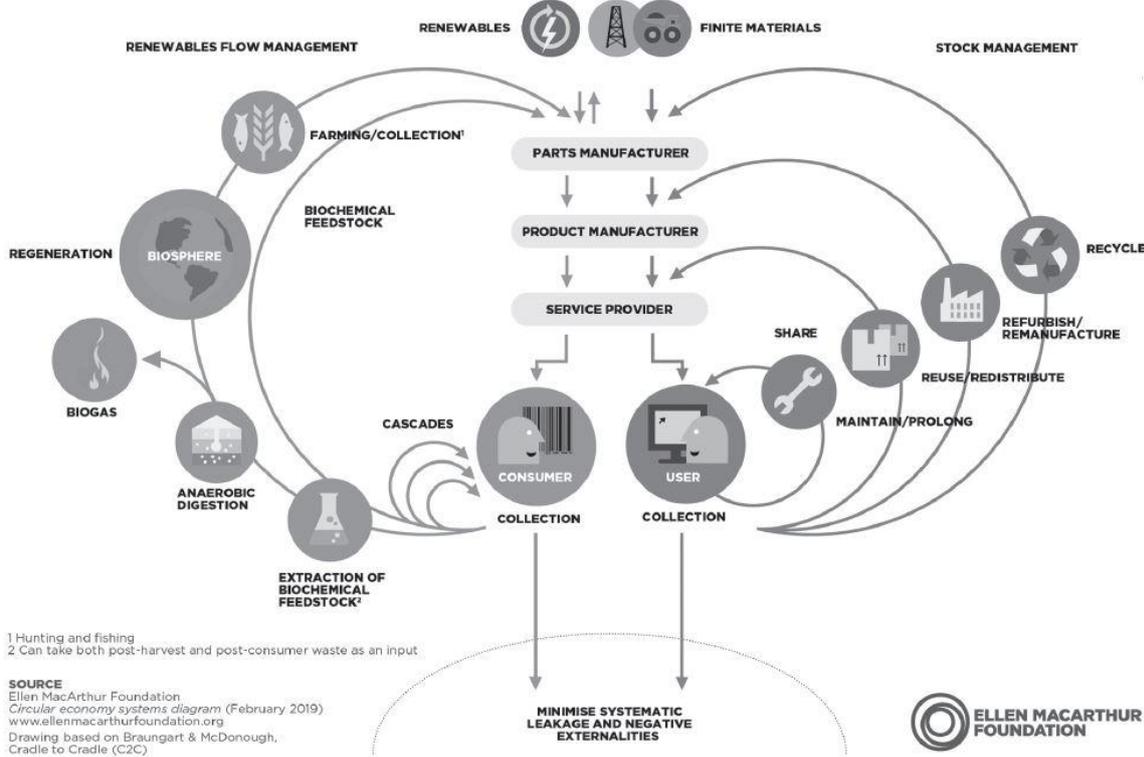
<sup>7</sup> See also D Monciardini et al., '13 Circular Economy Regulation: An Emerging Research Agenda' in A Alexander et al., (eds), *Handbook of the Circular Economy*, De Gruyter, 2023.

<sup>8</sup> J Voorter et al., 'The concept 'Circular Economy': towards a more Universal Definition', *Ius Publicum Network Review*, Issue n. 2-2021, 2022.

such as recycling, reusing, remaking, reducing, remanufacturing, rethinking, (see figure 1 below) etc., and it can be linked to several branches of law, including public procurement law. The potential of the CE in public procurement is self-evident: public purchasing represents at least 14 to 20% of the EU and South African GDPs, respectively. Thus, public authorities can steer their purchase toward more circular products (durable, reusable, easily repairable, and refurbished) to proactively reduce their environmental footprint and help maintain production and consumption within the planetary boundaries.<sup>9</sup>

This article highlights and compares the EU and South African legislative approaches to public procurement concerning the transition to a more circular economy. By doing so, the contribution to legal scholarship stands in its ambition to use comparative research to learn from different approaches and contribute to a better understanding of legal systems in the transition towards a circular economy. The article is organised as follows. First, it emphasises the relevance of the circular economy both in the EU and in South Africa; it investigates both legal systems and legislative approaches to public procurement and circular economy to uncover the primary enablers and barriers; finally, it discusses the main comparative elements and brings some suggestions and concluding remarks.

**Figure 1.** Ellen MacArthur Foundation, 2021, describes the technical and biological cycles of a circular economy



*Figure 3.1* Technical and biological cycles of a circular economy.  
Source: EMF, 2021.

**II. BENEFITS OF TRANSITIONING TO A CIRCULAR ECONOMY**

<sup>9</sup> On the role of circular economy to reverse the overshoot of planetary boundaries, see: Circle Economy, ‘The circularity gap report 2023’, Amsterdam, Circle Economy, (pp. 1-64, Rep.), 2023.

Transitioning to a more circular economic model is a decisive action to achieve the EU Green Deal's goal of becoming the first climate-neutral continent by 2050 and decoupling economic growth from resource extraction while ensuring long-term competitiveness.<sup>10</sup> The CE will accelerate the regenerative growth model and advance in keeping raw material consumption within planetary boundaries. Moreover, it will help secure research and innovation for the green and digital transition and develop the EU capacity of critical raw materials to avoid disruption in the supply chains that would adversely affect the industry and the single market. In the EU's vision, the CE has a core significance in the design of products as well. Generally, products available on the market can generate adverse environmental impact, thus shifting to products manufactured in compliance with circularity aspects such as durability, reusability, upgradability, and reparability standards; ensuring the absence of substances of concern; more energy and resource-efficient; containing recycled content; with remanufacturing and high-quality recycling standards; and with reduced carbon and environmental footprints. This will result in economic expansion, job creation, and social inclusion while helping the EU achieve its overall climate, environmental, and energy goals.

