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A note regarding page size

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A note regarding Table of Contents:

The original German document has the table of contents at the end. The English translation moves the table of contents to the beginning.

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Ausschreibungskriterien und Nachweispflichten zur Beschaffung von Solarmodulen mit einem möglichst geringen Risiko von staatlich verordneter Zwangsarbeit in der Lieferkette (Polysilizium)

von Rechtsanwältin Katja Gnittke

April 2026

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Tender criteria and verification requirements for the procurement of solar modules with the lowest possible risk of state-imposed forced labor in the supply chain (polysilicon)

by Attorney Katja Gnittke
April 2026

Contents

A. Background and Objective

This statement addresses procurement law aspects regarding criteria and verification requirements for the procurement of solar modules. Its objective is to minimize the risk of state-imposed forced labor within the solar module supply chain—specifically concerning the production of polysilicon—with a particular focus on the polysilicon manufacturing process.
This legal statement is intended to serve as a basis for drafting standard clauses for procurement documentation.

This report is based on research conducted by the Friedrichshain-Kreuzberg District Office regarding supply chains and potential forms of verification:

- The Chinese province of Xinjiang (Xinjiang Uyghur Autonomous Region) plays a pivotal role in the solar sector, as a significant share of the metallurgical-grade silicon and polysilicon used by the global solar industry is produced there.

- Production stages located in Xinjiang carry an elevated risk of state-imposed forced labor. Numerous reports indicate that Uyghurs and members of other Muslim Turkic ethnic groups in Xinjiang are subjected to systematic torture and (sexual) violence in detention camps. Many individuals are compelled to perform forced labor both inside and outside these camps.

- Obtaining reliable information regarding corporate activities, supply chain links to Xinjiang, and working conditions in China is virtually impossible. Organizations such as the ECCHR and the Fair Labor Association emphasize that companies cannot rule out the existence of forced labor in supply chains linked to Xinjiang through audits alone. Due to state surveillance and repression in the region, it is impossible for auditors to conduct independent inspections or speak freely with employees.

- Leading auditing firms, such as TÜV Süd, have ceased offering audits in Xinjiang since 2020, citing the fact that conditions on the ground do not allow for reliable inspections. Staff at Löning Human Rights & Responsible Business also distance themselves from audits in the region, arguing that the human rights situation prevents credible investigations. Human Rights Watch points out that the Chinese government takes criminal action against companies and individuals investigating supply chain links to human rights violations in China. Stricter espionage laws make uncovering such links more difficult and criminalize the practice.

- Background information current as of May 23, 2025, is available regarding OCI TerraSus, a polysilicon manufacturer with a production facility in Malaysia; this information includes reports concerning workplace accidents and working conditions.

B. Legal Assessment

First, the assessment examines whether excluding bidders based in China/Xinjiang Province and/or excluding solar modules manufactured wholly or partially in China/Xinjiang Province is compatible with public procurement law (I.). Section II addresses the provisions of the Net Zero Industry Act (Regulation (EU) 2024/1735 – NZIA) and the Foreign Subsidies Regulation (Regulation (EU) 2022/2560 – FSR). Section III deals with requirements regarding the exclusion of forced labor and compliance with environmental and human rights standards, as well as the formulation of obligations to provide proof and requirements for supply chain transparency.

The assessment is based on the provisions of the Act against Restraints of Competition (GWB) and the Public Procurement Ordinance (VgV). The VgV applies when solar modules—or polysilicon—are procured separately under a supply contract. Solar modules may also form part of construction contracts governed by the VOB/A;1 in such cases, the results are comparable. Specific considerations apply to procurement procedures conducted by sectoral contracting authorities; these are only briefly touched upon in this assessment.

As a public-law entity, the State of Berlin is subject to general public procurement law. For contracts exceeding the relevant thresholds (as of January 1, 2026: €5,404,000 for construction works; €216,000 for supplies and services), the GWB and the VOB/A (EU) [1] or VgV apply. For procurements below the threshold values, award procedures are conducted in accordance with the UVgO, based on the implementing regulations for the State Budget Code.

Municipal utilities constituted as legal entities under private law may be classified as sectoral contracting authorities within the meaning of Section 102 of the Act against Restraints of Competition (GWB). For the award of contracts by sectoral contracting authorities for the purpose of carrying out a sectoral activity, Sections 136 et seq. GWB and the Sectoral Procurement Ordinance (SektVO) apply [2] above the threshold value (as of 2026: €432,000). Under the budgetary regulations of the State of Berlin, legal entities under private law (e.g., a GmbH) are not bound by public procurement regulations when operating below the threshold values [3]. However, obligations may arise, for instance, from the articles of association or concession agreements. We do not have any documentation regarding this.

The subject of the expert opinion is the legal framework applicable above the thresholds. Based on this opinion, criteria were also developed that can be applied in procurement procedures falling under the UVgO. Contracting authorities that are not bound by formal procurement law below the thresholds may have even broader scope to exclude bids from tenderers based in specific countries or territories, or bids involving goods from specific countries or goods containing components from specific countries or territories.

I. Exclusion based on the place of polysilicon production

In terms of procurement law, a distinction must be made between the exclusion of bidders based in certain states and the exclusion of products or goods—or their components—manufactured in certain states or locations.

1. Procurement Law Framework

Key principles of procurement law include the principles of equal treatment and competition; these derive from EU procurement directives and Section 97(2) of the Act against Restraints of Competition (GWB) and are given concrete form through various procurement regulations found in the GWB, the Public Procurement Ordinance (VgV), the VOB/A, and the Sectoral Procurement Ordinance (SektVO).

2. Exclusion of Bidders from China

For the purposes of this legal opinion, the exclusion of bidders based in non-privileged third countries may be relevant if such bidders participate in procurement procedures and offer solar modules containing polysilicon manufactured in China. The exclusion of bidders from China is of particular practical relevance where polysilicon is procured separately and companies based in China are considered as potential bidders.

a) Principle of Equal Treatment and German Case Law

Under Union law, equal treatment is required for bidders from EU Member States, bidders based in GPA signatory states, and—where applicable—bidders from other states with which the EU has concluded free trade agreements. German public procurement tribunals (VK) [4] and Higher Regional Courts (OLG) have extended the personal scope of application of the equal treatment principle to include bidders from other states—including non-privileged third countries [5].

The Higher Regional Court (OLG) of Düsseldorf has deemed a distinction based on the bidder's registered office in procurement procedures to be impermissible [6]. A special rule applies only to sectoral contracting authorities under Section 55(1) of the Sectoral Procurement Ordinance (SektVO) [7].

b) CJEU Case Law in the *Kolin* and *Qingdao* Cases

In light of current case law from the Court of Justice of the European Union (CJEU), this position can no longer be maintained [8]. In two recent rulings, the CJEU rejected an interpretation of the EU law principle of equal treatment in public procurement—under which bidders from non-privileged third countries would enjoy equal rights in procurement procedures [9].

According to recent case law of the CJEU, bidders from non-privileged third countries have no right to equal treatment under EU law. Legal acts of general application that determine whether companies from third countries must be excluded from procurement procedures or admitted in principle fall under the exclusive competence of the Union (common trade policy). A right to equal treatment therefore cannot arise from national procurement law [10].

Bidders from non-privileged third countries have no subjective rights under EU procurement directives and cannot derive legal protection from EU law [11].

The CJEU's decisions in Kolin and Quindao concerned the exclusion of bidders based in non-privileged third countries [12] and are applicable to consortia whose members are based in non-privileged third countries. Statements regarding subsidiaries based in the Union, subcontractors, qualification providers [13] or suppliers cannot be derived from the decisions.

The contracting authority may determine whether to admit bidders from non-privileged third countries or to establish specific award criteria. In accordance with rulings by the CJEU, a contracting authority may (and must) specify in the procurement documents whether it will exclude companies based in non-privileged third countries, apply an evaluation adjustment (such as a deduction of points during the evaluation), or admit such companies on the same terms as bidders from Member States [14].

In a procurement procedure for the acquisition or installation of solar modules or the procurement of polysilicon, the contracting authority may stipulate that bidders from non-privileged third countries such as China and Malaysia be excluded. However, this does not preclude bidders from EU Member States and privileged third countries from offering solar modules containing polysilicon originating in China [15].

3. <u>Exclusion of products from Malaysia, China/Xinjiang Province</u>

Solar modules containing polysilicon produced in Malaysia, China, or specifically in Xinjiang Province are offered by companies that are also based outside China—potentially in EU Member States. It must be examined whether excluding such bidders—or excluding offers involving solar modules containing polysilicon manufactured in non-privileged third countries—is permissible under public procurement law. Excluding solar modules containing polysilicon produced in Malaysia or China (specifically Xinjiang Province) may violate the principle of product neutrality.

Under Section 31(6) of the VgV, Section 28(6) of the SektVO, and Section 7 EU (2) of the VOB/A, it is generally not permissible under public procurement law to exclude goods based on specific places of origin or specific sources [16]. Requirements concerning solar modules, quartz, MG-Si, and polysilicon must also be measured against this standard.

<u>Section 31(6) of the VgV [17] reads as follows</u>:

> "*The specifications may not refer to a specific production or origin or a particular process that characterizes the products or services of a specific company, or to industrial property rights, types or a specific origin, if this favors certain companies or specific products or be excluded, unless such reference is justified by the subject matter of the contract. Such references are permissible by way of exception if the subject matter of the contract cannot otherwise be described with sufficient precision and in a manner generally understood; such references must be accompanied by the words "or equivalent".*

The regulation relates to the subject matter of the procurement and concerns both the products or goods forming part of the contract and specifications regarding manufacturers, production, provenance, origin, and sources of supply. Consequently, requirements for upstream products and suppliers are also covered.

A prerequisite for criteria linked to the place of production or the location of a stage in the supply chain is, first and foremost, a connection between that location and the subject matter of the contract. The Federal Public Procurement Chamber deemed the production site to be unrelated to the contract [18]. In the subsequent appeal decision of 1 December 2021, the Higher Regional Court (OLG) of Düsseldorf left this question open but rejected the use of closed supply chains in specific countries as an award criterion; it held that such a criterion violated not only the principle of equal treatment of bidders—as enshrined in Section 97(2) of the Act against Restraints of Competition (GWB)—but also the requirement for objective award criteria set out in Section 127(4), sentence 1, of the GWB.

It remains an open question to what extent this assessment under procurement law remains valid in light of the more recent CJEU case law outlined in section 2. In its decision of 1 December 2021 [19], the Higher Regional Court (OLG) of Düsseldorf drew an inference a contrario from Section 55 of the Sectoral Procurement Ordinance (SektVO): only Section 55 SektVO permits the rejection of goods from non-privileged third countries. There is no equivalent provision in procurement regulations outside the sectoral scope. Consequently, the exclusion of goods from third countries is not permitted outside the sectoral scope. However, the conclusion that differential treatment of companies from non-privileged third countries requires an express justification under procurement law can hardly be maintained in light of the CJEU rulings.

The CJEU rulings in the *Kolin* and *Qingdao* cases do not, however, concern the exclusion of goods from third countries, but rather the admission of bidders to the procurement procedure. The CJEU rulings do not provide any guidance regarding the exclusion of tenders containing goods and services from third countries [20].

The aforementioned CJEU rulings do not address the participation of companies based in EU Member States in a procurement procedure where, during contract performance, they utilize goods or products manufactured in non-privileged third countries.

It remains an open question whether the CJEU rulings are applicable to supplies and services originating from non-privileged third countries. Some argue that the principles established in these rulings apply to supplies and services from third countries, given that cross-border trade in goods also falls within the scope of the Union's common commercial policy [21]. However, the Union's exclusive competence regarding the common commercial policy could preclude an interpretation of public procurement rules that mandates equal treatment—and thus admission—of goods from third countries and goods from the Union in procurement procedures.

This view is supported by the fact that the CJEU, in its rulings, expressly relied on Article 43 of Directive 2014/25/EU—which, like its counterpart in Article 25 of Directive 2014/24/EU, stipulates that contracting authorities must not apply less favourable conditions to works, supplies, services, and economic operators from the signatory states to these agreements than to those from the European Union. It is inferred from this that a requirement of equal treatment under procurement law applies only to Member States and signatory states to the aforementioned agreements [22]. According to the wording, the obligation applies not only to the economic operators themselves but also to works, supplies, and services.

Recital 10 of Regulation (EU) 2022/1031 on the International Procurement Instrument (IPI) states the following:

> *"Accordingly, measures adopted under this Regulation may apply to economic operators, goods, or services from third countries that are not parties to the plurilateral WTO Agreement on Government Procurement concluded with the Union or to bilateral or multilateral trade agreements concluded with the Union—which contain obligations regarding market access in the field of public procurement or concessions—or to economic operators, goods, or services from countries that are parties to such agreements, but only in relation to procurement procedures for goods, services, or concessions that are not covered by those agreements. In accordance with Directives 2014/23/EU [4], 2014/24/EU [5], and 2014/25/EU [6] of the European Parliament and of the Council, and as specified in the Commission Communication of 24 July 2019 entitled 'Guidance on the participation of third-country bidders and goods in the EU procurement market', economic operators from third countries that do not have an agreement with the Union opening up the procurement market, or whose goods, services, and works are not covered by such an agreement, do not have guaranteed access to procurement procedures in the Union and may be excluded."*

On the one hand, goods are expressly mentioned, which supports applying the principles established in the CJEU rulings in the *Kolin* and *Quindao* cases to goods. On the other hand, the text refers to goods originating from economic operators in third countries ("their goods"). Under Article 2(1)(b) of the IPI Regulation, the term "goods" does not encompass the intermediate products, materials, or components contained within those goods. Consequently, the IPI Regulation would allow action to be taken only in relation to the finished good—the solar module—rather than the polysilicon contained within it.

Goods fall within the scope of the free movement of goods under the TFEU. The free movement of goods pursuant to Articles 28 et seq. TFEU applies not only to goods manufactured within the Union but also to those in free circulation within the Union—that is, goods imported into the Union [23]. Bidders established in EU Member States and in privileged third countries may rely on the free movement of goods. Distinguishing between goods (or parts and components) that are already in free circulation on the EU market and those being imported specifically for the procurement procedure appears difficult, at least in practice.

Bidders established in EU Member States may invoke Section 31 VgV, Section 28(6) SektVO, or Section 7 EU(2) VOB/A, as well as the principle of equal treatment, and seek legal redress. Restrictions concerning goods from, or production stages in, third countries affect competition among bidders established in EU Member States if those bidders offer goods originating in third countries. The exclusion of solar modules from third countries—or of solar modules involving initial supply chain stages carried out in Malaysia or China/Xinjiang—can affect bidders established in EU Member States.

Section 31(6) VgV, Section 28(6) SektVO, and Section 7 EU(2) VOB/A expressly address the origin and provenance of products and require that any specifications in this regard be justified by the subject matter of the contract. These provisions align with the requirements of EU law set out in Article 42(4) of Directive 2014/24/EU and Article 60(4) of Directive 2014/25/EU, respectively.

The implications of the CJEU case law remain unresolved in many respects at present. To date—as far as is apparent—there is only one decision by German review bodies addressing the impact of CJEU case law on the admission of companies from third countries. On June 4, 2025, the Kammergericht ruled that competing bidders, at least, have no right to the exclusion of companies from third countries [24].

Given the current state of case law and debate, it therefore appears uncertain whether the exclusion or downgrading of bids based on the origin or source of the goods (or their components) from third countries—absent further justification—would be upheld by a public procurement review body or a procurement appeals court. This also applies to a criterion requiring that only solar modules be offered for which the first three stages of production (quartz, Mg-Si, and polysilicon) are not carried out in non-privileged third countries, unless this requirement is separately justified.