Despite the EU's efforts and far-reaching objectives, these goals can only be achieved if the transition goes hand in hand with a global shift to a just, climate-neutral, resource-efficient, and circular economy. Many products sold in the single market are manufactured, distributed, used, and discarded worldwide; therefore, it is essential to consider how the law can contribute to a global change toward a more circular society.<sup>11</sup> In particular, I contend that public procurement law plays a significant role, and I elaborate on this below. The international dimension in which the EU advances its strategy is generically discouraging; overall governance mechanisms addressing the unsustainable use of natural resources seem to be lacking, and critical raw materials are scarce and often highly concentrated in third countries,<sup>12</sup> which exposes the EU to the risk of supply shortages.

The circular economy is also gaining traction in the African continent, and it can create opportunities for new and diversified economic activities while concomitantly addressing urgent environmental and social issues. The African continent's interest in CE is increasing substantially, as can be observed from the several agreements launched recently, e.g., the African Circular Economy Alliance (ACEA),<sup>13</sup> the African Circular Economy Network (ACEN)<sup>14</sup> or the World Circular Economy Forum (WCEF)<sup>15</sup> and data showcase that most of the African countries have at least one CE related policy in place.<sup>16</sup> Building on this, it has been argued that the implementation of CE practices in the African continent could increase the GDP, and the employment rate by 2.7%, lower emissions while

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<sup>10</sup> European Commission, *The European Green Deal*, 2019, 640 final.

<sup>11</sup> C. Backes and M. Boeve, 'Envisioning the Future of the Circular Economy: A Legal Perspective', 52 *Environmental Policy and Law* 253, 2022.

<sup>12</sup> *The EU sources 97% of its magnesium in China. Heavy rare earth elements, used in permanent magnets, are exclusively refined in China. 63% of the world's cobalt, used in batteries, is extracted in the Democratic Republic of Congo, while 60% is refined in China.* In, European Commission, 'Proposal for a regulation establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) 168/2013, (EU) 2018/858, 2018/1724 and (EU) 2019/1020', COM/2023/160 final.

<sup>13</sup> The Alliance was established during the 23rd United Nations Conference of Parties (COP23) by the Governments of South Africa, Nigeria and Rwanda. Its mission is to spur Africa's transition to a Circular Economy at the country, regional and continental levels by operating as a collaborative platform to coordinate and link the various initiatives on the continent.

<sup>14</sup> It is a continent-wide membership-based initiative that aims to accelerate the transition to circularity in Africa. The network members consist of circular economy specialists with the expertise required to support the transition to more circular approaches to business. ACEN currently has representatives in 32 African countries.

<sup>15</sup> The forum is a global initiative launched by the Government of Finland.

<sup>16</sup> European Commission, 'Circular Economy in the Africa-EU Cooperation: Continental Report' Directorate General for Environment, Publications Office 2021.

ensuring economic growth, render a more competitive and resilient manufacturing sector, provide better working conditions, increase health quality and enhance biodiversity as a result of reduced air, soil, and water pollution. Finally, it could improve the resilience of agricultural systems to droughts and provide climate adaptation pathways.<sup>17</sup> CE is also relevant in advancing Sustainable Development Goals, particularly SDG 1 (No Poverty), SDG 3 (Good Health and Well-Being), SDG 6 (Clean Water and Sanitation), SDG 7 (Affordable and Clean Energy), SDG 8 (Decent Work and Economic Growth), SDG 9 (Industry, Innovation and Infrastructure), SDG 11 (Sustainable Cities and Communities), SDG 12 (Responsible Consumption and Production), and SDG 15 (Life on Land).<sup>18</sup>

In this context, the South African agenda has started exploring the concept of the circular economy, including it in its national strategies. South Africa's soil bears significant mineral resources; it is the world's largest resource of platinum group metals (PGM), manganese, chromium, and gold.<sup>19</sup> Its extractive areas also include coal, iron, and diamonds.<sup>20</sup> It is also considered that implementing CE practices could create job opportunities, new markets, and business opportunities, attract investments, promote sustainable practices, and develop new skills, allowing the country to prosper.

Undoubtedly, the circular economy is a promising tool for national and global economies and a more sustainable future; yet, the concept still needs to be provided with a stable legal framework as its fragmented and sectoral approach creates legal uncertainty and compromises the attainment of its goals.

Recent data showed that, despite the EU's remarkable roadmap toward a CE based on over ten years of legislative and non-legislative interventions, there is minimal evidence that the EU's efforts have influenced circular economy activities in the Member States, and the progress is plodding.<sup>21</sup> Overall, the EU's circularity rate is 11.7%, higher than the global one at 7.6%.<sup>22</sup> On the other hand, a particularly linear economy characterises South Africa, where material cycling is estimated at 7%, of which 5% is the result of ecological cycling of biomass and organic waste. The socio-economic cycling rate (recycling and reusing materials within the economy) is only 2%.<sup>23</sup> Numbers are not promising, and further investigation is required to understand the hindrances to increase these numbers.