4. Specifics regarding the utilities sector: Section 55 SektVO

Section 28(6) SektVO corresponds to Section 31(6) VgV. In principle, therefore, the same requirements apply to the utilities sector as those outlined under point 3.

However, for supply contracts in the utilities sector, contracting entities25 may—pursuant to the rule in Section 55 of the Sectoral Procurement Ordinance (SektVO) already mentioned under point 3—reject tenders where more than 50% of the total value of the goods originates from countries that are not contracting parties to the EEA Agreement and with which no other agreements on reciprocal market access exist [26].

Section 55 SektVO does not apply to works contracts or service contracts [27]. If solar modules or polysilicon are procured via a supply contract, the 50% threshold may apply. The criterion used is the origin of the goods (not the bidder's registered office) [28]. The rules of the Union Customs Code [29] apply to the determination of the origin and the proportion of the goods [30]. In accordance with Art. 60 of Regulation (EU) No 952/2013, goods wholly obtained or produced in a single country or territory are considered to originate in that country or territory, and goods involving the production of more than one country or territory are considered to originate in the country or territory where they underwent their last substantial, economically justified have undergone processing or working carried out in an undertaking equipped for that purpose, resulting in the manufacture of a new product or representing an important stage of manufacture.

Solar modules may only be rejected pursuant to Section 55 of the Sectoral Procurement Ordinance (SektVO) if the final substantial manufacturing step for the majority of the goods took place in a non-privileged third country. Where the subject matter of the procurement is the supply of polysilicon, a bid may be rejected if more than 50% of the polysilicon originates from third countries or underwent its final substantial manufacturing step there.

Rejecting solar modules on the grounds that the polysilicon contained within them originates in China is not covered by Section 55 SektVO.

Similarly, assigning a lower evaluation score on the grounds that the polysilicon contained in the solar modules originates in China would not be justified under Section 55(2) SektVO.

Accordingly, a lower rating based on the fact that the polysilicon contained in the solar modules originates from China would not be justified under Section 55(2) of the Sectoral Procurement Ordinance (SektVO).

5. Exclusion of specific places of origin on human rights grounds

The rationale for a requirement stipulating that the production stages in question must not take place in a specific region is the risk of state-imposed forced labor in Xinjiang. According to established case law—specifically that of the Federal Public Procurement Chamber and the Higher Regional Court (OLG) of Düsseldorf, as outlined in section 2 above—linking requirements to a place of origin or production is not automatically justified under procurement law, even when based on social criteria and human rights risks.

However, the environmental or social standards applicable at a specific location can certainly characterize the production process of the goods or services being tendered. It is not unreasonable to assume that sustainability requirements are more likely to be met if statutory sustainability standards, monitored by state authorities, are in place at the production site. It is permissible to require—and evaluate—measures to ensure adherence to human rights standards along the supply chain from companies that source products from countries where specific risks regarding contract-related criteria exist [31].

Developments in case law and the public procurement debate are likely to significantly increase the scope for public contracting authorities to justify criteria on the grounds of foreign trade or human rights compared to the case law of the Higher Regional Court of Düsseldorf before the decisions of the ECJ [32]. A link to the location of the Production—

particularly in non-privileged third countries—does not appear to be ruled out from the outset (any longer).

There are strong arguments for considering it permissible to justify the exclusion of goods from third countries associated with high human rights risks—where the bidder fails to demonstrate that it is adequately addressing such risks.

Decisive for the lawfulness of the award are the link to the subject matter of the contract, the objective justification for the differentiation, and the requirements for proof [33].

The link between the place of production and the risk of forced labor within the supply chain of the item to be procured must be substantiated; that is, reasons must be provided as to why the risk does not exist to the same extent at other locations and why it is being addressed in the procurement documents. Differential treatment of places of origin that is not justified by differing risk levels is open to legal challenge. It remains an open question whether differential treatment of individual production stages must also be objectively justified.

The more evidence there is indicating systematic and state-mandated forced labor in Xinjiang, the more justifiable it becomes to exclude bids that involve production in that region [34]. Consequently, bidders may be required to disclose and substantiate the location where the polysilicon production step takes place. High standards may be applied to such proof. It is not a requirement that bidders be able to provide such proof without significant effort.

If the specific risk of state-mandated forced labor arises from transfer programs affecting China as a whole, it may also be justifiable to exclude bids that involve the production of the polysilicon used within China. There are strong indications that the contracting authority possesses a margin of discretion regarding risk assessment. A comprehensible justification is required.

If production involving forced labour cannot be ruled out in the Xinjiang province or in China, addressing the issue through (stricter) evidentiary requirements applicable to all locations alike would likely be easier to justify under procurement law than an outright exclusion (see below) [35].

A company based in the EU or a privileged third country can challenge the exclusion of goods—based on the fact that stages of their production take place in specific regions—by arguing that such exclusion is unrelated to the contract and disproportionate, given that production in Xinjiang is also possible while complying with the specifications defined by the contracting authority in the tender documents.

It is currently difficult to predict whether review bodies would uphold a criterion mandating the exclusion of solar modules containing polysilicon, quartz, or Mg-Si mined or manufactured in China (specifically Xinjiang province).

6. Exclusion regarding specific production sites

Pursuant to Section 123 of the Act against Restraints of Competition (GWB), companies must be excluded from procurement procedures if a person whose conduct is attributable to the bidder has been subject to a final conviction for one of the criminal offenses listed in Section 123 GWB—such as human trafficking, forced labor, labor exploitation, or exploitation involving the deprivation of liberty. Mandatory grounds for exclusion under Section 123(1) GWB are based on final convictions and the imposition of fines for specific offenses [36].

Even though forced labor in Xinjiang province is confirmed by reports, there are unlikely to be any final convictions of persons attributable to bidders under Section 123 (3) of the Act against Restraints of Competition (GWB). However, such a conviction would be a prerequisite for grounds for exclusion under Section 123 GWB. Findings and information regarding human rights violations alone do not constitute grounds for exclusion under Section 123 GWB.

Section 123 of the Act against Restraints of Competition (GWB) governs the exclusion of a bidder. Human rights violations by sub-suppliers and suppliers do not fall within the scope of the provisions set out in Section 123 GWB. Unlike the case with subcontractors, the consideration of grounds for exclusion—and thus also of criminal convictions—regarding suppliers is not expressly regulated under public procurement law.

The grounds for exclusion listed in Section 124 GWB likewise relate to the bidder rather than to suppliers. Exclusion may be considered if a company has violated environmental, social, or labor law obligations during the performance of public contracts; has demonstrably committed grave professional misconduct calling the company’s integrity into question; or has performed a prior public contract or concession contract with significant or persistent deficiencies regarding a material requirement.

Grounds for exclusion under Section 124(2) of the Act against Restraints of Competition (GWB) in conjunction with Section 22 of the Supply Chain Due Diligence Act (LkSG) exist if the bidder has been fined a certain amount for violations of the Supply Chain Due Diligence Act.

Regarding grounds for exclusion under Sections 123 and 124 GWB, the provisions on self-cleaning set out in Sections 125 and 126 GWB must also be observed.

7. Proof of compliance with ILO core labor standards and due diligence obligations

The public contracting authority may require compliance with ILO core labour standards and human rights within the supply chain of the subject matter of the procurement, as well as the submission of appropriate evidence and/or the implementation of due diligence obligations throughout the supply chain. Human rights due diligence obligations often follow a risk-based approach. If, based on current reporting, there is reason to assume a risk of violations of specific workers' rights in a particular region, due diligence obligations—applied via a due diligence approach—would dictate that measures must be taken.

Where due diligence obligations are incorporated into procurement documents, they may address specific risks associated with manufacturing in Xinjiang or at sites in Malaysia; furthermore, based on the risk assessment, they may impose stricter requirements regarding proof than would apply to production facilities located, for instance, within the European Union.

The specific situation in Xinjiang may be taken into account both when determining which due diligence obligations are appropriate and when specifying the evidence required during the procurement process. State-imposed forced labour involves particular circumstances that can justify especially stringent due diligence requirements (see section VI.6.a below) [37].

8. Side note: Import restrictions

If import restrictions apply to certain goods, this has implications for the procurement process. Only goods that can be lawfully imported into Germany may be offered in the procurement process.

a) UFLPA

The Uyghur Forced Labor Prevention Act (UFLPA) has been in effect in the USA since 2021, prohibiting the import of products from the Chinese region of Xinjiang.

b) Import restrictions on products made with forced labor

Regulation (EU) 2024/3015 of 27 November 2024 on a ban on the sale of products manufactured using forced labor on the Union market and amending the addresses restrictions on the import of products made using forced labour. Under the regulation, a product made using forced labour is defined (Art. 2(7)) as a product in the extraction, harvesting, production, or manufacture of which forced labour was used, in whole or in part, at any stage. The regulation applies from 14 December 2027. It also covers state-imposed forced labour (Art. 2(1) of Regulation (EU) 2024/3015).

A ban on placing the products in question on the Union market or making them available there is imposed under Art. 20(4) if the competent lead authority determines that the products concerned—in violation of Art. 3—have been placed on the market, made available on the market, or are being exported. Consequently, import restrictions on solar modules and their components are to be expected only if such a measure is adopted following the procedure set out in the regulation. Should this occur, such products cannot be procured within the scope of a public procurement procedure. In certain cases, preliminary investigations or the risk of a decision under Art. 20(3) of Regulation (EU) 2024/3015 may also lead to specific supply chain documentation requirements within the procurement process.

c) Foreign Trade and Payments Ordinance/Sanctions

Import bans applicable in Germany are based on European Union regulations—which have direct effect in the Member States—and currently primarily concern products from North Korea and Russia (Section 77 (1) of the Foreign Trade and Payments Ordinance (AWV)). In connection with Russia's war of aggression against Ukraine, the European Union also adopted various decisions and regulations imposing sanctions on Russia [38]. To date, there are no EU import restrictions on products from China or the Xinjiang province.

II. Net-Zero Industry Act (NZIA)

On 29 June 2024, Regulation (EU) 2024/1735 of the European Parliament and of the Council, which comprises the NZIA, entered into force. Its aim is to foster the manufacturing and development of technologies required for the transition to a climate-neutral economy. In particular, the NZIA seeks to boost the EU's competitiveness in the production of net-zero technologies and to enhance the resilience of global supply chains for these technologies.

The NZIA covers eight strategic areas of climate-neutral technologies, including photovoltaics and solar thermal energy. The key provisions regarding public procurement are found primarily in Articles 25 and 27 of the NZIA. Article 25 of the NZIA governs the consideration of sustainability and resilience in public procurement.

1. <u>Sustainability</u>

Upon reaching the thresholds set out in EU Directives 2014/23/EU, 2014/24/EU, and 2014/25/EU, public contracting authorities must comply with mandatory minimum environmental requirements when contracts concern "net-zero technologies" or when construction projects incorporate such technology. The specific sustainability requirements are to be defined in an EU implementing act (which has not yet been issued) [39]. Until that act enters into force, no specific requirements regarding environmental criteria under the NZIA apply [40]. However, the NZIA does not preclude the consideration of environmental criteria on a voluntary basis, including in the procurement of net-zero technologies.

2. <u>Resilience criterion</u>

a) **Legal framework**

Article 25(7) of the NZIA reads as follows:

(1) The contribution of the offer to resilience shall be taken into account in procedures for the award of public contracts falling within the scope of Directives 2014/23/EU, 2014/24/EU or 2014/25/EU, if the net-zero technologies listed in Article 4(1)(a) to (k) of this Regulation are part of those contracts, or in the case of works contracts and works concessions referred to in paragraph 1, if they include one of the technologies mentioned, and in the case of contracts awarded on the basis of a framework agreement, if, in accordance with this paragraph, the estimated value of those agreements is equal to or exceeds the values laid down in Article 8 of Directive 2014/23/EU, Article 4 of Directive 2014/24/EU and Article 15 of Directive 2014/25/EU. If, at the time of publication of a call for tenders for a public procurement procedure pursuant to paragraph 1 of this Article or of

commencement of such a procedure pursuant to Article 29(2), the Commission has determined that the share of a specific net-zero technology or its key specific components originating from a third country constituted more than 50% of the supplies of that specific net-zero technology or its key specific components within the Union, or if the Commission has determined, pursuant to Article 29(2), that the share of supplies of a specific net-zero technology or its key specific components originating from a third country within the Union has increased by an average of at least 10 percentage points over two consecutive years and has reached at least 40 % of supplies within the Union, contracting authorities and contracting entities shall include the following conditions in the public procurement procedures referred to in paragraph 1 of this Article:

a. *an obligation that, for the duration of the contract, no more than 50% of the value of the specific net-zero technology covered by this paragraph is supplied from any single third country, as determined by the Commission;*

b. *an obligation that, for the duration of the contract—and as determined by the Commission—no more than 50% of the value of the key specific components of the specific net-zero technology covered by this paragraph is supplied or provided directly by a successful contractor or a subcontractor from any single third country;*

c. *an obligation to submit appropriate evidence regarding points (a) or (b) to the contracting authorities and contracting entities upon request, no later than the time of contract performance;*

d. *an obligation to pay a proportionate penalty in the event of non-compliance with the obligations referred to in points (a) or (b), amounting to at least 10% of the value of the specific net-zero technologies under the contract covered by this paragraph.*

(2) For contracts falling under Annex I to the GPA concerning the Union as well as other relevant international agreements binding on the Union, contracting authorities and contracting entities shall not apply the requirements set out in paragraph 7, second subparagraph, points (a) to (d), where the specific net-zero technology or its main specific components originate from sources that are signatories to those agreements.

The resilience criterion applies to public procurement procedures where net-zero technologies [41] are part of the contract, or where works contracts or concessions include such technologies.

The Regulation has been applicable since 30 December 2025. On 23 May 2025, the European Commission took further steps to implement the NZIA. It adopted three implementing acts, initiated a delegated act, and published an accompanying communication [42].

Specific components used primarily for the manufacture of net-zero technologies are, pursuant to point (6) of the implementing regulation are then considered essential for ensuring the effective implementation of the contribution to resilience in public procurement if they contribute significantly to the value of the final product or if they are crucial for strengthening the resilience of the entire supply chain. The Commission includes photovoltaics, among others, in the list of technologies of particular strategic importance. Under Article 25(7), first subparagraph, of the NZIA, the resilience criterion applies when net-zero technologies and their key components—such as polysilicon—form part of the contracts in public tenders. In Implementing Regulation (EU) 2025/1178, the Commission explicitly listed PV polysilicon as one of the key specific components for photovoltaic technologies [43].

In Communication C/2025/3236 [44], the Commission outlines the technologies for which a dependency exists within the meaning of the resilience criterion. It provides up-to-date information on the main sources of supply for final products and their key components.

If the EU Commission determines, pursuant to Article 25(7) of the NZIA, that a third country holds more than 50% of the market share for a net-zero technology or its key specific components, the resilience criterion must be applied in procurement procedures. Table 1 of Commission Communication C/2025/3236 contains current data (as of 2023) on the shares of supply available in the Union from the three leading third-country suppliers, while Table 2 shows the overall dependency on all third countries.

For PV polysilicon and PV silicon ingots or equivalents—listed as key specific components in the Annex to Implementing Regulation (EU) 2025/1178 and in the Communication under the sub-category "Photovoltaic technologies (PV)" in Table 5—the figures in Tables 1 and 2 are revealing:

- Table 1 (leading third-country suppliers): The share of the leading third-country supplier (China) is 79% for PV systems and 79% for PV wafers or equivalents, while the share for PV modules + photovoltaic cells or equivalents is 94%. This is well above the 50% threshold. (PV polysilicon and PV silicon ingots or equivalents are among the key specific components of PV systems as listed in the annex to Implementing Regulation (EU) 2025/1178.)