Thus, whether harmonised legislative interventions might be required or improving the monitoring of CE indicators, the present article strongly believes that public procurement law fosters the transition to a more circular economy;<sup>24</sup> namely, it can boost demand for circular

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<sup>17</sup> J E Potgieter et al., 'Circular economy in the Africa-EU cooperation - Country Report for South Africa. Country report under EC Contract ENV.F.2./ETU/2018/004 Project: "Circular Economy in Africa-EU cooperation"', Trinomics B.V., ACEN, Adelphi Consult GmbH and Cambridge Econometrics Ltd, 2020.

<sup>18</sup> Grid-Arendal (2021). 'Circular Economy on the African Continent: Perspectives and Potential'. 48 pages. Arendal, Norway: GRID-Arendal, 2021.

<sup>19</sup> L. Godfrey, 'The circular economy as development opportunity'. CSIR: Pretoria, 2021.

<sup>20</sup> *ibid*, L. Godfrey, (2021); "South Africa is a relatively resource-rich country. According to the Minerals Council "South Africa's modern economy is founded on the mining industry. The industry was the basis for the development of many other economic sectors, from the steel industry to construction, forestry, and financial services" in L Godfrey et al., 'Unlocking the Opportunities of a Circular Economy in South Africa' in S Kumar Ghosh and S Kumar Ghosh (eds), Circular Economy: Recent Trends in Global Perspective, Springer Nature Singapore, 2021.

<sup>21</sup> European Court of Auditors, Special report "Circular economy. Slow transition by member states despite EU action" EN 2023, 17.

<sup>22</sup> 'The circularity gap report 2023', Amsterdam: Circle Economy.

<sup>23</sup> L. Godfrey, 'The circular economy as development opportunity'. CSIR: Pretoria, 2021.

<sup>24</sup> This is also true outside the boundaries of public procurement when it comes to achieving circular economy objectives. In fact, the South African government has a critical role in transitioning South Africa to a more circular economy by providing policy direction and certainty and creating an enabling environment through appropriate regulatory and economic instruments. In L Godfrey et al., 'Unlocking the Opportunities of a Circular Economy in South Africa' in S Kumar Ghosh and S Kumar Ghosh (eds), Circular Economy: Recent Trends in Global Perspective, Springer Nature, Singapore, 2021.

products, rethink their need for more circular solutions, include circular requirements in the tendering phase, and act as a trendsetter for national and global circular activities. This research will investigate with a comparative approach the current understanding and possibility of using public procurement for the circular economy transition and what legislative interventions (if any) would be necessary. To answer this research question, the paper analyses and compares the EU and South African legal systems to identify legislative enablers and barriers; subsequently, it provides possible solutions and some concluding remarks.

### III. THE APPROACH TO PUBLIC PROCUREMENT IN THE EU AND SA

Before diving into the comparative analysis of the legal frameworks of public procurement and circular economy, it is worth emphasising the relevance of comparing these legal systems. Notwithstanding the academic ambition to use comparative research to learn, evolve, and contribute to a better understanding of legal systems by sharing the best legislative solutions, economic reasons are also of significant value. In fact, trade agreements between the EU and South Africa are governed by the Trade, Development, and Co-operation Agreement (TDCA).<sup>25</sup> The TDCA establishes a Free Trade Area (FTA) that covers 90% of bilateral trade between the EU and South Africa. This trading represents a considerable amount: in 2018, about 23% of total exports went to the EU, while 29% of imports originated from the EU. Over 15% of the EU's African exports go to South Africa. Of all EU imports, 16% of the African continent comes from South Africa, making the country EU's most important export partner in Africa while ranking as the primary import partner in Africa.<sup>26</sup> Moreover, EU best practices on CE could be further developed in South Africa and vice versa. The increased circularity interest in the EU will inevitably affect extractive-based economies such as South Africa. Exploring CE domestically provides opportunities for safeguarding the South African economy against future resource constraints and volatility in international markets while unlocking the socio-economic benefits.<sup>27</sup>

#### *III.a. European Union's Public Procurement Dimension*

Regulating the public sector within the EU has always had a particular significance. The Treaty on European Union and the Treaty on the Functioning of European Union (TEU, TFEU) in their previous versions, going back to the Treaty of Rome (1957), have had as prominent objectives the creation of a common market based on the free movement of goods, people, services and capitals.<sup>28</sup> The aim of achieving a common market has been facilitated by the enactment of new legislative acts (directives and regulations) which have abolished -or at least aimed at abolishing- the physical, technical, and fiscal barriers to trade and ensured more effective competition within the internal market.<sup>29</sup> Considering Member States' predisposition to keep purchases within their frontier, public procurement has been one of the activities that have faced the most tangible impediments to creating an internal market. Several consecutive directives have regulated the public procurement sector, each time with a more integrationist approach than the previous and with the willingness to ensure compliance with the core

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<sup>25</sup> Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa. OJ L 311, 04/12/1999 P. 0003 - 0415

<sup>26</sup> J E Potgieter, J Rajput, et al., "Circular economy in the Africa-EU cooperation - Country Report for South Africa", 2020. Country report under EC Contract ENV.F.2. / ETU/2018/004 Project: "Circular Economy in Africa-EU cooperation", Trinomics B.V., ACEN, Adelphi Consult GmbH and Cambridge Econometrics Ltd.

<sup>27</sup> L Godfrey, "The circular economy as development opportunity", CSIR, Pretoria, 2021.

<sup>28</sup> P Craig, G De Burca 'EU LAW, Text, Cases, and Materials', Oxford University Press, 2011, pp. 581-610.

<sup>29</sup> C Bovis, 'Public-Private Partnerships in the European Union', Routledge, 2014.

principles relevant to the market, namely, non-discrimination and transparency, subsequently enriched by the equal treatment and proportionality principles.<sup>30</sup>

Coming to the in-force legislation on public procurement, Directive 2014/24/EU, carried out the set of rules on how to procure and, for the first time, has opened the stage to seeking strategic objectives by means of public procurement, e.g., environmental or social aspects, and ensured legal certainty incorporating the case law of the CJEU on sustainability. Two novelty elements of this directive are worth mentioning for this paper's purposes. Firstly, recital 91 recalls Article 11 TFEU demanding the integration of environmental protection requirements into the definition and implementation of the Union policies and activities, particularly to promote sustainable development, including in public contracts. Secondly, article 18.2 elevates the sustainability principles<sup>31</sup> (i.e., ensuring compliance of public contracts with applicable obligations in the fields of environmental, social, and labour law) as cardinal values of procurement with the same standing as the old-fashioned ones (i.e., transparency, non-discrimination, equality, proportionality). Finally, under article 288 TFEU, directives are binding for EU Member States as the result to be achieved, leaving national authorities the power to choose the form and methods to achieve the outcome (generally within two years). As such, all EU member states have transposed Directive 2014/24/EU's objectives into their national legislation, including the provision concerning sustainability aspects.<sup>32</sup> However, the CJEU developed the concept of "link to the subject matter," which sets a series of limitations in terms of procuring sustainability.<sup>33</sup> Additionally, there seems to be a misbalance in the possibility of achieving environmental objectives compared with social objectives, with a prevalence of the former, and it is commonly accepted that accommodating environmental goals is less controversial.<sup>34</sup> This imbalance is reflected in the domestic legislation unless the national legislators decide to adopt more sustainable provisions discretionally.

### *III.b. The South African Procurement Dimension*

Whereas procurement is a complex and highly contested discipline in South Africa, it has significantly impacted its societal and economic aspects and has been recognised as a policy tool.<sup>35</sup> Procurement has been constitutionalised since 1996 under section 217 of the Constitution, which reads that public bodies<sup>36</sup> of each level shall procure in compliance with a fair, equitable, transparent, competitive, and cost-effective system. Moreover, subsection 2a allows for the preferential allocation of contracts to categories of persons disadvantaged by unfair discrimination.<sup>37</sup> As indicated in the general procurement guidelines, procurement

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<sup>30</sup> Article 18, para.1, Directive 2014/24/EU.

<sup>31</sup> On EU PP principles, see: C Risvig Hamer and M Andhov, 'Public Procurement Principles' 187-207, in Caranta R., and Sanchez-Graells A., (eds), *European Public Procurement Commentary on Directive 2014/24/EU*, Edward Elgar Publishing 2021.

<sup>32</sup> *Ibid.*, M Andhov, 2021. Denmark is the only EU country that decided not to transpose article 18.2.

<sup>33</sup> M Andrecka & K Peterkova, 'Sustainability requirements in EU public and private procurement – a right or an obligation', *Nordic Journal of Commercial Law* (2017), p. 56–89.

<sup>34</sup> For an in-depth discussion, see the recent study conducted by C Methven O'Brien & R Caranta, 'Due Diligence in EU Institutions' Own-Account Procurement: Rules and Practices' January 2024 for the EU Parliament and R Caranta & M Trybus, 'The law of green and social procurement in Europe', 2010.

<sup>35</sup> Bolton P., 'Government Procurement as a Policy Tool in South Africa' (2006) 6 *Journal of Public Procurement* 193.

<sup>36</sup> The wording is generic and does not address the exceptions provided in South African law.

<sup>37</sup> Constitution of the Republic of South Africa, Section 217. *Procurement. (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair equitable, transparent, competitive and cost-effective. (2) Subsection (1) does not prevent the organs of state or institutions referred to*

revolves around five pillars: i) the value for money, as the best available outcome when all relevant costs and benefits over the procurement cycle are considered; ii) open and effective competition, based on transparency and accessibility to all parties and avoidance of biases; iii) ethics and fair dealing, as a result of mutual trust and respect and recognising conflicts of interest; iv) accountability and reporting by ensuring that organisations are accountable for their plans, actions, and outcomes; and v) equity, meaning the observance of government policies which are designed to advance persons or categories of persons disadvantaged by unfair discrimination.<sup>38</sup> Accordingly, South Africa holds high its procurement founding principles and values while, concomitantly, addressing its history of discrimination, unfair practices, and marginalisation of people by encouraging affirmative actions.