- Table 2 (share from all third countries): PV systems: 85% from third countries; PV modules + photovoltaic cells or equivalents: 96% from third countries. The total share from third countries for "PV wafers or equivalents" is as high as 100%.

It follows from this that the conditions set out in Article 25(7) of the NZIA are met for PV systems and PV wafers (or equivalents). PV systems from a specific third country (China) account for more than 50% of supplies within the Union. Specific data for PV polysilicon and

PV silicon ingots (or equivalents) are not yet available [45]. There are strong indications that Article 25(7) of the NZIA nevertheless applies to PV polysilicon, given that a dependency has been established for PV systems, PV wafers, and PV modules. PV polysilicon (as a precursor for PV wafers and one of the key specific components for solar technologies) would then also be covered. However, it could also be argued that a dependency for PV polysilicon must first be established by the Commission [46].

In principle, contracting authorities must include the following conditions in the tender documents (in accordance with Article 25(7)(a) to (d) of the NZIA) [47]:

- A requirement must be included stating that, for the duration of the contract, no more than 50% of the value of the specific net-zero technology may be supplied from any single third country.

- Limitation on the supply of components per third country (b): Similar to the technology itself, a requirement must also be included for key specific components (including PV polysilicon, PV silicon ingots, or equivalents) stating that no more than 50% of the value of these components may be supplied or provided directly by a contractor or subcontractor from any single third country [48].

Given that China currently accounts for a 79% share of PV systems and PV wafers (and, by implication, PV polysilicon, PV ingots, or their equivalents), the successful bidder must demonstrate compliance with the 50% threshold per individual third country for key specific components as well. This requires knowledge of the places of origin [49].

Various questions arise regarding the practical implementation of the NZIA.

b) 50% of the value of the main component

The wording of the resilience criterion refers to the limit of 50% of the value of the specific net-zero technology or 50% of the value of the most important specific components. The regulation does not specify how this value is determined. Since it is linked to the technology or the key specific components, this value—rather than the total contract value—is likely the decisive factor, particularly in cases where construction and installation services are also included in the contract. Given that components from China have a significantly lower market price than those manufactured elsewhere [50], basing the calculation on market price would allow for a share of Chinese components—in terms of quantity and mass—that significantly exceeds 50% of the contract.

3. What does the 50% threshold refer to?

The wording does not make it immediately clear whether the 50% limit applies to each individual component or to the product as a whole. In the absence of any guidance from the Commission, various interpretations are likely possible.

4. What does “supplied or provided directly by a contractor or subcontractor” mean?

Article 25(7) of the NZIA stipulates, under point (b), an obligation to limit the value of key specific components to no more than 50%, referring to supply “directly by a successful contractor or by a subcontractor.” There are strong indications that this restriction applies to the share of key specific components—regardless of whether they are supplied directly by the contractor or a subcontractor, and regardless of whether the latter, in turn, source them from a supplier in a third country. The obligation focuses on the components themselves rather than the location of the contractor or subcontractor. It is highly likely that the word “directly” refers to the contractor and is intended to convey that, in addition to direct supply by the contractor, supplies by subcontractors are also covered. However, an alternative interpretation is possible.

5. Proof

The contractor must undertake to submit “suitable proof” regarding compliance with supply restrictions from third countries upon request—specifically, no later than the time of contract performance. The regulatory authority does not specify what constitutes such suitable proof. This could encompass the disclosure of supply chain information, proof of origin for materials and components, certificates, or declarations regarding the origin of polysilicon supplies [51]. General public procurement requirements likely apply to such proof (see V.4. below).

6. Conclusion

Under the provisions of the NZIA, public contracting authorities conducting EU-wide procurement procedures are required to include conditions stipulating that no more than 50% of the net-zero technology and no more than 50% of the key specific components—which include, inter alia, PV polysilicon, PV silicon ingots or equivalents, PV wafers or equivalents, and PV cells or equivalents—are to be provided and supplied. Quartz and metallurgical-grade silicon are not listed among the key specific components in Implementing Regulation (EU) 2025/1178 [52].

The requirement for diversification and resilience addresses specific dependencies. According to Recital 76, Article 25 of Directive 2014/24/EU and Articles 43 and 85 of Directive 2014/25/EU—which concern equal treatment—remain unaffected. Consequently, while the NZIA does not rule out more stringent requirements or total restrictions, it is our understanding that such measures cannot be justified by the NZIA itself.

III. Possibilities for exclusion under the Foreign Subsidies Regulation (FSR)

The information provided to us indicates that China supported its solar industry with more than €120 billion in 2023, thereby enabling companies to offer solar modules at dumping prices. By the end of 2023, the price of Chinese solar modules was approximately one-third that of Western suppliers. Under the Foreign Subsidies Regulation (FSR), the EU Commission can prohibit the awarding of contracts based on bids that are exceptionally low due to subsidies from third countries and that adversely affect the internal market. The FSR applies to public contracts with a value exceeding €250 million. Decisions taken by the Commission under the FSR are made on a case-by-case basis, meaning there is no systematic exclusion of companies receiving third-country subsidies from procurement procedures.

IV. Exclusion of specific manufacturers from procurement procedures

Reports of human rights violations exist regarding the Malaysia-based polysilicon manufacturer OCI TerraSus. The question arises as to whether offers based on components from the polysilicon manufacturer OCI TerraSus can be excluded from procurement procedures. Regarding the prerequisites for exclusion due to violations of essential employee protection regulations, reference can essentially be made to section I.5 above.

V. Supply chain-related criteria

1. <u>Link to the subject matter of the contract</u>

Criteria concerning the consideration of social and environmental requirements within the supply chain of the goods or services being procured are linked to the subject matter of the contract [53]. Under Section 127 of the Act against Restraints of Competition (GWB), a link to the subject matter of the contract is deemed to exist even if the criterion relates to processes associated with the production, provision, or disposal of the goods or services, to the trading of the goods or services, or to another stage in the life cycle of the goods or services—even if these factors do not affect the material characteristics of the subject matter of the contract. Pursuant to Section 31(3) of the Public Procurement Ordinance (VgV), performance characteristics may relate to the process or method of production or provision of the goods or services, or to another stage in the life cycle of the subject matter of the contract, including the production and supply chain.

2. Exclusion of forced labor and guarantee of labor and human rights in the supply chain

A criterion concerning the exclusion of forced labor and the guarantee of labor and human rights within the supply chain of the subject matter of the contract—and thus within the supply chain of solar modules—is unobjectionable under public procurement law. Such criteria are covered by Section 31 VgV or Section 7 EU VOB/A.

3. Transparency

The subject of this procurement law review is the permissibility under procurement law of a transparency criterion, that is, a criterion that relates solely to the transparency of the supply chain (the specification of production sites, supplier names, supplier types, and locations for the production of polysilicon).

If the information serves to verify and validate criteria related to the subject matter of the contract, it is permissible to request this information with the bids. If the exclusion of forced labor, either entirely or at specific production stages, is stipulated as a contract-related requirement, requesting information on production sites, supplier names, supplier types, and locations related to the affected production stages is permissible under procurement law, provided it is proportionate.

The same applies if the requirements for transparency in this regard can be justified, for example, from the perspective of the reliability and security of the supply chain.

Knowledge of the supply chain is a prerequisite for the bidder to verify the supply chain against social and environmental criteria and to assess risks arising from disruptions at individual stages of the supply chain. In this context, the location can be of considerable significance, particularly regarding tariffs and crises [54].

If the contracting authority establishes social and environmental criteria for the entire supply chain or for specific stages thereof, it is—in the view held here—also entitled to require information regarding those specific stages. The same applies if the authority formulates requirements concerning supply chain resilience and crisis robustness for specific stages of the supply chain [55].

A transparency criterion requiring the disclosure of specific production stages should therefore be linked, for example, to reliability, security of supply, or social and environmental criteria.

4. Proof and Audit

In the context of a procurement procedure, the contracting authority has considerable latitude for assessment and discretion when determining which forms of proof to require. This applies both to proof relating to the supply chain—which enables verification in the first place—and to proof concerning compliance with human rights or environmental standards.