The public procurement regulatory framework must be more cohesive alongside the constitutional provision. The contemporary trend creates more detailed rules instead of a coherent and harmonised system.<sup>39</sup> Every legislative act partially rules the procurement phases, and many pieces of legislation must be read together to complete the puzzle. The rules deriving from the Public Finance Management Act (PFMA) 1999 are applied to national and provincial government entities, and those of the Municipal Finance Management Act (MFMA) of 2003 are used for local government entities. The Parliament also prescribed in 2000 a statutory framework for preferential procurement that allows preferential treatment of certain contractors during the award stage of the contract, the Preferential Procurement Policy Framework Act (PPPFA),<sup>40</sup> and, under each statute, further sets of regulations are issued.<sup>41</sup>

Section 217 of the Constitution and the PPPFA demonstrates that South Africa uses public procurement to achieve sustainability goals, especially its social component, as preferential procurement appears widely accepted, especially in light of its apartheid history.<sup>42</sup> Nonetheless, the PPPFA has undergone many reforms, and more recently, the new public procurement bill of June 2023 aims to repeal it in its entirety.<sup>43</sup>

Regrettably, the current in-force fragmented and decentralized procurement rules do not contain provisions on using procurement to achieve environmental targets. It has been argued that the lack of environmental considerations is a remarkable absence, suggesting that South Africa still has a long road ahead to fully realize sustainable public procurement (SPP).<sup>44</sup>

However, it is possible to trace the roadmap of environmental considerations in procurement, referring to other constitutionalized provisions which deserve to be interpreted and

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*in that subsection from implementing a procurement policy providing for-(a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.*

<sup>38</sup> Government of South Africa, General Procurement Guidelines.

<sup>39</sup> G Quinot, 'Contemporary Trends in the Development of Public Procurement Law in South Africa' (2023) 85 *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 71.

<sup>40</sup> Methods to implement preferential procurement include set-asides, qualification criteria, contractual conditions, offering back, product or service specification, preferences at the shortlisting stage, tender evaluation criteria and general assistance; in J Nkwananhi Hlakudi, 'The Implementation of Preferential Procurement Policy in Gauteng Province: Challenges and Solutions' (2015) 3 *Africa's Public Service Delivery and Performance Review* 55; Watermeyer, R.B. 2003, 'Implementing preferential procurement policies in the public sector in South Africa'. *Journal of the South African Institution of Civil Engineering*, 45, Issue 3, P 1 – 20.

<sup>41</sup> G Quinot & A Anthony, 'Towards open contracting in South African public procurement law', P.P.L.R. 2022, 3, 113-119; and G Quinot, 'Reforming procurement law in South Africa' (2020) 7 *African Public Procurement Law Journal*; and A Molver, and Noeth G., 'Chapter 19 - South Africa', in 'The Government procurement review' Davey J. and A Gatenby, (editors), Fifth ed., The Law Reviews, May 2017.

<sup>42</sup> See also Bolton, 2006.

<sup>43</sup> The National Assembly passed the Public Procurement Bill B18B-2023 on December 5, 2023; the legislative item has not yet been concluded.

The process is available online at <https://www.parliament.gov.za/bill/2310365> (last accessed 9 February 2024).

<sup>44</sup> *Ibid.*, G Quinot, 2023.

contextualized: firstly, under section 24, everyone has the right to a healthy environment for the benefit of present and future generation and measures that secure ecologically sustainable development and promotes justifiable economic and social development;<sup>45</sup> secondly, section 152 mentions that ensuring the provision of services to communities is as well as promoting safe and healthy environment are among the objectives of the local government<sup>46</sup>.<sup>47</sup> It has been argued that procurement could be used to give effect to section 24 of the Constitution. Yet, the link with section 217 has yet to be explored, and organs of state are not legislatively authorized to bring environmental consideration in awarding a contract.<sup>48</sup> On the local level, procurement could be successfully used to implement section 152 and obtain tangible results in terms of circularity much faster.

Exceptionally, as preferential procurement awarding points to historically disadvantaged individuals is fully admissible, there seems not to exist a limitation corresponding to the EU “link to the subject matter”, accordingly, preferential procurement embedding circular economy principles could be foreseen.

As a final point, the multiple pieces of legislation on public procurement do not focus on environmental considerations, yet the newly published bill seems – albeit with minimal reference- to have taken the sustainability path by mentioning among its objectives provided in article 2 (2)(g) the promotion of a sustainable environment, as well as, under article 22 when a preferential procurement policy is implemented, the envisaged policy must include measures to advance a sustainable environment.<sup>49</sup> I consider that these novelty elements display an openness towards a constitutionally oriented interpretation and application of the sections mentioned above 217, 24, and 158, paving the way to inserting circular economy criteria into public procurement. These assumptions have nonetheless to be put into perspective with the State’s socio-political circumstances, lack of capacity, skills, and knowledge as well as depleted state funds, which result in a tendency to prioritise short-term needs over more sustainably purchases.<sup>50</sup>

#### IV. THE APPROACH TO CIRCULAR ECONOMY IN THE EU AND SA

##### *IV.a. European Union’s Circular Economy Dimension*

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<sup>45</sup> Section 24. Environment. - *Everyone has the right- (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, to through reasonable legislative and other measures that- (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.*

<sup>46</sup> Section 152. Objects of local government. - *(1) The objects of local government are-(a) to provide democratic and accountable government for local communities; (E) to ensure the provision of services to communities in a sustainable manner; (c) to promote social and economic development; (6) to promote a safe and healthy environment; and (e) to encourage the involvement of communities and community organisations in the matters of local government. (2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).*

<sup>47</sup> Although the legislation on procurement does not contain environmental considerations, studies have showcased that metropolitan municipalities started working with the notion of green procurement based on their environmental policies: in AO Agyepong and G Godwell Nhamo, ‘Green Procurement in South Africa: Perspectives on Legislative Provisions in Metropolitan Municipalities’ (2017) 19 *Environment, Development and Sustainability* 2457.

<sup>48</sup> P Bolton, ‘Protecting the Environment through Public Procurement: The Case of South Africa’ (2008) 32 *Natural Resources Forum* 1.