The Public Procurement Ordinance lists self-declarations, quality labels (Section 34 VgV), and certificates from conformity assessment bodies (Section 33 VgV) as possible forms of proof. In principle, the contracting authority is free to choose the means of verification. Specifying the place of production—along with related declarations and proof—can constitute an objectively justified means of verification if it enables the contracting authority to verify specific information. The chosen means of proof must be suitable, and the selection must be made without regard to extraneous considerations [56]. Case law establishes that the contracting authority may, in principle, rely on the bidder's declarations; it is under no obligation to verify the information provided by bidders. While case law does require that award criteria be verifiable, there is no obligation for the public contracting authority to verify bidder information regarding performance-related award criteria without a specific reason for doing so [57].

However, the situation differs if the tender itself gives rise to concrete indications casting doubt on the accuracy of the bidder's statements. Particularly in cases involving complex supply chains and difficulties regarding verification, the contracting authority may decide to require bidders to submit appropriate evidence along with their tenders. This includes the option of demanding an audit [58]. Such a measure is particularly appropriate when the contracting authority cannot conduct the verification itself and reliance on the bidder's self-declarations does not appear sufficient.

If the contracting authority decides to require a third-party audit, it must address the standards it sets regarding the robustness and credibility of such audits [59].

The depth of verification and the independence of the auditors are factors that the contracting authority must typically consider.

5. Differentiated evidence for individual stages of production

If a contracting authority establishes criteria covering the entire supply chain or multiple stages of production, it does not necessarily follow that it must require the same proof—in addition to disclosure—for every production step addressed. It is permissible to limit the obligation to submit quality labels or audit reports to specific, critical stages of production.

The contracting authority has discretion in this regard. It may restrict audit requirements to particularly critical stages of the supply chain, demand proof only from bidders who have been shortlisted, or limit requirements to tenders involving specific risks—provided that such differentiation is objectively justified (e.g., the particular relevance of a supply chain stage, specific human rights risks, feasibility of verification, or market conditions) and is implemented clearly and transparently in the procurement documents.

6. Specific issues arising from state-mandated forced labor and Chinese espionage legislation

Demonstrating compliance with human rights requirements in the supply chain—specifically regarding stages of the supply chain in China, and particularly in Xinjiang province—is complicated by Chinese legislation concerning espionage and countermeasures against foreign sanctions [60]. Publicly available sources do not indicate that such inspections are impermissible in principle [61]. However, given the legal situation in China, obtaining reliable information regarding corporate activities, supply chain links to Xinjiang, and working conditions in China is practically impossible. For companies with production stages in China—particularly in Xinjiang—it would likely be difficult to provide proof, via independent audits, of compliance with labor and human rights standards and the absence of forced labor. According to available reports, individuals and companies participating in such audits or providing information risk facing criminal sanctions. It is therefore questionable whether independent audits can be produced at all for production stages located in China or Xinjiang.

The Chinese espionage laws and the Anti-Foreign Sanctions Law, which is directed against sanctions imposed by other states [62], have been amended in recent years.

The regulations can be interpreted very broadly [63]. Key terms are not defined [64]. The penalties are sometimes very severe. There is considerable uncertainty regarding their application. Precisely because of the lack of standards for applying the laws, it cannot be ruled out that the gathering or disclosure of information for due diligence measures or audits, in order to demonstrate compliance with human rights standards in China and Xinjiang in particular, could be subject to criminal penalties [65].

The legal uncertainties described above regarding the preparation of audits in China that address forced labor and other labor and human rights violations make it plausible that credible verifications can hardly be presented. According to the reports, the legal requirements in China are not clearly defined .Chinese legislation make it difficult - if not impossible- to conduct audits and provide credible evidence of compliance with labor and human rights standards. However, as we understand it, the legal regulations do not fundamentally preclude taking into account requirements regarding the exclusion of forced labor.

There are, therefore, valid arguments for justifying the exclusion of specific production steps in a region on these grounds. The decisive factor is likely whether such a measure is considered proportionate. In this context, the standards set out in the LkSG (German Supply Chain Due Diligence Act) may be applied. If a company subject to the LkSG is prohibited from sourcing goods from production facilities in Xinjiang because doing so would violate the Act's requirements, a public contracting authority must likewise be able to exclude such sourcing. If one proceeds on the premise that monitoring and implementing human rights due diligence obligations regarding human rights violations in China/Xinjiang are not feasible, then—pursuant to Section 7 (3) of the LkSG—terminating business relationships may be considered in exceptional cases [66]. A 2021 report by the German Bundestag's Scientific Service states that, based on this standard, terminating business relationships with Chinese suppliers is virtually inevitable [67].

Whether the exclusion of products or production steps originating in Xinjiang can be justified—based on the high risk of forced labor, the lack of independent third-party verification, and the resulting violation of human rights due diligence obligations—depends on whether the contracting authority can provide sufficient evidence and document the matter in a transparent, traceable manner. It is difficult to predict whether such an exclusion would withstand scrutiny by review bodies. Precisely because circumstances vary and obligations under the LkSG (German Supply Chain Due Diligence Act) and the UN Guiding Principles on Business and Human Rights are not yet fully defined, it is impossible to predict with certainty how a review body would rule [68].

It may therefore be considered safer from a procurement law perspective to refrain from a blanket exclusion and instead address forced labor and other human rights-related criteria within the procurement documents, while requiring the submission of evidence. It is likely permissible for the contracting authority to specify or define a standard for due diligence obligations regarding the supply chain of the subject matter of the contract within the procurement documents. In the procurement documents, the contracting authority may specify the information required to verify whether appropriate measures have been taken to rule out state-imposed forced labor; it may require bidders to provide declarations and supporting evidence demonstrating that they have conducted such a verification and may, where applicable, mandate third-party verification of the documentation. There are strong indications that the contracting authority may also specify exactly which documents are required (e.g., the submission of overviews regarding personnel and recruitment methods, the involvement of recruitment agencies, and details concerning participation in specific state programs).

Third-party verification may be required in this regard and concerning other aspects as well. Such requirements may, for instance, address auditor independence, audit intervals, on-site inspections, employee interviews, and unannounced on-site inspections.

If objectively justified requirements result in a situation where virtually no modules containing polysilicon produced in China/Xinjiang are (or can be) offered—because audits cannot be conducted there due to Chinese legislation—this raises no objections under procurement law. Criteria justified by the subject matter of the contract need not be designed in such a way that every bidder or every product can meet them. Verification requirements need not be structured to allow for lower standards regarding China/Xinjiang. If, due to objectively justified verification requirements, it is effectively impossible to provide proof regarding production stages in China, this raises no objections under procurement law.

VI. Proof of traceability of the polysilicon used for the order

A requirement stipulating that a company may use only polysilicon that was not manufactured in China—and that otherwise complies with the tender specifications—would be impermissible, as there is no link to the subject matter of the contract. The same would apply to a requirement stipulating that at least 50% of the total polysilicon used by the company must meet the specified requirements. Similarly, requirements concerning human rights must relate to the subject matter of the contract. Knowledge of the supply chain is relevant for verifying compliance with NZIA requirements, supply chain due diligence obligations, and human rights standards regarding the polysilicon.

To implement the exclusion of polysilicon manufactured in China in accordance with the NZIA and to verify compliance with human rights criteria, the contracting authority must therefore determine the requirements it will impose regarding supply chain traceability and verification during contract performance.

Proof of the polysilicon's origin may be provided, where applicable, through documentation linking the material to manufacturer declarations, delivery notes, quantity specifications, and invoices.

VII. Summary

- Under current CJEU case law, bidders from non-privileged third countries may be excluded from the procurement process. Consequently, bidders and consortia based in China and Malaysia need not be admitted to the competition. Some argue that bidders based in specific third countries—or even specific regions—may also be excluded. Bidders from non-privileged third countries cannot seek legal redress before review bodies.

- It remains an open question whether, under current CJEU rulings, it is permissible under procurement law to exclude bidders from EU Member States from using goods or components manufactured—or having undergone specific production stages—in non-privileged third countries.

- For supply contracts governed by the Sectoral Procurement Ordinance (SektVO), Section 55 SektVO allows for the rejection of tenders where goods from non-privileged third countries account for more than 50% of the total. In a procurement procedure for the supply of PV polysilicon initiated by a sectoral contracting entity, the entity may reject tenders in which more than 50% of the polysilicon originates from Malaysia or China. However, in a procurement procedure for the purchase of solar modules or a construction contract for their installation, rejection on the grounds that more than 50% of the polysilicon originates from China or Malaysia is not permitted under Section 55 SektVO.

- Under the NZIA, contracting authorities must include a 50% limit in the procurement documents regarding PV systems and their key specific components (including polysilicon) if the Commission identifies a dependency on specific countries. • While excluding solar modules—or those containing PV polysilicon from Xinjiang, China—on the grounds of the human rights situation, the specific nature of state-imposed forced labor, and verification difficulties arising from Chinese legislation does not appear to be fundamentally ruled out, doing so places a high burden of justification on the contracting authority.

- Contracting authorities may incorporate human rights and environmental criteria regarding PV polysilicon when procuring the material itself or when procuring solar modules containing it (as part of supply or construction contracts); they may define requirements addressing, in particular, (state-imposed) forced labor, due diligence obligations, and audits. These requirements must be objectively justified, but they need not be designed in such a way that every company can meet them for every production site.

- Public procurement mechanisms can be particularly effectively employed during the separate procurement of PV polysilicon to effectively rule out sourcing the material from China and Malaysia. Procuring polysilicon directly via a supply contract—and subsequently providing it to the company commissioned by the contracting authority to supply solar modules or to supply and install solar systems—is permissible under procurement law. When structuring contractual risk, however, it must be taken into account that the contractor has no say in selecting the polysilicon supplier and that the supplier is not their contractual partner [69].

C. References

References in the document are in green brackets, i.e. [reference number].

1 The VOB/A applies where solar modules are supplied or installed as part of a construction contract. The rules governing the award of contracts comprising various types of services are determined by Section 110 of the GWB.

2 Sector-specific activities are defined in Section 102 of the GWB. Section 102(2) of the GWB concerns sector-specific activities in the electricity sector.

3 The personal scope of application of the BerlAVG covers legal entities under private law only where the relevant thresholds are exceeded.

4 According to a decision by the Federal Public Procurement Chamber (VK Bund) of 1 December 2020 (Case VK 1-90/20), the unequal treatment of production sites in non-privileged third countries cannot be justified on the basis of Article 25 of Directive 2014/24/EU, which mandates equal treatment for bidders from Member States and GPA signatory states. It cannot be inferred a contrario from this that unequal treatment is permissible in other respects; rather—as demonstrated by Article 85 of Directive 2014/25/EU—the EU legislature reserved the right to establish specific rules regarding the unequal treatment of supplies from third countries, a provision that is, however, absent outside the utilities sector. See, e.g., Fritz/Klaedtke, *Lieferketten im Vergabeverfahren* [Supply Chains in Procurement Procedures], NZBau 2022, 131, 132.

5 These are states that are neither EU Member States nor GPA signatory states, nor have they concluded other free trade agreements with the EU governing access to public contracts within the Union.

6 OLG Düsseldorf, December 1st, 2021 – VII-Verg 54/20.

7 See B.I.4 below.

8 The draft of the Procurement Acceleration Act therefore requires an adjustment of the wording in Section 97 Paragraph 2 GWB provided. Federal government bill, draft of a law to accelerate the Award of public contracts, BT-Drs. 21/1934 v. October 1, 2025, 8.

9 ECJ, October 22, 2024 – C-652/22 (Kolin) and ECJ, March 13, 2025-C-266/22 (Quindao).

10 According to Friton/Ader, companies from third countries are “second class” bidders?, NZBau 2025, 164, 168 Differentiations between individual non-privileged third countries or

even individual companies men from a third country are permitted, even if there are no special reasons for this.

11 This means that under German public procurement law, no legal protection before the Public Procurement Chamber is permitted. However, legal protection in the civil courts may be considered.

12 CJEU, 22 October 2024 – C-652/22 (Kolin) and CJEU, 13 March 2025 – C-266/22 (Quindao).

13 Where the scope of the decision also extends to companies from third countries acting as subcontractors or entities whose capacities are relied upon to meet qualification criteria, contracting authorities may prohibit bidders from EU Member States from relying on the capacities of third-country companies or engaging them as subcontractors; see Friton/Ader, *Unternehmen aus Drittstaaten als Bieter „zweiter Klasse“?* [Third-country companies as ‘second-class’ bidders?], NZBau 2025, 164, 169.

14 Friton/Ader, Companies from third countries as ‘second-class’ bidders?, NZBau 2025, 164, 168.

15 In a procurement process for polysilicon, it is currently not necessarily to be expected that polysilicon manufactured in China will be offered by companies based outside China. However, it cannot be ruled out that companies—for instance, those with Chinese equity participation—may be based in EU Member States and offer goods from China or goods containing components manufactured in China.

16 Gnittke/Hattig, § 29 Food and Catering, in: Lausen/Müller, *Handbuch Nachhaltigkeit im Vergaberecht* [Handbook on Sustainability in Procurement Law], para. 38.

17 Section 28(6) of the Sectoral Procurement Ordinance (SektVO) and Section 7 EU (2) of the VOB/A contain corresponding provisions.

18 VK Federal, December 3rd, 2020 - VK 1-94/20.

19 OLG Düsseldorf, December 1st, 2021 – VII-Verg 54/20.

20 “Non-Paper”, Participation in the EU Procurement Market of Bidders from Non-Covered Third Countries in View of The Recent Court of Justice Case-Law (Judgments in Cases C-652, Kolin, and C-266/22, Quindao), Services of the European Commission from May 15, 2025.

21 Ollmann, Consequences of the *Kolin* and *Quindao* Judgments, VergabeR 2025, 855, 858.

22 Ollmann, Consequences of the *Kolin* and *Quindao* Judgments, VergabeR 2025, 855, 858.

23 However, this may not apply to goods imported into the EU only after the contract has been awarded; cf. in this regard OLG Brandenburg, 2 June 2020 – 19 Verg 1/20.

24 KG, 4 June 2025 – Verg 6/24.

25 For the definition: see B above.

26 Regarding conformity with Union law: Higher Regional Court (OLG) of Brandenburg, 2 June 2020 – 19 Verg 1/20.

27 Kruse, in: Münchener Kommentar Wettbewerbsrecht [Munich Commentary on Competition Law], Vol. 3, § 55 SektVO, marginal no. 3.

28 Goods are economic assets that are the subject of trade; see CJEU, 10 December 1968, 7/68; Müller, in: Greb/Müller, *Sektorenvergaberecht*, § 55 SektVO, marginal no. 16.

29 Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code.

30 Kruse, in *Münchener Kommentar zum Wettbewerbsrecht*, Vol. 3, § 55 SektVO, marginal no. 5; Langenbach, *Beck'scher Vergaberechtskommentar*, § 55 SektVO, marginal no. 7.

31 Opitz, Supply Chains and Procurement Law, NZBau 2022, 1, 2.

32 Ollmann, Consequences of the *Kolin* and *Quindao* Judgments, VergabeR 2025, 855, 858.

33 Katja Drinhausen's presentation during the online dialogue on socially responsible public procurement in the context of China indicated that the detectability of forced labor in Xinjiang province has changed in recent years, and the underlying structures are not readily identifiable as involving involuntary labor. This likely complicates the process of substantiating claims and providing evidence within procurement procedures.

34 Cf. VK Bund, 3 December 2020 – VK 1-94/20, regarding the classification of the production site as a requirement unrelated to the specific contract.