<sup>49</sup> The bill has already been amended in its second version of 2024 which has erased the function of the procurement office of prohibiting a procedure whenever it did not result in achieving one of the listed principles (fairness, equity, transparency, competitiveness, or cost-effectiveness, or to promote socioeconomic, industrial,) including among those the environmental development.

<sup>50</sup> A. Breytenbach, ‘Green is the new gold: Going green in public procurement in South Africa – the use of environmental considerations in the criteria and contract terms of tender procedures’, 10 *APPLJ* 1, 2023.

The EU's interest in resource efficiency and decoupling economic growth from resource extraction has increased substantially in the last decade. The two flag moments in the EU's engagement on circular economy legislative interventions are identified in 2015 and 2020. The first Circular Economy Action Plan (Circular Package I)<sup>51</sup> was adopted by the Commission in 2015 to ensure that nothing is being wasted. It has represented an innovative path on how to deal with resource consumption in accordance with the UN 2030 Agenda and Gt Alliance on resource efficiency. The plan aimed to boost the EU's competitiveness, help the creation of new business opportunities, and provide new legislative proposals. The Package has led to several interventions, directive amendments, and new guidelines, and the green public procurement (GPP) has been identified in the Package as a critical component for the CE to be further supported and implemented. The essential intervention of the first circular package was the amendment of the Waste Framework Directive<sup>52</sup>. In 2018 the Waste legislation was extensively amended through several directives. Among others, particularly relevant is Directive 2018/851/EU which endorsed and explicitly promoted the principles of circular economy. The amendments were required to ensure that waste targets reflect the EU's ambition to move towards a circular economy, improve the efficiency of resources, and reduce the dependence on the import of raw materials.

The second Circular Economy Action Plan (CEAP or Circular Package II)<sup>53</sup> is the newest EU key policy under the EU Green Deal strategy to achieve the first climate-neutral continent by 2050. With this, the EU sought a regenerative growth model that gives back to the planet more than it takes and keeps its resource consumption within planetary boundaries. The plan emphasizes again the circular objectives and stresses the need to create a strong and coherent product policy framework to reinvent consumption patterns and make sustainable products and services the norm. The plan's goal is to switch the focus from mere recycling to the product design and improve product durability, reusability, upgradability, and repairability; to increase resource efficiency; to enable remanufacturing and high-quality recycling; to restrict single-use products and premature obsolescence<sup>54</sup>; ban the destruction of unsold durable goods, incentivize product-as-a-service models. The intervention focuses on ICT, textiles, furniture, packaging, construction, vehicles and batteries, food, and other nutrients.<sup>55</sup> With the CEAP, the EU has also considered the public procurement sector, underlining the relevance of GPP as a vital tool for more circular governmental purchasing.<sup>56</sup>

Thus, the EU interventions in the field of circular economy are multiple, and to date, there is no unique legislative framework, but CE actions are found in different legislative sectors. In

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<sup>51</sup> EU COM, (2015) 614 final, Closing the loop - An EU action plan for the Circular Economy.

<sup>52</sup> Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste.

<sup>53</sup> EU COM (2020) 98 final, 11.3.2020, A new Circular Economy Action Plan for a cleaner and more competitive Europe.

<sup>54</sup> A totally contrasting strategy to the Circular economy is the 'planned obsolescence' business strategy. Planned obsolescence means that products are manufactured and designed to have a shorter lifetime and encourage customers to buy a replacement quicker than normally. Despite the good intentions, the current EU law is not adequately equipped to address it, and without regulating it, the Circular Economy cannot be achieved. On the topic: J Malinauskaite & F Burga Erdem, Planned obsolescence in the Context of a Holistic Legal sphere and the Circular Economy, *Oxford Journal of Legal Studies*, Vol. 41, No. 3 (2021), pp. 719-749

<sup>55</sup> Among many others see, for example, EU COM 2022/0095, 142 final, Proposal for Eco-design Regulation; EU COM, 2023, 160 final, Proposal for a Regulation of critical raw materials; EU COM/2020/798 final, Proposal for a Regulation concerning batteries and waste batteries; EU COM/2022/677 final, Proposal for a Regulation on packaging and packaging waste.

<sup>56</sup> *Ibid*, Backes, 2022.

fact, the legal definition of CE is provided in another piece of legislation, namely the Taxonomy<sup>57</sup>, which defines it as

*“an economic system whereby the value of products, materials and other resources in the economy is maintained for as long as possible, enhancing their efficient use in production and consumption, thereby reducing the environmental impact of their use, minimizing waste and the release of hazardous substances at all stages of their life cycle, including through the application of the waste hierarchy”.*

Interestingly, while the circular economy claims to bring a more sustainable future tackling environmental and social issues, the legal definition is designed around its environmental aspects without addressing any social advantage or objective -at least, not expressly-. In this vein, accommodating circular economy principles into procurement, such as demanding more durable, reusable, repairable, remanufactured, more energy efficient across the life cycle of the goods purchased, is a possibility emphasised more and more as a direction (perhaps, even - an obligation-), to be taken by contracting authorities who shall lead by example in the attainment of sustainability goals.

Finally, the EU merged the public procurement and circular economy in one of its communications,<sup>58</sup> providing several considerations to embed circular economy principles into the public procurement process.

#### *IV.b. The South African Circular Economy Dimension*

South Africa is a critical player in advancing the African continent's sustainability goals, and it is part of the most relevant continental and global alliances, ACEA, ACEN, and WCEF. At the national level, the first explanation of a circular economy approach was given in the 2019 White Paper policy<sup>59</sup>, and concomitantly, a CE Guideline<sup>60</sup> was launched. The guideline provided an entry point for understanding the many opportunities and potential benefits of a CE and identified opportunities for adopting circular practices along the materials value chain, from resource extraction, processing, eco-design of products, production, and consumption to beneficiation, with associated benefits of new work opportunities, more efficient and sustainable use of materials. The guideline highlights the possibility of incorporating circular economy principles into procurement law, for example, by drawing up lists of preferred suppliers or materials and building capabilities and skills in procurement departments around concepts such as total cost of ownership and measures of material circularity.

Subsequently, CE became the centre of the 2020 National Waste Management Strategy<sup>61</sup> (NWMS). The Strategy was founded on three pillars: i) *waste minimization*, having as primary actions the prevention of waste (through cleaner production, industrial symbiosis, extender producers responsibility), enhancement of reuse, recycling, and recovery and improvement of technical capacities; ii) *effective and sustainable waste services*, with separation of waste, sustainable disposal of hazardous waste and effective management planning; and iii) *compliance, enforcement, and awareness*, to reduce pollution and illegal dumping, enhancing

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<sup>57</sup> Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088. The regulation sets uniform criteria to determine environmentally sustainable economic activities and ensure that the single market is balanced by different interpretations of these concepts across Member States.

<sup>58</sup> EU COM. ‘Public procurement for a circular economy, Good practice and guidance’, 2017.

<sup>59</sup> ‘White Paper on Science, Technology and Innovation Science, technology and innovation enabling inclusive and sustainable, South African development in a changing world’, Department of Science and Technology, Pretoria, March 2019.

<sup>60</sup> A Circular Economy Guideline for the Waste Sector— A Driving force towards Sustainable Consumption and Production, 2020 Department of Environment, Forestry and Fisheries, Republic of South Africa.

<sup>61</sup> National Waste Management Strategy 2020, Minister of Forestry, Fisheries and the Environment.

monitoring and licensing requirements. Within the first pillar's intervention focusing on increasing waste reuse, recycling, and recovery rates, the NWMS identifies public procurement as one of the main actions to be developed and implemented to support circularity. Concomitantly, the circular economy has become the core of many national projects such as the South African Plastics Pact<sup>62</sup> or the Green Cape's circular procurement initiative.<sup>63</sup> The CE has quickly expanded in South Africa. Yet, the country's understanding is still developing, and it appears that more legislative actions are required, such as further adopting new instruments and a more comprehensive CE framework.

## V. THE COMPARATIVE DIMENSION: WHAT'S NEXT?

In this brief overview of the two legal systems' legislative approach to embedding CE and public procurement, various insights could be observed. From a sustainable procurement perspective, both the EU and SA have achieved significant results in one of the sustainability pillars; in particular, the EU has advanced notably from the environmental perspective compared to the social one; conversely, SA's preferential procurement towards historically disadvantaged individuals has delivered a fully-fledged legal tool, and both have had scarce results on the opposite pillar.<sup>64</sup> Interestingly, through a combined interpretation, both systems seem to provide in their founding acts (TFEU/TEU and RSA Constitution) means to address environmental and social considerations in public procurement simultaneously; which are not entirely explored to date. This partial slowdown could be related to the political agenda and overall political will. Considerable legislative improvements are just around the corner, waiting for the final fine-tuning before entry into force. The EU has foreseen the adoption of mandatory GPP criteria in several upcoming directives and regulations, to be enacted by sector and with the most compulsory suitable GPP in terms of technical specifications, selection or award requirements, and contractual clauses.<sup>65</sup> Conversely, SA is undergoing a significant procurement reform that seems to pave the way to circular economy principles in public procurement. As such, whereas I consider that the ongoing legal reforms -if maintained- on the public procurement side could boost CE practices.

From a circular economy perspective, both systems acknowledge the internal and international implications and benefits of transitioning toward a circular society, abiding by mentioning its limitations.<sup>66</sup> However, it is important to stress that a different approach to CE should exist as it is not an economic model that will equally benefit everyone. Governments should engage in those circular activities that are better suited and beneficial for their national, regional, local

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<sup>62</sup> The Plastics Pact is a collaborative initiative part of the Ellen MacArthur Foundation's global network focusing on a roadmap to address plastic waste and pollution at its source. Within its fourth target of achieving 30% average recycled content across all plastic packaging, the Plastic Pact foresees public procurement as a key activity by the end of 2025, and guidelines on recycled content are awaited. <https://www.saplásticospact.org.za/>

<sup>63</sup> Through its "Closing the Loop with HDPE: 50/Fifty Wheelie Bin. Building a resilient city through circular public procurement 50/Fifty programme", the Cape Town metropolitan municipality has leveraged its procurement policy to tangibly facilitate circularity at scale. More specifically, the CCT has used circular procurement to not only meet its constitutional mandate to ensure waste services. It secured end-markets for plastic recyclers, secured offtakes to their bin waste and created circular jobs. <https://greencape.co.za/library/case-study-wheelie-bin/>

<sup>64</sup> On the topic also: Stoffel et al., 'Multidimensionality of Sustainable Public Procurement (SPP)—Exploring Concepts and Effects in Sub-Saharan Africa and Europe' (2019) 11 Sustainability 6352.

<sup>65</sup> W Janssen & R Caranta, (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law*, Bloomsbury Hart, 2023.