35 Cf. I. 5.

36 Observations by human rights organizations, as well as documentation—for instance, within the framework of complaint mechanisms—do not fall under Section 123(1) of the Act against Restraints of Competition (GWB).

37 Whether this can be designed in the award procedure in such a way that a de facto reversal of the burden of proof takes place, at least seems possible.

38 S. dazu: https://russland.ahk.de/infothek/sanktionen/

39 The Commission has submitted a proposal for an implementing act. See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=PI_COM%3AAres%282025%297728646&qid=1761166242993 (abgerufen am 10.12.2025).

40 Pavese/Schrotz, Sustainable Procurement: Ambition vs. Reality – Significance and Implementation of environmental and sustainability-related aspects in current procurement practices, ESG 2026, 22–23.

41 Within the meaning of Article 4(1)(a) to (k) of the NZIA.

42.https://single-market-economy.ec.europa.eu/publications/net-zero-industry-act-secondary-legislation_en. (last accessed on 10.12.2025)

43 Items mentioned include, among others, PV polysilicon, PV silicon ingots or equivalents, PV wafers or equivalents, and PV cells or equivalents. Quartz, among other things, is not mentioned.

44 https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=OJ:C_202503236

45 Quartz is not listed as a key specific component of solar technologies in the annex to Implementing Regulation (EU) 2025/1178. In addition to PV polysilicon, items such as PV silicon ingots or equivalents are included.

46 It is to be expected that the Commission will continuously update and supplement the information used to determine the shares.

47 Exceptions arise under Art. 25(9) NZIA (only one undertaking can fulfill the contract; no suitable tenders were received in a prior procedure; procurement would entail disproportionately high costs or incompatibility) and Art. 25(11) NZIA (application of paragraph 7 resulted in no suitable tenders being received).

48 The wording of Art. 25(7), first subparagraph, point (b) refers to contractors or subcontractors. Suppliers are not addressed.

49 The provision is based on the place of origin, not the registered office of the bidder or contractual partner.

50 Cf. German Energy Agency (dena), *Significance of the NZIA for Renewable Energy Tenders*, 2025, p. 5.

51 Pursuant to Art. 25(7)(d) of the NZIA, in the event of non-compliance with the aforementioned obligations, a proportional penalty fee amounting to at least 10% of the value of the specific net-zero technologies covered by the contract (based on the quantities for which the obligation was not met) is to be stipulated. Should procurement in compliance with the NZIA limits prove impossible for the entity concerned, exceptions are permitted under Art. 25(9) of the NZIA.

52 However, see footnote 1 to the Annex, according to which the term “equivalent” refers to similar steps or key technologies required for thin-film, organic, tandem, or other photovoltaic technologies.

53 The necessary distinction from company-related criteria is not the subject of this statement.

54 Due diligence and verification obligations—such as those under the German Supply Chain Act (LkSG)—also apply based on manufacturing locations. Under the provisions of the EU Conflict Minerals Regulation, EU importers must ensure that their raw material procurement involves a supply chain policy aligned with the OECD Guidelines and must make this policy transparently accessible; OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, online: https://read.oecd-ilibrary.org/governance/oecd-leitfaden-fur-die-erfullung-der-sorgfaltspflicht-zur-forderung-verantwor-tungsvoller-lieferketten-fur-minerale-aus-konflikt-und-hochrisikogebieten_3d21faa0-de#page1
(16.06.2021).

55 From the point of view of proportionality and reasonableness, according to the standard of Section 36 VgV to check at what point in time such information is required from the bidder or subsequent contractor. The obligation to provide detailed information on production sites at all stages of the supply chain with the offer can be viewed critically from this point of view.

56 OLG Düsseldorf, April 10, 2024-Verg 24/23.

57 OLG Düsseldorf, April 10, 2024-Verg 24/23.
58 Beneke/Eletskaya, § 23 Evidence and quality marks, in Müller/Lausen, Sustainability Handbook in procurement law, paragraph 98.

59 On criticism and alternatives: e.g., Beneke/Eletskaya, § 23 Proof and Quality Labels, in Müller/Lausen, *Handbuch Nachhaltigkeit im Vergaberecht*, marginal nos. 99 et seq.

60 Response of the Federal Government to the minor interpellation by the CDU/CSU parliamentary group, Bundestag printed paper 20/12482 dated 8 August 2024: Minor interpellation: "Last year, regulations concerning protection against foreign espionage in the People's Republic of China were tightened. Since then, any gathering of information by foreign entities can be subject to criminal penalties. To the knowledge of the questioners, this tightening has led some federal states to suspend their inspectors' travel to the People's Republic of China due to concerns regarding their safety (www.tagesschau.de/ausland/asien/china-anti-spionage-gesetz-medikamente-100.html)."
Response to Question 1: "The amended Chinese Anti-Espionage Law entered into force on 1 July 2023. It expands the definition of the offense of 'espionage.' Criminal liability now extends to any unspecified acts directed against the national interests of the People's Republic of China." Response of the Federal Government to the minor interpellation by the CDU/CSU parliamentary group (Bundestag Printed Paper 20/8252 of 28 September 2023) regarding Question 31: "A multitude of Chinese laws can serve as a potential legal basis for measures taken by Chinese authorities that infringe upon the rights of foreign nationals and companies. Specific reference is made to this regarding China in the 'Travel Information – Legal Particularities' subsection of the Federal Foreign Office's travel and safety advice (www.auswaertiges-amt.de/de/service/laender/china-node/chinasicherheit/200466). In this regard, the amended Anti-Espionage Law creates an additional legal basis for practices that, in some cases, already exist. The Federal Government is closely monitoring the implementation and application of the amendment to the Anti-Espionage Law. No instances of official action taken against German nationals based on the amended law have come to light so far. This applies not only to companies but also to inspectors from Germany. Areas particularly affected include pharmaceutical inspections in China."

61 See Kirchner, "German inspectors fear arrest in China," as of July 11, 2024: "However, even a year after the new anti-espionage law came into force, it remains unclear exactly what constitutes espionage in China. 'The ambiguity of key terms in the law makes it very difficult for companies to assess the potential risks,' criticizes Jens Eskelund, President of the European Chamber of Commerce in Beijing." https://www.tagesschau.de/ausland/asien/china-anti-spionage-gesetz-medikamente-100.html, accessed on July 27, 2025.

62 Regarding the Anti-Foreign Sanctions Law, https://www.jonesday.com/en/insights/2025/04/china-boosts-enforcement-of-antiforeign-

sanctions-law (last accessed on December 10, 2025), https://www.china-briefing.com/news/new-guidelines-for-implementing-chinas-anti-foreign-sanctions-law-what-foreign-companies-need-to-know/ (last accessed on December 10, 2025).

63 According to Katja Drinhausen, this is precisely what the legislature intended.

64 For example, terms such as "espionage organization" or documents related to national security https://merics.org/en/comment/amended-anti-espionage-law-aims-curate-chinas-own-narrative (last accessed on December 10, 2025).

65 For example, "espionage organization" or documents related to national security https://merics.org/en/comment/amended-anti-espionage-law-aims-curate-chinas-own-narrative (last accessed on 10 December 2025).

66 In 2023, a complaint procedure was initiated with the Federal Office for Economic Affairs and Export Control (BAFA) against VW, BMW, and Mercedes-Benz regarding human rights violations in Xinjiang; Miriam Saage-Maaß stated: “How this is taking place in the Uyghur region remains a mystery. As long as there are no credible and effective due diligence mechanisms, companies should cease their business activities there,” https://www.business-humanrights.org/de/neuste-meldungen/lieferkettensorgfaltspflichtgesetz-ecchr-reicht-wegen-verdacht-auf-menschenrechtsverletzungen-in-xinjiang-beschwerde-gegen-vw-bmw-und-mercedes-benz-ein/ (last accessed on December 10, 2025).

67 The Uyghurs in Xinjiang in Light of the Genocide Convention, WD 2 – 3000 -027/21, 80.

68 See above I.2.

69 The procurement documents must appropriately reflect this, particularly with regard to performance periods and rights concerning defects.