<sup>66</sup> H Lehmann et al., 'The Impossibilities of the Circular Economy: Separating Aspirations from Reality', 1st ed, Routledge, 2022. Harry Lehmann and others, *The Impossibilities of the Circular Economy: Separating Aspirations from Reality* (1st edn, Routledge 2022).

objectives.<sup>67</sup> Indeed, if a region lacks the needed tools to fully work with circular solutions and concomitantly faces a waste crisis, it goes without saying that recycling and collecting should be prioritized.

Anyway, as the practice has shown, adopting CE practices in public procurement could increase sustainability uptake both in the EU and SA; procuring recycled or refurbished products could boost job creation and new businesses, reduce human rights violations along the supply chain, and simultaneously, have reduced environmental impact.

Moreover, while the EU's CE dimension seems more structured and goes beyond mere recycling and the waste hierarchy concept in terms of regulating the concept; the South African experience has quickly developed around the waste management sector. The difference between the Global North and the Global South is reflected in fact in this comparison.<sup>68</sup> Global South countries such as SA still have recycling as the core CE activity while reusing, remanufacturing, and even rethinking product design are in their infancy. Conversely, the EU has launched multiple cohesive sectoral legislative acts which complete the whole spectrum to phase out or minimise waste from the extraction of raw materials.<sup>69</sup>

In this vein, even if the EU seems one step ahead of SA, both systems require further legislative interventions of harmonisation and awareness campaigns for consumers, businesses and public actors. It is of utmost importance to claim an absolute reduction of consumption to drag a reduction at the source, meaning a reduction of production.<sup>70</sup>

It is well known that sustainability requirements can be embedded in multiple stages of the procurement process; this is also a true for CE principles. Among the many examples one could find, it is interesting to acknowledge the role of shifting procurement needs to product-as-a-service systems (PAAS), which, to my knowledge, has not yet gained momentum in the South African system. When dealing with product as a service (PAAS), in procurement the procuring entity demands access to the product, not the product's ownership. The PAAS procurement should be built as result-oriented requirements, meaning that it focuses on practical usage by the public entity, detached from a specific product. For example, public authorities can consider purchasing light (the result) instead of light bulbs (specific product).<sup>71</sup>

While the CE concepts of the Global North and South do not fully overlap, at least with regard to the systems compared in this paper, which leaves space for further research and legislative harmonization. Still, it seems that public procurement can already explore and embed circular solutions/activities in both scenarios. The ongoing reforms support CE practices, but

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<sup>67</sup> "As such the laws and regulations adopted to transform the dominant linear economic system into a CE will result in winners and losers. Winners and losers are determined by both the processes to make laws, regulations, and standards adopted, both public and private, their substance, and the governance structures underpinning their implementation." In F Lesniewska K Steenmans, 'Circular Economy and the Law, Bringing Justice in to the Frame', Routledge, 2023.

<sup>68</sup> Stoffel et al, (n 63).

Moreover, the Global North consume beyond its needs and often exports its waste to the Global South, causing an ecologically unequal exchange in C Dorninger et al., 'Global Patterns of Ecologically Unequal Exchange: Implications for Sustainability in the 21st Century' (2021) 179 *Ecological Economics* 106824.

<sup>69</sup> See, for example, the recent EU proposals on Ecodesign COM (2022) 142 final, Critical Raw Materials COM (2023) 161 final, and Net-Zero technology COM/2023/160 final, which are different facets of the same coin and partially addressing different steps in a circular oriented economy.

<sup>70</sup> As mentioned in this paper, the city of Cape Town is focusing on circular public procurement for waste management services, conversely, in the EU the circular procurement projects are mostly related to reused/refurbished office furniture and textiles or substituting purchasing with sharing services/product as service systems, alongside the mere recycling requirements. For more see C Sandberg, G Don, & S van Herk, 'How to procure circular: lessons from 30 pilots', Barcelona, Bax & Company, 2023.

<sup>71</sup> L.L Kjaer, DCA Pigosso, M Niero, NM Bech, and TC McAlloone, 'Product/Service-Systems for a Circular Economy: The Route to Decoupling Economic Growth from Resource Consumption?' *Journal of Industrial Ecology*, 23, 2019, p. 22-35; and A Tukker, 'Product services for a resource-efficient and circular economy—A review'. *Journal of Cleaner Production* 97, 2015, p 76– 91

its operationalisation through public procurement law needs to be enforced and deliver results; therefore, legislative improvements could provide legal certainty, clear guidelines and obligations, and far-reaching effects.

This brief comparative journey into the EU and South African systems presented encouraging and discouraging elements. First, it provided an overview of what CE entails and its role within the EU and South African perspectives. Next, it showcased the distinguishing features of each legal system. It contended that public procurement should include and be used as a legislative tool to implement CE, and lastly, it has delivered some solutions.

In summary, I argued that whereas CE can and should be embedded in public purchasing, legal systems present hindrances that might undermine its full potential. While waiting for new interventions to be enforced, founding and constitutionalised principles should suffice to steer public entities to lead by example, take distance from brute economic efficiency,<sup>72</sup> and base their administrative actions on transparent decision-making processes, accountability, and best value for money while constantly bearing in mind the sustainability pillars for the present and future generations.

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<sup>72</sup> R Caranta, 'Public Procurement for the SDGs – Rethinking the Basics', October, 2021. Available at SSRN: <https://ssrn.com/abstract=4038840>